Frontiers of Equality in the development of EU and US citizenship

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If we wish to understand the development of the citizenship of the European Union and its relationship to the nationalities of the member states, it is helpful to examine the history of United States citizenship and, in particular, to elaborate a theory of “duplex” citizenships found in federal orders. In such a citizenship, each person’s citizenship is necessarily “layered” with the citizenship or nationality of a (member) state, a legal status which can resemble subjecthood to a monarch in its exclusive claim to the holder’s allegiance. The research question of this doctoral dissertation in European constitutional law is: how can a duplex citizenship be seen and be understood to affect the exclusiveness of a singular citizenship, nationality or subjecthood? The thesis is that it can be understood by considering different aspects of and claims to equality inherent in citizenship, which affect the exclusivity of the claim of allegiance as found in subjecthood. Even if the substance of this study is mostly (constitutional) law, its method is historical (largely following a chronological line of development, in fact) and comparative. It is not doctrinal, nor normative.

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in the development of EU and US
citizenship

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This book never would have happened if less than twelve years ago, I had not decided to change direction in life and study law. That was not the decision that brought me to Amsterdam—I already lived there and was on my own path to citizenship by then—and the choice for the University of Amsterdam, whose LL.B program in Dutch law I enrolled in only two weeks before the fall semester began in 2003, was informed by nothing more than the convenient fact that its law faculty was less than ten minutes’ bike ride from my home. But looking back, I consider myself truly fortunate to have ended up in that course of study at that university.

My first acknowledgment is to a teacher I had in the second semester of the bachelor program, Joep van der Vliet: the course he designed in “conflict resolution”, a course on the philosophy, sociology and anthropology of law, spoke powerfully to my interests in the humanities and social sciences, and saved my interest in a course of study that I had seriously been considering dropping out of after the first mind-numbing semester. In particular, it was the captivating weekly guest lectures in the Aula—the convocation hall of the university where I am to defend this thesis—given by prominent lawyers and public figures for that course that made me commit to giving law a serious chance.

Although this at first made me passionate for the academic path, it was the practical experience I gained helping people at the Rechtwinkel Migranten—the Amsterdam immigration law clinic—that helped me realize I wanted to practice law. And during my student internship at the law firm now known as Prakken d’Oliveira, attorney Martijn Strooij gave me an assignment—“Jeremy, I want you to research for me whether EU citizens gain the right to permanent residence provided for by Directive 2004/38 ex lege”—that opened my eyes to the historic potential of EU law for allowing citizens to assert rights for themselves and their family members without having to ask or plead for them to be bestowed as a favor.

In my mind, I was already headed for a career in legal practice, but my master’s thesis advisor in constitutional and administrative law, Prof. Jit Peters, told me that I should seriously consider pursuing a doctorate. And then Jan-Herman Reestman and Tom Eijsbouts, whose course in European constitutional law I had taken in the final semester of the master’s program, simply would not take no for an answer when they offered me a part-time job as managing editor of the European Constitutional Law Review (and I did try to refuse). From the day I assented to them putting my name on the masthead of that journal as “Ph.D candidate, University of Amsterdam”, there was no going back. And the lively brainstorming sessions with them as my supervisors, later joined by Annette Schrauwen, put me back on track at the moments when I just didn’t know what I was doing anymore.
Since I was an external doctoral candidate, my research and writing processes were relatively secluded. So it was nice to be able to have the opportunity to air my ideas and receive feedback on them. The informal meetings at the Center for Migration Law at the Radboud University Nijmegen provided me with such a sounding board. Thanks to Karin Zwaan, Ricky van Oers, Kees Groenendijk, Elspeth Guild, and last but not least Tineke Strik, who tipped me off to a very recent and relevant development in the Dutch case law just as I was about to complete this thesis. Thanks are due as well to Sébastien Chauvin, of the department of sociology at my own university, for inviting me to give a guest lecture to his students every year: an experience which helped me greatly in presenting my ideas to a non-legal audience.

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As the rebellious son of a mother with a Ph.D and a father who was an attorney, I would have laughed if you had ever asked me if I was planning to follow in the footsteps of either of them. But it was precisely their footsteps in front of me that made starting a law practice out of my home (as my father Charles had done himself) and writing a doctoral thesis in my free time (as my mother, Jane Offutt, had done herself, on the side of a full-time job and raising me) seem almost like a path of least resistance in life. To them I owe the most of all.

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In 2013, Peggy Franssen invited me to join her new law firm. I am grateful to her for providing me with the opportunity to broaden and improve myself as a legal practitioner, at a time when (I now know) I was much farther from completing this thesis than I thought at the time; I ended up spending many late nights at my new office working on it.

As an external doctoral candidate, I felt no real pressure to get done: there was no fellowship contract that was going to run out. But it was the untimely passing in 2014 of Sarah van Walsum, professor of migration law and family ties at VU University Amsterdam, that made me feel a deep regret that I had not finished
sooner. I had bonded with her, a fellow immigrant to the Netherlands from North America, over our shared fear of misgendering nouns while publicly speaking in Dutch. I never had the chance to tell her how essential her work was to my thesis; I politely declined an invitation to dinner from her once, thinking I would have all the time in the world after completing my thesis. More than anything else, missing those opportunities reminded me that time is fleeting, and inspired me to finally finish.

And last, but not least: Stefan, I am so glad that you didn’t let me continue to put off moving in with you until I finished this thesis. That would have meant missing out on almost two years of the wonderful life we have together now, not to mention missing out on your vital support in the final phase.
Introduction: *Civis duplex sum*: two layers of citizenship in a dialogue of equality

In the middle of the forum of Messana a Roman citizen, O judges, was beaten with rods; while in the mean time no groan was heard, no other expression was heard from that wretched man, amid all his pain, and between the sound of the blows, except these words, “I am a citizen of Rome [*civis romanus sum*]”. He fancied that by this one statement of his citizenship he could ward off all blows, and remove all torture from his person. […] It is a crime to bind a Roman citizen; to scourge him is a wickedness; to put him to death is almost parricide. -- Cicero, *In Verrem*, 2.5.162 and 2.5.170

22 The crowd listened to Paul until he said this. Then they raised their voices and shouted, “Rid the earth of him! He’s not fit to live!”

23 As they were shouting and throwing off their cloaks and flinging dust into the air, 24 the commander ordered that Paul be taken into the barracks. He directed that he be flogged and interrogated in order to find out why the people were shouting at him like this. 25 As they stretched him out to flog him, Paul said to the centurion standing there, “Is it legal for you to flog a Roman citizen who hasn’t even been found guilty?”

26 When the centurion heard this, he went to the commander and reported it. “What are you going to do?” he asked. “This man is a Roman citizen [*civis romanus est*].”

27 The commander went to Paul and asked, “Tell me, are you a Roman citizen [*dic mihi tu Romanus*]?”

“Yes, I am [*est*],” he answered.

28 Then the commander said, “I had to pay a lot of money for my citizenship.”

29 Those who were about to interrogate him withdrew immediately. The commander himself was alarmed when he realized that he had put Paul, a Roman citizen, in chains.


From subject to citizen

In 1992, with the adoption of the Treaty of Maastricht, the legal status of citizen of the European Union was granted to all of the “nationals” of the member states of what had heretofore been the European Economic Community. As a term for designating the individual in her relationship to the political order she lives in, “citizen” is a term with a rich history hearkening back to the city-states of antiquity, the original Roman republic, and the cities of medieval Europe that gave rise to the middle class and the rule of law. “National”, on the other hand, is a term deliberately stripped of all historical baggage (aside from, perhaps, that of the nation-state), a term of international law meant to serve as the most abstract
possible designation of which State an individual “belongs” to, without any
assumptions as to what the political content of that relationship is.

Of the now twenty-eight member states of the European Union, seven
are still monarchies;1 the rest are republics. We can say “still” because all of them
were monarchies, or were part of a monarchical empire, at some point in their
history. In a monarchy, the individual, in his relationship to the monarch, and
therefore to the State, is ultimately a “subject”. The legal status of subjecthood, in
its most pure form, is characterized by a reciprocal relationship of allegiance and
protection: the subject owes the monarch his allegiance, and the monarch owes
the subject his protection. All of the remaining monarchies in the European
Union, of course, are democracies: constitutional monarchies where the power of
the monarch is limited and effectively subjugated to the will of the people (or at
least what is presumed to be the democratic majority of the people). And not a
single one of these monarchies still uses the term “subject” to describe the legal
status of being a member of its own people: the United Kingdom even describes
the people that “belong” to it as “British citizens”, thereby adopting the term that
seems more at home in a republic.

Curiously, in the legal language of the Netherlands, even though the
word for “subject” (“onderdaan”) is not used to describe the nationals of the post-
colonial Kingdom of the Netherlands (they are described, simply, as
“Nederlanders”), it is still used to describe nationals of any other state. In practice,
then, it is simply the Dutch word for the noun “national”. D’Oliveira cites the
particular ill-suitedness of this term in a provision of the main Dutch immigration
statute in which the term “Community subjects”2 is employed to denote the
“subjects of the member states of the European Union” and their family members
as the beneficiaries of EU law in Dutch immigration law. As D’Oliveira drily
notes, “the EU has many things, but subjects are not one of them.”3

Yet in this inaccurate terminology, I see the basis for a useful
exaggeration for the purpose of comparing different citizenships. The European
Union, as I noted to start with, has citizens. It is generally agreed upon that Union
citizenship is not in any sense a “nationality”, largely because the European Union
is not a State. But what is Union citizenship, then? The power of the term
“citizen” lies not so much in its precision as in its flexibility, its adaptability to
many various types of polities. The term “national”, on the other hand, even if it is
agnostic of the precise political structure of any given State, is exclusively oriented
toward the notion of a State, a polity that is presumed to have sovereignty over a
given territory and population to the exclusion of all others. The modern State, in
turn, traces its origin to the monarchical states of sixteenth- and seventeenth-
century Europe and their struggle to clearly delineate their respective sovereignties.
And the legal concept that was developed to describe the denizens of these states

2 See also, on this term, Bierbach (2008), p. 350.
was precisely the “subject”. Not only was “citizenship”, derived as it was from the community of the “city”, too small-scale a term to describe the relationship between a person and her or his monarch, who might be hundreds or thousands of miles away, but it also had undesirable associations with republican Rome, ill-suited to absolute monarchy. 4

All of the absolute monarchies of Europe have faded by now, but the exclusive claim of a State to a given territory and population has remained. Moreover, the State still claims allegiance from its people; and each of them can be compelled to risk his (and sometimes her) life for the State through military service. In these aspects of exclusivity and allegiance, which vary little among all of the States of the world, we can thus exaggerate and say that the “national” as an ideal type can still be said to be a “subject”. We can employ “citizenship”, by contrast, as a term for a form of attachment that does not necessarily lay an exclusive claim on its holders or demand their allegiance. One of the earliest forms of “citizenship” in this sense, contemporary with the emergence of subjecthood, was the citizenship of the medieval cities of northern Europe. There, citizenship typically co-existed, usually necessarily, with subjecthood to the lord of the territory the city stood on.

**Duplex citizenship**

It was in the United States where a modern citizenship was first created that was not merely local, but covered a great territorial expanse. Rather than being carved out of a larger allegiance, this citizenship was something of a collection of citizenships or allegiances on the level of the states. For quite some time after the American Revolution, the citizenship of a state was in almost all cases a necessary prerequisite to United States citizenship. The two citizenships were necessarily doubled or linked, in what in French has been called a *dédoublement fonctionnel*, or what this study will call a “duplex” citizenship. But although the state citizenship, in accordance with the enlightened lexicon of the Revolution, was called “citizenship”, some states’ citizenships, in accordance with their own tendencies toward asserting an ever-more exclusive sovereignty over their territory and allegiance from their population (as well as disenfranchising a significant portion of their population), could really be more accurately described as subjecthoods.

Those states that had slavery not only refused to extend the privileges of citizenship to their black inhabitants, but also refused to recognize the black citizens of other states as United States citizens entitled to equal treatment. This violation of the dependent relationship of United States citizenship on state

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5 a term coined by Scelle (1956), to describe the dual role of a State institution in operating both within the law of that State and the realm of international law, as applied to citizenship by Schönberger (2005), p. 188.
citizenship was endorsed by the Supreme Court in the \textit{Dred Scott} decision, one of the fissures in that Union that led to the Civil War. If the subsequent victory of the Union established the United States as the primary, if not the only polity demanding allegiance, the adoption of the Fourteenth Amendment to the Constitution established United States citizenship as the primary legal status, upon which state citizenship depended. Nonetheless, the black citizens of the formerly slave states (as well as—to a certain extent—states that had never officially had slavery) still struggled for over a century for equal treatment, subjected as they were to state and local laws that denied them the substance of citizenship. In their legal challenges to those states, they deployed their United States citizenship, thereby causing United States citizenship to develop primarily into a source of equality, not just an embodiment of legal allegiance.

If we wish to understand the development of the citizenship of the European Union and its relationship to the nationalities of the member states, it is helpful to examine the history of United States citizenship and, in particular, to elaborate a theory of duplex citizenship. This study will define a duplex citizenship as a status that necessarily entails a double political membership for citizens. As to the nationalities that such a duplex citizenship is layered with, I will exaggerate them as being jealous “subjecthoods” that are primarily concerned with \textit{subjection} to political will (be it monarchical or democratic in origin).

The development of the relationship between citizenship and nationality is heavily informed and even driven by different aspects of the \textit{equality} inherent in citizenship. This is so in the EU, as it has been in the US. European Union citizenship has the same potential for insinuating norms and forms of equality into the member state nationalities it is linked to. By its nature, a duplex citizenship contains the potential for infinite dialogue with itself: a citizen observes that she is being treated unequally to another citizen in a given area, either because she is of a different nationality within that citizenship or because she is a member of a different class within the same nationality, and she therefore makes a normative claim (either in the political process, or in court) to be treated equally based on her citizenship. If this claim is successful, then equality is established in that area, and citizens become more conscious of remaining inequalities, which feeds the virtuous circle. In this way, nationality or subjecthood is affected by the citizenship to which it loses its exclusiveness and of which it is destined to become the “double”. That is the thesis of this study.

With my approach, I aim to break with scholars of EU citizenship who implicitly measure European Union citizenship against the legal standard of nationality. By their account, European Union citizenship cannot amount to much as long as the European Union does not claim the allegiance of its citizens, i.e. as long as the European Union is not a State. Thus, they claim, European Union citizenship cannot be compared to United States citizenship, which is “actually” a nationality. They in essence fail to recognize the way in which equality,
more than allegiance, is the compelling legal norm within citizenship. My
exploration of Commonwealth citizenship, a sort of duplex “citizenship” based
entirely on allegiance, will reveal how allegiance cannot carry the day if it is not
accompanied by a norm of equality.

A second group of scholars of EU citizenship comes closer to my
approach and is consequently more interesting for me. They are able to quite
easily draw a comparison between EU and US citizenship as “federal” citizenships,
but they conclude with disappointment that EU citizenship, by contrast to US
citizenship, really only benefits the mobile EU citizen (i.e. the citizen who moves
to a member state whose nationality he does not possess), who is entitled to non-
discriminatory treatment relative to nationals of the host member state. Implicitly,
this analysis is also measuring the European Union by the standard of a State:
since the European Union, unlike the United States, does not have its own
judicial system or executive agencies “on the ground” that make Union law
tangible for sedentary citizens (i.e. the citizens who remain resident in their home
member states, for which some authors writing in English alternatively use the
term “static”), and since sedentary citizens also largely fall outside the field of
competence of the Union, these citizens cannot draw any benefit from their
Union citizenship. I aim to show how and why Union citizenship is already
changing the rights enjoyed by sedentary citizens in much the same way, with the
same dialectic of equality, as United States citizenship did for sedentary citizens
of the United States. In this regard, I am further elaborating on at least one author’s
assertion that Union citizenship is more than merely a “transnational” accessory to
member state nationality: that it in fact “penetrates and subverts” the nationality
of the member state.6

Before exposing the order of this study, let me establish its main tenets, its lines of
argument, its research question and its method.

This investigation claims to lay bare some fundamentals that the development of
EU citizenship shares with that of the US, in order to explain, compellingly, some
of the ways taken by the former.

It deviates from two leading approaches of EU citizenship which consider this
citizenship to be hampered or stifled in its development because the EU is not on
its way to becoming a traditional State.

The study’s research question is this: how can a duplex citizenship be seen and be
understood to affect the exclusiveness of a singular citizenship, nationality or
subjecthood? The thesis is that it can be understood by considering different
aspects of equality inherent in citizenship, which affect the exclusivity of the claim
of allegiance as found in subjecthood.

Even if the substance of this study is mostly (constitutional) law, its method is historical (largely following a chronological line of development, in fact) and comparative. It is not doctrinal, nor normative.

**Justification of the cases selected**

I will focus, in particular, on the court judgments that have been most formative of citizenship in the US and the EU, as these are usually the result of a case brought by a disadvantaged citizen. For the US (and its British prehistory) I have selected the court judgments that fairly uncontroversially make up the settled core of legal doctrine on US citizenship. With regard to EU citizenship (and its Community beginnings), on the other hand, the doctrine is less settled—indeed, the purpose of this study is to express a particular point of view on the way EU citizenship works. As such, I have selected the decisions of the European Court of Justice that in my view most powerfully represent the claims made by individuals in the European Union (and Community) on the basis of their (proto-)citizenship, which have the greatest potential to influence the nationalities of the member states. Most of the decisions I have selected, in fact, are still regularly invoked in court by disadvantaged citizens who see those decisions as being applicable to their own situations. And in the 2014 pair of decisions I conclude my research with, **O&B** and **S&G**, the Court attempts to consolidate and explain several of the decisions I will have presented.

It will also be revealed that many of these decisions of the European Court of Justice were engendered by court cases brought against the government of the Netherlands. My selection of these cases is not solely due to the fact that I live in the Netherlands and am trained in and have a practice in Dutch immigration law, although that is certainly convenient. Referrals from Dutch courts regarding (incipient) citizenship are simply overrepresented, relative to the small size of the Netherlands, in the case law of the European Court of Justice: **Unger, Knoors, Morson and Jhanjan**, **Levin, Reed, Förster, Eind**, and **O&B** and **S&G**. On the one hand, this is due to a high degree of loyal cooperation with the European Union on the part of Dutch courts, which are inclined to refer preliminary questions when Union law, the existing case law of the Court of Justice, and their own case law on doctrines of Union law are not clear on a matter and one of the parties in the court proceedings suggests making a referral. On the other hand, this is also due to the fact that Dutch parliamentary politics constantly exhibits an outsized concern for restricting immigration, limiting immigrants’ access to the welfare state, and regulating and controlling the family life of Dutch nationals; indeed, I see this type of action on the part of a

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democratic majority as archetypical of an attitude toward nationals of a State as its “subjects”.

Dutch law and government policy therefore offers more opportunities for mobile and sedentary Union citizens to be disadvantaged relative to their fellow citizens; and the Dutch courts offer those disadvantaged citizens more opportunity to invoke their Union citizenship for relief.

Road map

Chapter 1 explores the theoretical underpinnings of English and Scottish, then British subjecthood. The very first judicial decision of an individual asserting entitlement to equal treatment is the famous *Calvin’s Case* (1603), which established a form of non-discrimination for English subjects in Scotland and Scottish subjects in England. To whatever extent there was such a core value as “equality” in British subjecthood, however, it was derived directly from the personal relationship of allegiance between the British monarch and his or her subjects; as Parliament increased its territorial power, the value of subjecthood as a source of equality decreased. The nascent “citizen” within the British subject was only a third party in what was really a conflict between king and Parliament. This would become a sore spot in the North American colonies, whose citizens wished to mobilize their subjecthood as a means of absorbing immigrants and decentralizing political power.

In the second chapter, the citizens of the new United States have broken the bond of allegiance to the British monarch and have found models of defining their new citizenship as a nationality on the international scene. Initially, under the Articles of Confederation, United States citizenship is horizontally defined, derived solely from the citizenship of the several states. But immigration from without, and the question of what the rules would be for making citizens of immigrants, would play a role in some considerations behind establishing the Constitution, which provided for a vertically uniform rule of naturalization. Discussions in Congress on what the rights of newly minted citizens were to be, and declaring classes or gradations of citizenship to be undesirable, would further entrench equality as a central value of United States citizenship under the Constitution.

Nevertheless, aside from the uniformity of the rule of naturalization for obtaining the *de jure* status of United States citizenship, that citizenship contained few compelling vertical norms of *de facto* equality. In the third chapter, the existence of slavery and the refusal of the southern states to ever recognize black Americans as United States citizens will be seen to put the Union under strain. There are as yet virtually no uniform rules of equality that United States citizens can use to ward off oppression on the part of the states; at the same time, there are extremely pernicious forms of equality under the Constitution (for slave owners with cross-border claims) that mean that black citizens of non-slave states are not
even safe in their home states. The infamous Dred Scott decision of the Supreme Court exposes the fatal flaw of a horizontally defined United States citizenship, decoupling it from state citizenship.

The fourth chapter begins after the Civil War, when the Fourteenth Amendment introduces an unambiguously vertical form of United States citizenship, supposedly attaching guarantees of equality to the possession of that formal status. But in practice, citizenship-as-equality can still only be inductively derived from any number of other factors: whiteness in particular, but also from the interests of interstate commerce. Black Americans are still, by virtue of having a *de jure* status without *de facto* content, “second class citizens”. It would take almost a century for the Supreme Court and Congress, pushed by the civil rights movement, to develop United States citizenship into a reliable source of equality, even if equalities would not be directly deduced from it.

From there, the study can turn to the European Union. In the fifth chapter, we will explore the foundation of the European integration project, in which, as at first in the US, the citizen is first at most a third party on the stage between the States striving for an “ever closer union”, and the institutions they establish. This is so in both of the two competing paradigms of European integration, one based on deference to the interests of the States, and one based on the establishment of a supranational order. In the latter paradigm, first implemented in the European Coal and Steel Community, the freedom of movement of workers is established as an equality enjoyed by all member state nationals who cross borders to work; the successor European Economic Community entrenches this equality even more decisively. Non-discrimination based on nationality, a horizontal norm of equality, is established as well.

Nevertheless, it is especially within the aforementioned cross-border equality for workers (a vertical norm of equality) that we see an “incipient” citizen of the Community emerge. In the sixth chapter, the European Court of Justice reads rights for individuals into the EEC Treaty, making it something more than a contract between the member states. This is a *de facto* Community “citizenship” (i.e., one that has does not at all exist *de jure* and has no name as such) that we can inductively derive from consistent entitlement to certain equalities. British subjecthood (in its new guise of Commonwealth citizenship) will reappear here, as well, when the United Kingdom accedes to the Community and has to define its own nationality for the Community.

In the seventh chapter, I explore the struggle (via appeals to judicial intervention) to strengthen Community citizenship, first by increasing the role of non-discrimination as a source of equality for mobile member state nationals, then (through new primary legislation) with the introduction of the formal status of European Union citizenship. To start with, though, no truly new rights can be deduced from this status; European Union citizenship remains, in practice, little more than a bundle of the equalities that had already been granted to member state nationals who cross borders. But the European Court of Justice rises to the challenge of Union citizens invoking that status: the Court increasingly makes use...
of it to make the citizen even less of a third party in the interactions between the member states and the European Commission.

In the eighth chapter, the Union legislature, in which the European Parliament plays a more prominent role, is seen to introduce legislation to consolidate the rights of Union citizenship. At the same time, the Court takes up much of the remaining slack by fully incorporating the equality established in the freedom of movement of workers into Union citizenship. The more the “cross-border” equalities of the mobile Union citizen are strengthened, however, the more it becomes apparent that the sedentary Union citizen is a sort of “second class Union citizen”, entitled to little protection against the political whims of his own member state. Some Union citizens intentionally become mobile citizens with the aim of being entitled to the equalities for mobile Union citizens. The Court will work to establish increasingly uniform vertical norms of equality for Union citizens, while at the same time trying not to alienate the member states.

In the ninth and final chapter, I analyze the Court’s 2014 decisions O&G and S&G in terms of all of my historical findings on the development of Union citizenship, as a case study.

Note for the reader

I must add that as this study progresses, I provide ever more references to my findings in previous chapters (i.e., supra). I thereby aim to make it possible for the reader to open the book at any chapter and start reading, while being able to refer back to the findings I build on.
Appendix 1: Terminology

federal, horizontal vs. vertical, State vs. state

It will be necessary, in order to make it possible to compare the quite divergent legal orders of the European (Economic) Community/European Union, the United States (both pre- and post-Constitution; and ante- and postbellum), and Britain/the British Empire/the Commonwealth, to first establish a terminology that can cover all of them. To start with, I will come to grips with the term “federal” and define the terms “horizontal” and “vertical”.

Any terminology is of course necessarily contingent to the language that one is writing in: it must be admitted that this thesis owes a great debt to Christoph Schönberger’s 2005 professorial thesis *Unionsbürger,* which elaborates an abstract definition of federal citizenship (as derived from a comparison of the European Union with the United States, the Federal Republic of Germany, and Switzerland) in order to apply it to Union citizenship. Schönberger takes apart the German term *Staatsangehörigkeit* (“state-belonging”, which means “nationality” in the sense of an attachment or belonging to a sovereign State) and creates the neologism *Bundesangehörigkeit* (“federation-belonging”, which I simply translate as “federal citizenship”) in order to be able to compare the European Union to the other polities without presupposing that the European Union is, or will ever be, a sovereign State. Schönberger places the emphasis in federalism on the “bottom-up” movement of independent states voluntarily joining into a form of closer association, whether that is a State or not.

Without any doubt, I am an adherent of Schönberger’s project of divesting the notion of “federalism” of any notion of centralization of power in a sovereign State. In my thesis, as well, I do not mean the term “federal” in the sense that it is typically used in European political discourse (in which the supporters of the creation of a sovereign European super-State identify themselves as “federalists”). For that matter, I am applying a consciously constitutional analysis to the European Union without in any way trying to assert that it is a State. The (written) treaties founding it, establishing rigid legal norms that have priority over the legal norms of the member states, strongly resemble a constitution and can be analyzed as one.

Of course, Commonwealth citizenship is of another order than polities created by the voluntary associations of component states such as the United States and the European Union: but I am less concerned with whether or not it is truly “federal” in any sense of the word. For all three legal orders, I will refer to the centrally defined legal norms applying to the citizen as “vertical” and the legal norms applying to the citizen that originate from the local polities or component

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9 Schönberger (2005); see also my review essay on his book: Bierbach (2009)
9 Schönberger (2005), p. 53.
10 Cf. ibid., p. 52-54.
states as “horizontal”. Schönberger makes a similar distinction, but my distinction diverges from his in a crucial way. Schönberger describes as “horizontal” the legal relationship between a federal citizen hailing from one component state and the “sister” component states, and as “vertical” the legal relationship of the federal citizen to the central government. Our distinctions overlap to some extent, but not entirely; and this subtle difference between our distinctions will also lead to rather divergent conclusions.

By using the term “vertical” we will be able to avoid the confusing and sometimes inappropriate nature of the term “federal” and its association with a sovereign or centralizing State. And on that note, I will address another extremely confusing discrepancy between, in particular, American and European political discourse. As a term of international law, a “State” (which I will perhaps somewhat idiosyncratically always capitalize to mean in this sense, even though I do not mean it as a proper noun) denotes (in brief) the supreme bearer of sovereignty over a certain territory, competent to sign treaties with other States. But due to the semantic and constitutional history of the United States, this word is almost never used to denote the United States as a whole in internal political discourse; for that matter, in everyday American English, foreign States are rarely described with that term but rather as “nations” or “countries”. Internally to the United States, laws passed by the United States Congress are referred to as “federal” or “national”.

In European Union discourse, on the other hand, “national law” or a “national court” means the law or court of an individual member state, as opposed to of the Union. I will thus studiously avoid the term “national” (at least, as an adjective) in both contexts. As to what might be called “national law” in the context of the US, I will only call it “federal law”. And as to what might be called “national law” in the context of the European Union, I will only call it “member state law”. (A “member state” of the European Union is of course a “State” as well, but I will not capitalize “state” in the context of the EU when I mean to refer to it as a component of the Union, thereby admittedly comparing its position to that of a US “state”.)

11 ibid., p. 268; also, in an English-language publication of his that presents the arguments of his book in a nutshell, Schönberger (2007), p. 79.
12 If anywhere, this convention does seem to have some currency in the United States for international legal writing.
Appendix 2: types of equality

Since I will be focusing on citizenships that exist in a *dédoubllement fonctionnel* with local forms of nationality or attachment, I will analyze that equality along the two axes of “horizontal” and “vertical” that the legal norms of equality applying to the citizen can come from. This results in four forms of equality, from most uniform to least uniform:

1) **uniform equality** for all citizens, defined in absolute terms, over the whole of the federal territory;

2) **non-discrimination**, of which the substance is determined by the law of a host state, by which migrating federal citizens enjoy equality to the citizens of a host state under the laws of that state;

3) **cross-border equality**, i.e. uniform equality for all migrating citizens (and not for sedentary citizens), defined as an absolute vertical norm; and

4) **portability**, of which the substance is determined by the law of a home state, by which migrating citizens equally enjoy the rights of their home state in a host state.

Uniform equality

Uniform equality is the result of a single vertical norm of substantial equality to the exclusion of any horizontal norms: all federal citizens, wherever they are, are entitled to the equal applicability of that norm. In this sense, it is not really a “federal” norm as much as it is a “central” norm. In that ideal form, it strives toward absolute uniformity. However, I will also identify a somewhat less strongly centralized, more federal form: where there is a single vertical norm of equality, but one that is “regulated” or implemented with some variations in different component states.

Non-discrimination

Non-discrimination, on the other hand, is an equality of which the *substance is defined purely in horizontal terms*. Every component state is obliged to apply its own laws equally to all federal citizens, whether those federal citizens themselves have the citizenship of the component state where they reside (“sedentary” citizens) or have the citizenship of another component state (“mobile” citizens). Non-discrimination is always the most prominent form of equality in federal citizenships, entailing pure abolition of any formal inequality before local law for mobile citizens.

Cross-border equality

This is a vertical norm of substantial equality that applies exclusively to mobile federal citizens, i.e. those who reside in a component state other than their own.
Wherever this form of equality gives the mobile citizen an advantage, any more disadvantageous treatment that a “horizontal” norm provides for in that area is excluded. A cross-border equality is typically intended not just to remove formal inequalities for mobile citizens, but also give them an extra advantage, possibly to increase their substantial equality with the sedentary citizens of a state.

**Portability**

Finally, portability is a horizontal norm of equality that applies exclusively to mobile federal citizens. They can bring with them to a host state equalities that they were entitled to in their home states, possibly to the exclusion of norms of the host state.
Chapter 1: Subjecthood in England and the British Empire

Introduction

An analysis of the legal roots of US citizenship in British subjecthood, dating from the period of the English, later British colonies in North America and prior, is essential to understanding the development of the relationship of state and federal citizenship in the United States. This contributes to no small degree to the comparative project at hand. But largely, this analysis of the development of British legal doctrine on subjecthood, and the centrality of allegiance in it, will help us to define our ideal type for subjecthood, and later nationality.

We shall begin with an event that marked the beginning of a so-called personal union of two states and brought up issues of a common subjecthood across borders: the crowning in 1603 of King of Scots James VI as James I of England, through which the kingdoms of England and Scotland were united in the person of their common monarch. The question soon arose of whether Scots, by virtue of this common allegiance, were to have the same legal rights as Englishmen in England. In Calvin’s Case, a case brought by the Scottish infant Robert Colville (or really: on his behalf), Lord Chief Justice Sir Edward Coke issued his seminal opinion in which he analyzed allegiance in terms of the natural reciprocal rights and obligations of the subject and the monarch, thereby defining the circumstances under which Scots had recourse to the English king’s courts.

However, allegiance, i.e. the relationship between a subject and the monarch, was to prove an easier nut to crack than jurisdiction, or the relationship between a given subject in a given territory on the one hand and a parliament on the other hand. What determines a parliament’s jurisdiction? Indeed, in modern democratic States that claim exclusive authority over a given territory, this aspect arguably has as much relevance to nationality as allegiance does, if not more. As the power of the English parliament increased at the expense of that of the king, and notions of government by consent such as those formulated by John Locke gained currency, Coke’s concept of “natural” allegiance was reinterpreted by English lawyers to suit the new doctrine of parliamentary supremacy. Thus Parliament, as the representative of society, would increasingly define subjecthood as being a relationship to the King-in-Parliament rather than the person of the king.

The colonists in the British colonies of North America, meanwhile, had begun to develop their own notions of subjecthood and jurisdiction. They did not dispute
their allegiance to the English king, but they failed to see why they should be considered to fall under the jurisdiction of the English parliament, especially considering that they had their own colonial legislatures. American jurists rediscovered Coke and cited Calvin's Case to their own ends. Just as Scots—in the period of personal union prior to the creation of the United Kingdom of Great Britain in 1707—were by no means subject to the laws passed by the English parliament, they argued, American colonists were joined to England only by virtue of a common monarch. The colonies were political bodies separate from England, but within the same British Empire. This notion was inconceivable to British jurists, to whom imperium in imperio (a state within a state) was a logical impossibility. Problems arose as to what the position in Great Britain was of an alien who had been naturalized by the parliament of a colony, or indeed of what his position was in other colonies.

But one legal argument would decisively sow the seeds of their revolution: that where a monarch has failed to live up to the contractual relationship with his subjects, they have the right to replace him. The colonists' claim that King George III had failed to give them protection was to justify their declaration of independence.

From American independence onward, the development of American citizenship and law would diverge from British legal thought and follow its own course. As we shall see in the fourth chapter, however, the same legal argument supporting the colonies' erstwhile claim to be separate political entities in a British Empire, i.e. that they were joined to Britain solely by shared personal allegiance to a common monarch, would end up being of key significance to the development of citizenship within the Commonwealth.
CHAPTER 1

Calvin’s Case

If medieval Europeans’ relationships to other members of society and the entities within it had once been multi-layered and ambiguous,¹ the rise of the sovereign State, with territory and population exclusive from other sovereign States, inevitably led to a rise in importance of subjecthood as a means of establishing who was “in” and who was “out”.² (Bosniak refers to this dimension of citizenship-as-nationality as its "hard outside".³) And indeed, as the drawing of State borders did, this demanded some degree of exclusivity: to the mind of a 17th-century jurist, the Biblical adage that “no one can serve two masters” may well have been a logical given,⁴ implying that as a rule, one could not be a subject of two kings. The situation that a king might have two realms, on the other hand, was less inconceivable; yet the existence of such a situation created problems for the first rule. How could subjecthood be construed to be as unambiguous as possible?

The accession in 1603 of James, King of Scots VI as James I of England, the successor of his first cousin twice removed Queen Elizabeth, created just such an exceptional situation. The Kingdom of Scotland and the Kingdom of England were by no means politically united, notwithstanding James’ attempts to style himself “King of Great Britain”.⁵ Yet what was the relationship of one of James’ Scottish subjects to the Kingdom of England, and vice versa, what was the relationship of one of James’ English subjects to the Kingdom of Scotland? This was the crux of the problem in Calvin’s Case, a lawsuit brought on behalf of the Scottish infant Robert Colville (corrupted to “Calvin”) that was ultimately heard by the Court of Exchequer-Chamber. Calvin was born after the accession of James to the English throne and is therefore a so-called postnatus Scot (by contrast to the antenati). (In fact, the lawsuit was a test case, contrived by James to resolve a debate that had been ongoing between the parliamentary and royal factions regarding the nature of the new union.⁶) The 1608 opinion of Sir Edward Coke, chief justice of Common Pleas, is now what is meant when we refer to Calvin’s Case, as his opinion is taken to be the authoritative settlement of the problem.⁷ Coke’s opinion is worth reading not only for its binding rulings on unsettled questions, but also for its obiter dicta (incidental statements) that reveal the undisputed state of the law in 1608. We shall use Calvin’s Case to begin our analysis of citizenship in a bygone era in which one might presume the

² See, at least with regard to the rise of nationality in the 19th century as states gained interest in controlling the movements of “nationals”, Torpey (2000), p. 7 and p. 72-73.
“subjecthood” dimension of citizenship, i.e., the relationship of pure personal subordination to a monarch, to be the more salient one. Yet even at this time, the picture is not so simple: if the question were “simply” about whether the *postnatus* Calvin is a subject of James, there would be no legal question to be resolved. Indeed, this was not disputed by anyone. Rather, it is Calvin’s attempt to exercise *rights* in England on equal terms to an Englishman, in other words to make use of what might be identified as part of the “citizenship” dimension of his subjecthood, that brings up the legal question to be resolved.

Ultimately, the case is a property dispute: Calvin has been prevented from taking possession of lands in England to which he was entitled. The question is thus whether Calvin can be denied access to the courts in order to file his complaint, in Coke’s words, whether he is “an alien born, and consequently disabled to bring any real or personal action for any lands within the realm of England”. We must first pause to consider the implications of this undisputed given in the legal thought of the time, namely that an alien would not have access to court for a land dispute. While one must always be careful in applying modern legal concepts to historical texts, I shall go on to do so while clearly identifying the source. An “action” (*actio*), a concept dating from Roman law, is a legal remedy—a lawsuit—brought by a party in order to ask a judge to grant a claim: either for property (a real action) or against an individual to enforce an obligation (a personal action). While the Romans saw this functioning of the law in terms of an action, modern legal thought, viewed from a certain perspective, has coalesced the possibilities for legal action into the concept of a *right*. It is not always accurate to construe the past in these modern terms: for instance, the 19th-century German legal thinker Friedrich Karl von Savigny interpreted the Roman action as being intended to enforce pre-existing “rights”, while a later thinker of the same era, Bernhard Windscheid, was skeptical of this analysis, concluding that the Roman *praetor* acting as a judge was less concerned with justice than with economic reality. However, to the extent that one deconstructs today’s “rights” into actions, then we can rephrase Coke’s “bringing actions” as “exercising rights” without too much trouble. The important aspect is that we never fail to recognize the potential for action encapsulated in a right, in order always to be able to identify the subject and object of that action. Thus we can rephrase the question at issue in *Calvin’s Case*: can Calvin be viewed as a subject in England, and does he therefore have equally enforceable rights there? We shall return to the rationale of this undisputed rule below, which Coke provides in his analysis of the relationship between the subject and the king.

Coke begins his opinion by announcing that his analysis will be fourfold, based on the four nouns to be identified in Calvin’s plea: “ligiance” or allegiance (*ligantia*);

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8 *Calvin’s Case* (1608), 1a.
9 ibid., 2a.
11 ibid., p. 122.
kingdom (*regnum*); law (*leges*); and alien (*alienigena*). Coke clearly relishes embarking on an exploration of a legal question that has never before arisen, whose resolution he seems to know will form a precedent for years to come:

And albeit I concurred with those that adjudged the plaintiff to be no alien, yet do I find a mere stranger in this case, such a one as the eye of the law (our books and book-cases) never saw, as the ears of the law (our reporters) never heard of, nor the mouth of the law (for *judex est lex loquens*) the Judges our forefathers of the law never tasted: I say, such a one, as the stomach of the law, our exquisite and perfect records of pleadings, entries, and judgments, (that make equal and true distribution of all cases in question) never digested. In a word, this little plea is a great stranger to the laws of England, as shall manifestly appear by the resolution of this case.

Coke’s opinion primarily turns on allegiance, which is what the subject by definition owes to his sovereign. Coke discerns four types of allegiance: natural, acquired, local and legal. The natural subject (*subditus natu*), the archetype of subjecthood, is a subject by birth. Kettner notes that the legal criteria of the time for acquisition at birth could be analyzed in modern terms as a combination of *jus soli* (the law of the soil or “birthright”, i.e. birth on English soil) and *jus sanguinis* (the law or right of blood, i.e. descent from an English father) without either of these factors being necessarily decisive. The natural subjecthood of a child who satisfied only one of these criteria—e.g., a child born of aliens on English soil, or a child born of an English father abroad—was far from certain: in the first case, it could generally be ruled out, although at least one English jurist writing in 1527 seemed to be of the opinion that the child of an “alyon […] whiche is not of kynges enemyes […] is not alion but englysh”. In the second case, which was governed by the 1350 statute *De natis ultra mare*, it depended on the circumstances under which the father had left England, for this determined whether the child was born within the relationship of allegiance.

For Coke, natural subjecthood was anything but an abstract, artificial legal status or category: it was an “immutable” law of nature comparable to the relationship between parent and child, that existed “before any judicial or municipal law in the world”, and which solely by virtue of that fact could be considered to be part of English law. Indeed, Coke writes, “[a]s the ligatures or strings do knit together the joints of all the parts of the body, so doth ligeance join together the Sovereign and all his subjects, quasi uno ligamine.” It is furthermore of critical importance to Coke’s ultimate conclusion in this case that allegiance is anything but territorially determined or bounded, but rather like “faith and truth which are her members and parts, are qualities of the mind and soul of man”. If natural allegiance were local (i.e. territorial), Coke reasons, then the King’s

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12 *Calvin’s Case*, (1608)2b-3a.
13 Ibid. 4a.
16 25 Edw. III st. 2, summarized in Blackstone (1832), p. *373*
17 *Calvin’s Case*, (1608), 4b.
English and Scottish subjects could not be compelled to leave the territory of England or Scotland for military service, nor could laws be made prescribing the way in which the King was to pay his subjects wages for foreign service.  

An alien could also acquire allegiance: the king acting alone (by issuing letters patent) could endenize, or make a “denizen” of an alien. However, Coke’s obiter dicta reveal that although the king had the power to extend denization to all of an alien’s heirs, a denizen was, crucially, excluded from the law of inheritance: his heirs would not inherit his estate. Only an Act of Parliament could “naturalize [an alien] to all purposes”, granting him and his heirs exactly the same rights as if they had been natural-born subjects. Somewhat curiously, Coke stubbornly insists on his own Norman French etymology of the word “denizen”: at the first mention of the word adding “or rather donaison, because he is subditus datus”. It becomes clear, later on, that Coke wishes to emphasize the given nature of the denizen in order also to emphasize his limited nature: “donaison: for that is the right name, so called, because his legitimation is given unto him; for if you derive denizen from deins nee, one born within the obedience or ligeance of the King, then such a one should be all one with a naturalborn subject.” This last statement implicitly reveals the superiority, in Coke’s view, of “natural”, God-given law and birthright to a right given by man. At the same time, the fact that an alien can in fact be made completely equivalent to a natural-born subject by an Act of Parliament reveals something about the already limited power of the King and the notion that an Act of Parliament is of a higher standard than merely a man-made norm.

Coke touches briefly on the last two forms of allegiance: local and legal. Local allegiance is the relationship with the sovereign entered into when an alien from a country at peace with England enters English territory, “because as long as he is within England, he is within the King’s protection; therefore so long as he is here, he oweth unto the King a local obedience or ligeance, for that the one (as it hath been said) draweth the other.” Central to any definition of allegiance, as we see here, is that it is that which is owed by the subject in return for the protection provided by the sovereign. Indeed, for Coke, the acid test of whether a relationship of allegiance exists (or existed) is whether it is possible for the person concerned to commit treason—in other words, to violate the obligation implied

18 ibid., 8a.
19 ibid., 6b.
20 ibid., 7a.
21 ibid., 7a.
23 The accepted etymology, according to the Oxford English Dictionary, is: “late Middle English deynseyn, via Anglo-Norman French from Old French deinz “within” (from Latin de "from" + intus "within") + -einz (from Latin -aneus “-aneous’). The change in the form of the word was due to association with citizen”
24 Calvin’s Case, (1608)5b.
25 ibid., 18b.
26 ibid., 5b.
by allegiance, which in turn would be implied by the King providing protection. Coke cites the separate precedents of a “Frenchman, being in amity with the King” and “two Portuguese born, coming to England under Queen Elizabeth’s safe conduct, and living here under her protection” who had been indicted of treason, of which a necessary element of the indictment was “contra ligeant suæ debitum” (against his allegiance owed). If, by contrast, an alien enemy come to invade this realm, and be taken in war, he cannot be indicted of treason: for the indictment cannot conclude contra ligeant suæ debitum, for he never was in the protection of the King, nor ever owed any manner of ligeance unto him, but malice and enmity, and therefore he shall be put to death by martial law.

Legal allegiance, finally, is the allegiance that is entered into by swearing a formal oath of allegiance; however, Coke does not devote much attention to this, largely because it is usually simply declaratory (i.e., not constitutive) of a allegiance that already existed. Again, the hierarchical distinction between natural law and man-made law is apparent: “The substance and effect hereof is, as hath been said, due by the law of nature, ex institutione naturæ, as hereafter shall appear: the form and addition of the oath is, ex provisione hominis.”

What, then, is the relationship of the allegiance owed by James’ Scottish subjects, whether antenati or postnati, to the ligeance owed by James’ English subjects in England? Because, as we have seen, the allegiance owed by the subject is somehow bound up with the protection provided by the sovereign, it is necessary to resolve this first question in order to resolve the question of whether Calvin has access to English courts in order to secure his land. After all, as Coke makes clear, access to those courts is part and parcel of the protection provided by the sovereign: “Now let us see what the law saith […] concerning the King’s protection and power of command […] that his subjects in all places may be protected from violence, and that justice may equally be administered to all his subjects.” A person who has lost the “King’s legal protection […] is thereby utterly disabled to sue any action real or personal”.

It will be useful to examine the protection offered to various categories of non-subjects. Coke notes that even alien friends enjoy access to the courts as regards personal goods, as well as for houses “for their necessary habitation”, but not for any land or house otherwise. One could read this as further evidence for the relationship between allegiance and protection, since alien friends do owe local allegiance to the sovereign. However, rather strikingly, Coke does not expressly base this statement of the law on legal-formal grounds regarding the

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27 Cf., for the prescribed form of the indictment for treason, Blackstone (1832) Book IV, p. 252 (in Chapter XXIII, “Of The Several Modes of Prosecution”).
28 Calvin’s Case, (1608), 6b.
29 ibid., 7a.
30 ibid., 8a.
31 ibid., 14a.
relationship between allegiance and protection, but rather on teleological or policy grounds that could be described as “economically liberal” in today’s political terminology: “For if [alien friends] should be disabled to acquire and maintain these things, it were in effect to deny unto them trade and traffic, which is the life of every island.” Coke later on provides a further teleological elucidation of exactly why all but natural-born subjects are denied real property rights: first of all, if aliens and their descendants could inherit land, they could eventually come to form a fifth column within England that in time of war could subvert the kingdom from within—Coke underscores this argument by express reference to the legend of the Trojan horse. The second reason Coke provides is that if such an alien population were to become large enough, a “failure of justice” would follow due to the fact that aliens are unable to serve on juries “for the trial of issues between the King and subject, or between subject and subject.”

Let us pause to consider this point in order to identify some issues that we will see recur in our investigation of the development of United States and European Union citizenship. Clearly, we can already recognize parallels in Coke’s reasoning with modern-day political discourse on the regulation of migration. In the first reason, we encounter, in today’s language, a policy of “national security” justifying restrictions on settlement for aliens. This defines negatively, to once more use Bosniak’s metaphor, the “hard outside” of subjecthood. We see how restricting aliens’ right to property served as a form of immigration control at a point in history when complete surveillance at the outer borders, and thus using the borders as the main locus for immigration control, would have been nigh impossible. And anyhow we may find it odd, in modern constitutional democracies, to regulate migration by means of private law (as to what is now the United Kingdom, it ultimately repealed the common-law ban on aliens owning and inheriting property in 1870).

However, particularly in Coke’s second reason, we can already recognize an even clearer dimension of citizenship (in the sense of the republican civis archetype of antiquity) to the subjecthood of the time that cannot simply be traced back to a simple relationship of protection and allegiance between an absolute monarch and his subject, as, say, the mere exercise of enforceable rights might. Indeed, in the very role the subject is called on to play as a juror, we see an obligation to the community (or as Coke calls it, the “commonwealth”). Riesenberg notes that the republican notion of “citizenship” was never entirely discarded as a component of subjecthood for early modern monarchs: it was attractive for its aspect of state service and active life in the service of the community. However, what is particularly striking about the English subject of

32 ibid., 17a.
33 ibid., 18b.
34 Karatani (2003), p. 50.
36 ibid., p. 204.
1608 is his role as a juror in the “public law” dimension, i.e. trials between the King and subject (such as, most prominently, criminal prosecution): in this we can see a clear obligation of the subject to potentially limit the King’s exercise of power.

This aspect of limitation may be even more apparent in Coke’s discussion of the rights of a denizen and the King’s power to endenize. Parry reveals that the distinction between denization and naturalization was still somewhat fuzzy at the time of Calvin’s Case, coming out of the Elizabethan era. However, by the end of the seventeenth century the distinction was much more firmly settled. The key disability of a denizen relative to a natural-born subject or a fully naturalized subject seemed to have everything to do with the retroactivity of the acquisition and the temporal effects on the ability of the person in question to inherit and transmit property to his heirs. Denization by letters patent was not retroactive to the denizen’s birth, thereby leaving the already-born children of the denizen aliens and thus bereft of the right of inheritance. By the same token, the denizen might himself be unable to inherit, not having retroactively gained a particular right of inheritance at birth.

The power of an Act of Parliament, by contrast to the power of the King acting alone, may have lain precisely in Parliament’s power to correct a prior defect in the law (i.e., in Coke’s terms, the law of nature according to which a subject was natural-born), and thus only naturalization by Act of Parliament can deem a subject to be natural-born. The interests that Parliament represents in allowing for such a defect to be “corrected” might also well be reflected in the following passage in Calvin’s Case, to which I have added italics: “The King only without the subject may make not only letters of safe conduct, but letters patent of denization, to whom, and how many he will, and enable them at his pleasure to sue any of his subjects in any action whatsoever real or personal,…”, Coke begins. In this passage, Coke is identifying denization as one of the foremost royal prerogatives. However, he goes on to say: “…which the King could not do without the subject, if the subject had any interest given unto him by the law in any thing concerning an alien born.” If Coke is using the “subject” here as a pars pro toto for all subjects, and thus Parliament as its representative, he could be referring to the necessity of consulting Parliament to make sure no subject’s interests would be violated by the retroactive naturalization of the alien in question.

In any case, to return to protection and the central question of Calvin’s Case, Coke’s ultimate binding ruling is that postnati Scots, having been born in allegiance to one and the same king (“united by birthright”), are in fact to be

38 ibid., p. 49.
39 See ibid., p. 51.
40 Parry apparently only sees this passage as being relevant for implying that the power of denization was exclusive to the King (i.e., unavailable to lower lords or mayors), and is silent on what it might say about any limitations to this royal prerogative. ibid., p. 38.
viewed as natural-born subjects in England and are to have access to English courts, as the common allegiance also creates “a union of protection of both kingdoms”.  

Why, then, do the antenati, at least those born during the reign of James IV King of Scots, not share in this common allegiance? The logic of Coke’s ruling is entirely underpinned by the notion that the King is of a dual nature: that the King is to be analyzed as a “natural body”, on the one hand, the living, breathing person who has inherited the royal blood; and as a “politic body or capacity” on the other, i.e. the office of the King, “framed by the policy of man”. Allegiance is sworn to the natural body of the King, as the King as a natural person is sworn to protect his subjects; “the body politic”, on the other hand, “(being invisible) can as a body politic neither make or take homage.” The law, however, is addressed to the King’s political body. The reasons that Coke provides have everything to do with the King’s political body as standing for the rule of law (“And therefore a King’s Crown is an hieroglyphic of the laws, where justice, &c. is administered”43), which cannot be seen to die or be interrupted. However, the political body of the King is necessarily bound to a natural body at all times: the two bodies are entirely interdependent. Coke holds, first of all, that Kingship is acquired by the natural person entitled to it de jure, “without any essential ceremony or act to be done”: James, for instance, became King of England instantly upon the death of Queen Elizabeth. One practical reason (“causa necessitatis”) that Coke provides for this is to prevent legal moves to disinherit (by “attainder”) the successor to the Crown prior to his crowning: if the act of crowning were constitutive of Kingship, then this would result in an interregnum, a vacuum “which the law will not suffer”.45

Without going any more deeply into the theory of the king’s two bodies and its theological origins (which is extensively dealt with by Kantorowicz46), the logical consequence for Coke is that a Scottish postnatus, born into a state of allegiance to James (as a natural body) who is simultaneously the King of Scots and the King of England (James’ political bodies), is entitled to James’ protection in England (from his natural body) that he offers as the bearer of the English Crown (his political body, the English rule of law). A Scottish antenatus, on the other hand, was born into a state of allegiance to James (as a natural body) at a time when James was exclusively King of Scots, thus was born “under the ligeance and obedience of another King” and must be viewed as an alien in England. 47 Although a union of protection (a union of the Law, so to speak, capitalized and singular) had been created by the accession of James to the English throne,

41 Calvin’s Case, (1608), 14b-15a.
42 ibid., 10a.
43 ibid., 11b.
44 ibid., 11a.
45 ibid.12a.
46 Kantorowicz (1957)In particular, a deeper relevance of Coke’s assertion of accession to the throne ex jure in Calvin’s Case is discussed on p. 317.
47 Calvin’s Case, (1608)18b.
England and Scotland were to maintain separate systems of laws (lower case and plural), separate Parliaments and separate nobilities.

In making use of the King’s two bodies, Coke was drawing on precedent, specifically the case of the Duchy of Lancaster, in which a question was at issue of the disposal of the personal property of a king. However, we must be careful not to be too glib with our use of the word “precedent”, as Coke, while he did use that term from time to time, never meant to say that a previous judgment was itself binding (i.e., the modern concept of *stare decisis*) or itself set a norm. Rather, for Coke, citing precedent merely emphasized the continuity and timelessness of the law, in that the judge cited had only been restating or clarifying what the law had always been. By the same token, Coke would not have accepted a distinction between holdings and *obiter dicta* in a judgment—the entire judgment was merely declaratory, not normative. For, Coke held,

we are but of yesterday, (and therefore had need of the wisdom of those that were before us) and had been ignorant (if we had not received light and knowledge from our forefathers) and our days upon the earth are but as a shadow, in respect of the old ancient days and times past, wherein the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience, (the trial of right and truth) fined and refined, which no one man, (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto. And therefore it is *optima regula, qua nulla est verior aut firmior in jure, neminem oportet esse sapientiorum legibus*: no man ought to take upon him to be wiser than the laws.

We shall return in the following section to the significance of Coke’s views to the doctrine of the common law.

To move on from doctrinal considerations to pragmatic ones: without commenting on the internal logic or inherent justice of Coke’s decision in *Calvin’s Case*, it can be said that it represented a masterful compromise between the two political poles represented by the counsel for the plaintiff and the counsel for the defendants. As noted before, the case was really a test case to settle a dispute between the Commons on the one hand and royal factions on the other. The royal factions, in line with James’ wish to style himself King of Great Britain, held that James’ accession had completely unified the two kingdoms (in Law and laws), since there was only one ruler of two Kingdoms. The parliamentary faction, on the other hand, fearing diminishment of its power, held that a *postnatus* such as Calvin only owed allegiance to James as King of Scots, and that he could only be viewed as a natural subject in England if he were naturalized by an Act of the English Parliament. No less a mind than Francis Bacon argued the plaintiff’s

50 *Calvin’s Case* (1608), 4a.
case for the unionist (i.e. royal) camp, in which he argued that allegiance to a
King is not territorially defined, therefore that Calvin’s allegiance is to one and the
same King.52 The central argument of the anti-union camp was based on the civil
law maxim “ quando duo jura concurrunt in una persona, sequum est as si essent in
diversi”: when two rights (or systems of law) meet in one person, it is the same as
if they were in different persons.53 Thus Coke’s ruling, based as it was on the
King’s dual nature and incorporating both parties’ arguments, represented a
middle ground, “straddl[ing] both sides”54 between the plaintiff’s appeal to the
King as purely a natural person and the defendants’ appeal to the purely political
nature of the King.

Such an analysis of Coke’s ruling neatly fits into the view of the modern
movement of Critical Legal Studies, an heir to legal realism, which holds that all
law represents a “patchwork quilt” of irreconcilably opposed political ideologies
that have been crystallized into settled law.55 And indeed, history reveals that
Coke’s ruling became the definitive statement of the law, not necessarily by any of
its inherent qualities, but by its pragmatic value: apparently, neither King nor
Parliament resisted it. The record shows that a considerable number of Scottish
antenati applied for denization and were endenized in the decades subsequent to
the ruling, of which some went on to apply for naturalization, thereby recognizing
that these procedures were necessary to gain rights in England;56 as well, there is
some record of English antenati being endenized and naturalized in Scotland.57

However, there are other aspects of Coke’s decision that did not have a major
bearing on the political conflict of the day, and therefore, it could be said, did not
gain the status of settled law. Coke’s description of the reciprocity implied by
allegiance, in particular, would later become subject to divergent interpretations.
The subject, it was undisputed, owed allegiance to the sovereign, and the subject’s
violation of that allegiance amounted to treason, which could be punished by the
sovereign’s withdrawal of protection. But did the sovereign owe his subjects
protection, and if so, what was the penalty for not providing it? This question
would become relevant when applied to a future conflict: the one between the
American colonies and the British parliament, which we shall return to in the
final section of this chapter.

52 Bacon (1826), Vol. IV, p. 319-362.
56 Parry (1954), p. 54. In fact, Parry notes here, Scots were given preferential treatment in
the denization procedure, not being required to pay the fee that other aliens had to, which
Kettner sees as evidence for King James making maximal use of the royal prerogative
available to him to endenize his Scottish subjects in England. Kettner (1978) p. 27, n. 44.
57 Parry (1957), p. 55.
CHAPTER 1

The Glorious Revolution

The King’s two bodies were to endure as the dominant paradigm for understanding the nature of the monarch in England. However, in the light of social upheaval, specifically the rise of a strong and assertive Parliament, this paradigm would be subject to some reinterpretation. How would this, in turn, affect the paradigm of subjecthood? And how would new philosophical ideas be infused into that paradigm? As we will see, each of the ideas in development in this period was related to the relationship between any two points on the triangle: King – Parliament – subject.

The reign of Charles I, son and successor (as of 1625) of James I & VI, was hallmarked by conflicts with Parliament. These largely had to do with finance, as Parliament claimed the right to ask questions about Charles’ policies (especially his military campaigns) in return for parliamentary funding. Charles had dismissed Parliament in 1629, going on to rule exclusively within his royal prerogative for eleven years.

Judges at the time held that the royal prerogative was technically quite limited: the king could issue ordinances and proclamations, but could not, for instance, create any new offenses by means of these. New offenses could be created only by Act of Parliament, i.e. a statute passed with the joint assent of commons, lords and king. We can recognize a pattern in this distinction between the powers of the king alone and that King acting jointly with Parliament: we already saw that only an Act of Parliament could be certain of naturalizing an alien “to all purposes”, possibly because only an Act of Parliament could correct a prior defect in the law.

The law, as for instance Coke saw it, had binding power by virtue of being something almost as perpetual and immutable as a law of nature, not by being a man-made norm. For Coke, whose statements are viewed as an authoritative contribution to the doctrine of the common law, even a statute might be best seen as merely a clarification or declaration of an already existing custom. Sir John Davies, a contemporary of Coke whose ideas closely mirrored Coke’s, asserted that a new custom recorded in an Act of Parliament would really only become law when the act was

found to be good and beneficial to the people, and agreeable to their nature and disposition, [and …] they use it and practise it again and again, and so by often iteration and multiplication of the act […] being continued without interruption time out of mind.

Pocock identifies the “paradox” of the common law as the fact that it is constantly evolving and being changed to suit the needs of the present, while at the same

59 Supra at n. 21
61 Quoted in ibid., p. 32-33.
time it is based on a myth of being immutable and immemorial. In any case, it is clear that an Act of Parliament had this mythical power to define punishable offenses by perhaps implicitly declaring them to have always been offenses, where the king acting alone did not have this power. Coke’s assertion of the power of judges to void statutes, which the judges who preceded him had never quite so authoritatively asserted, may well have been based on the notion that a statute was not itself a legal norm, but merely a descriptive statement of a legal norm, and that judges were in a better position to declare that statement incorrect. This is the ultimate basis of the description of the common law as “judge-made law”.

Nonetheless, there was also a legal theory underpinning royal prerogative that granted the king some latitude. Coke himself ruled in 1610, upon an inquiry by the council of James I, that the power of royal prerogative was twofold. On the one hand, the king could not create a new offense, but could by proclamation admonish his subjects to obey the law on an existing offense on pain of punishment, where disobeying the proclamation would aggravate the offense. We can recognize this even today as a key aspect of executive power, the power of enforcement. By issuing proclamations, the king in council could effectively select which offenses were to be punished. Yet at the same time, Coke ruled, the king in council could define offenses by proclamation if the offenses were punishable in the Court of Star Chamber.

The Star Chamber traced its roots to a statute of 1487, during the reign of Henry VII. It was originally a select committee of several of the king’s main councilors and two justices, limited to trying serious offenses related to interferences with justice—for this reason it was expressly created not to try cases by jury, since it functioned as a highest court of appeal for cases where a trial by jury in an ordinary court might have been manifestly unjust. Yet by the reign of James I, the record shows that the Court of Star Chamber had grown to be virtually indistinguishable from the Privy Council, with sometimes up to 25 members of the council, including the king himself, sitting in it. Nor did it limit itself to the offenses enumerated in its founding statute: it claimed practically unlimited jurisdiction, lacking only the authority to pass a death sentence. It could hardly be called a “court of judges administering the law”, as Maitland writes, but rather “a court of politicians enforcing a policy”, always ruling in the king’s favor. Even at this time, Coke nonetheless had great respect for it, as it was apparently felt to be necessary as a corrective factor to lower courts. Maitland notes that the Star Chamber was probably not really limited by statute, as was later asserted; rather, the privy council as a whole had since time immemorial had a supreme adjudicative function, meeting for this purpose in the Star Chamber (that is, the

62 ibid., p. 36. Kantorowicz (1957) identifies this myth as being based on the medieval notion of *aevum*, whereby a political order could not be shown to change, p. 279 et seq.
64 ibid., p. 257-258.
Charles I made maximum use of this wagon-sized loophole to essentially legislate by proclamation, since the last word was never to the judges, but to his own privy council—as-Star-Chamber.66 And the Star Chamber under Charles I achieved such a level of notoriety for its capricious judgments and use of torture that the concept of a “Star Chamber” lives on in the Anglo-Saxon legal tradition as the epitome of an arbitrary and uncontrolled court. However, it was to be Charles’ dubious extra-parliamentary means of raising money that would prove to be truly unpopular. Levying inland taxes was one thing that the king could not manage on his own; for this he needed the approval of parliament. Charles’ first parliament reminded him of its power to control the purse strings, as well, by only granting him tonnage and poundage (taxes and duties on imported wine) for one year, rather than giving him the customary lifetime grant. As such, Charles I was forced to raise funds by the limited means available to him: one was through collecting duties on imports, which could be justified on somewhat tenuous legal grounds; the other was by demanding forced loans from his knights.67

After two more parliaments hallmarked by conflict and power struggles, and the aforementioned twelve years of ruling exclusively within his prerogative, Charles ultimately recalled parliament in April 1640 in order to secure funding for his war against the Scottish rebellion, then dissolved it again (the so-called Short Parliament). Charles had to recall Parliament once more in November 1640 (the Long Parliament), and this time was forced to make real concessions, accepting limitations on his ability to dissolve Parliament, and giving his assent to an Act of Parliament abolishing the Star Chamber.68 Nevertheless, further pushing and pulling between King and Parliament ultimately led to a break in January 1642: the English Civil War between royalist and parliamentary forces.

The Long Parliament was, at least at first, not calling the monarchy as such into question, however. In raising troops to fight against the king, in fact, Parliament acted in the name of the King, but then the body politic of the King, “the Fountain of Justice and Protection”, as the Lords and Commons declared on 27 May 1642. It was this King-in-Parliament that the Parliament was fighting to defend. And as such, the execution of the natural body of Charles I could be carried out on 30 January 1649 without killing the body politic of the King.69

Of course, the latter was executed as well, on 7 February 1649 when Parliament passed an Act abolishing the kingship, one day after passing an act

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65 ibid., p. 261-263.
66 ibid., p. 302.
68 As Maitland already noted, this Act may have been erroneously based on the notion that the Court of the Star Chamber derived its authority from the 1487 statute. However, the Act left no stones unturned by declaring “that no court should exercise the same or the like jurisdiction as had been exercised by the Star Chamber.” ibid., p. 311.
abolishing the lords. The Kingdom of England, at least from the constitutional perspective of the new Commonwealth of England (founded by the Commonwealth Act of 19 May 1649), had ended. By the Treason Act of 17 July 1649 it was declared to be treason to state that “the Commons in Parliament are not the supreme Authority, or raise force against it”. From the perspective of the constitutional law of the Kingdom of England, however, re-established with the Restoration of Charles II on 8 May 1660, not one of the Acts of Parliament during the Commonwealth period was valid, having obtained the assent of neither the lords nor the king. In fact, from the perspective of the constitutional law of the Kingdom there had been no interregnum, since if we extend Coke’s ruling on succession in *Calvin’s Case*, Charles II had simply *de jure* become king on the day his father was killed.70

The Civil War, simply put, is not very constitutionally interesting to us because the legal questions to be answered, i.e. the relationship between king and parliament, were only answered in an all-or-nothing way, and the existence of the kingdom picked up seamlessly, when viewed in retrospect, from where it had left off. At most, the Civil War left a legacy of a Sword of Damocles hanging over the king’s head, reminding him that even if Parliament did not have a legal right to power, it could always take recourse to violent means. The Glorious Revolution, on the other hand, really was a constitutional revolution and rupture.

The Restoration marked the ascension to power of a Parliament made up largely of royalists, the so-called Cavalier Parliament. But religious loyalties, less than constitutional loyalties to the king, were to be far more decisive. The Cavalier Parliament, after all, was also overwhelmingly Anglican, and viewed Charles II’s real and imagined sympathies with Catholicism with great suspicion. When Charles II issued the Declaration of Indulgence in 1672, granting some degree of religious liberty to Protestant nonconformists (i.e. non-Anglicans) and Catholics by way of using his royal prerogative to suspend the criminal prosecution of them, Parliament forced him to retract it, certainly a sign that the balance of power was increasingly in its hands. Parliament was also consolidating its grip on the purse strings—the legal basis for its control over taxation had already been secured in the Petition of Right, passed long before the Civil War in 1628.71

Parliament willingly funded Charles II’s reign, but when Charles II died without an heir, his openly Catholic brother James ascended to the throne as James II of England, driving anti-Catholic suspicions to a fever pitch. James II had only one heir, his daughter Mary, but she was a Protestant, married to Stadtholder William III, Prince of Orange; this was a strategic marriage that Parliament had persuaded James II to arrange before his ascent. But the subsequent birth in June of 1688 of a male heir, Prince James, made clear that a

71 ibid., p. 309.
Catholic dynasty was more than an idle suspicion. By the end of the month, seven peers wrote a letter to William of Orange to pledge their support if he were to invade England. On 5 November, William’s fleet landed on English shores and made quick work of the invasion thanks to popular support and defections from James’ ranks—on 22 December, James finally fled the kingdom.\textsuperscript{72}

William summoned the peers, all of the members of parliament (from Charles II’s reign, not James II’s) present in London, and the aldermen of London. This assembly, selected specifically to be overwhelmingly biased more toward the Williamite Whigs than toward the Jacobite Tories, then advised William to call a “Convention” (i.e., a Parliament except in name), and to assume the powers of government in the meantime. This convention subsequently took place on 22 January 1689.\textsuperscript{73} On 25 January the (Convention) House of Commons resolved that James had “broken “the original contract”, “abdicated the government”, and had left the throne “vacant”.\textsuperscript{74} But in the Convention House of Lords, the lords still loyal to James held a slender majority over the adherents of William; before the lords would agree to the commons’ resolution, it would have to be established that the crown was still held by the House of Stuart (i.e., that James had not “vacated” the throne on behalf of his heirs as well) and was not being granted to the House of Orange: thus the crown would have to be offered to William and Mary jointly, and the line of succession would not continue down through any offspring of William and any subsequent wife if Mary were to predecease William. It was further confirmed that in the absence of any descendants of William and Mary, the crown would pass to Mary’s younger sister Anne. The Stuart succession having been settled, the lords agreed to the commons’ resolution on 12 February, and on 13 February Parliament offered the crown to William and Mary jointly.\textsuperscript{75} Now that there was once again a reigning monarch, Parliament was able to pass an Act of Parliament declaring itself to be Parliament, despite not having been summoned by the king. This Convention Parliament continued until early in 1690, passing a considerable amount of legislation including the Bill of Rights, which declared, significantly, that parliaments should be held frequently for the redress of grievances and for aiding the legislative process.\textsuperscript{76} The Bill of Rights also further impugned James’ having levied import duties within his royal prerogative (albeit for a period of only two months subsequent to his ascent), declaring that “levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal”.\textsuperscript{77} Finally, after the dissolution of the Convention Parliament, a new Parliament was called in the proper way, by the issuance of writs from the king and queen. This

\textsuperscript{72} Beddard (1988), p. 64.
\textsuperscript{73}ibid., p. 65.
\textsuperscript{74}Horwitz (1977), p. 9-10.
\textsuperscript{75} ibid., p. 10-11.
\textsuperscript{76} Maitland (1961), p. 296.
\textsuperscript{77} ibid., p. 309.
Parliament ratified the statutes of the Convention Parliament and confirmed by statute that the king and queen were lawfully so.\textsuperscript{78}

Nonetheless, Maitland describes this constitutional process as "extremely difficult for any lawyer to make out […] as […] lawful."\textsuperscript{79} The very base on which the kingdom formally stood, after all, was the king; and only the quasi-natural law of succession could determine who the king was, as Coke had already ruled. Part of the legal problem that the commons and lords had to hammer out in formulating their resolution and deciding what it meant was how to account for an altered succession to James II. Parliament ultimately reasoned that James II had "abdicated" on 11 December 1688, the day he had dropped the great seal into the Thames, and Parliament apparently accepted that there actually had been an interregnum until the day William and Mary accepted the crown.

Nevertheless, even if the defective succession could be glossed over, there was still the problem of the fact that parliament had not been legally summoned. Neither the initial assembly nor the convention could be said to have summoned themselves (an act which constitutionally, would be comparable to the later legend of Baron Munchausen lifting himself up by his hair); nor were they summoned by a King of England, but by a Prince of Orange, an equally unprecedented act.\textsuperscript{80} Hence, the Glorious Revolution cannot be interpreted otherwise than as a complete constitutional rupture in England, effectively declaring the supremacy of parliament above the king. This took quite some time to become entirely settled law in either the common-law or the legal realist sense. After all, for over a century to come, the Jacobite movement was to persist among various parts of the population, a movement dedicated to the restoration (if needs by violent means) of the House of Stuart to its "rightful" place—in the sense of the old constitutional order—on the thrones of England and Scotland (and later of Great Britain).

(On that note, however, it must be noted what had happened in parallel in Scotland, which still had a formally separate constitutional order. In Scotland, it was not accepted doctrine that James VII—as he was in his Scottish numbering—had abdicated. Moreover, he still enjoyed considerable support in Scotland, as the latest king in an ultimately Scottish dynasty. The Convention of Estates of Scotland, Scotland's own "Convention parliament", meeting to resolve the matter of succession, entertained letters from both James and William before voting on 4 April 1689, by a slim margin of five votes, to deprive James of the crown. Thus in Lynch's view, the Scots had more openly accepted the contractual nature of monarchy than the English had, who for their part had "grasp[ed] at the convenient fiction of James's abdication."\textsuperscript{81})

\textsuperscript{78} ibid., p. 284.
\textsuperscript{79} ibid., p. 283.
\textsuperscript{80} ibid., p. 284-285.
\textsuperscript{81} Lynch (1992), p. 300-302.
The English Parliament’s resolution of 12 February 1689 notably contained a reference to one of the ideas the new constitutional order was based on: the “original contract” that King James II had supposedly broken. Today this would be at first glance recognized as a reference to the theories of John Locke: his “social contract” theory which holds that legitimate government only exists by the consent of those governed. Nonetheless, it would be slightly anachronistic, at best, to assert that the drafters of the resolution were being consciously “Lockean”: Two Treatises of Government, after all, was published months afterwards, and anonymously at that. (The thinker who most certainly predated the Glorious Revolution and whose writings had more of an identifiable influence on its players, on the other hand, was Machiavelli.) Behrens identifies ideas that would later show up in Locke’s writings, such as the contract theory, as already having currency in Whig circles during the reign of Charles II. Nevertheless, Locke himself was so deeply embedded in the events leading up to the Glorious Revolution, that we can take his writings to be, if not a normative statement of the ideas of the time, then a fairly reliable description of those ideas.

The moment at which Locke arguably hitched himself to a rising political star was when he became a close advisor to Lord Ashley in 1666. Ashley was a member of parliament sympathetic to religious tolerance, who, as the later 1st Earl of Shaftesbury, would be identified as the founder of the Whig Party, the political movement most strongly associated with constitutional (i.e. limited) monarchism in England. In 1672 Shaftesbury, as a Privy Councilor and member of the five-person “Cabal” (a word composed of their initials, including Ashley’s) out of the Council that effectively governed England, was a supporter of Charles II’s aforementioned Declaration of Indulgence. But Shaftesbury soon became suspicious of Charles II’s sympathies to Catholicism and France, turned against him, and was dismissed from office in 1673. By 1677 Shaftesbury had fallen so out of royal favor, due to among other things his agitation for Charles II to name a successor other than his Catholic brother, that he was imprisoned in the Tower of London for a year.

Little is known about the substantive interchange between Shaftesbury and Locke, but they were intimately linked and both suspected of treasonous activity. In December 1682, Shaftesbury fled to exile in Holland, fearing prosecution—he died there soon afterwards of natural causes. In July 1683, it was discovered that since December 1681, there had been a plot afoot—the Rye House Plot—presumably to assassinate Charles II and his brother. Soon afterwards, Locke fled to exile in Holland as well, where he remained for five years to escape the government’s suspicions. When Locke returned in February 1689, around the same time that William and Mary were offered the crown, he

82 Locke (c. 1681), in particular, Ch. 8.
83 Wootton (1993), P. 22.
84 For a more in-depth analysis of the Machiavellian influence, see Pocock (1975), in particular Chapters 10–13.
85 Behrens (1941) At p. 48–49.
was clearly well connected in and well respected by the new ruling class, as he was offered an ambassadorship to Brandenburg, which he turned down.86

It is important to establish the place and relevance of Locke before we return to the development of subjecthood leading up to and subsequent to the Glorious Revolution. Kettner, for instance, perhaps somewhat facilely locates the dominant paradigms of subjecthood in Coke prior to the Glorious Revolution, and Locke afterwards.87 The writings of both the jurist and the political theorist provide a good basis for comparison, and Kettner is careful to note that the intellectual revolution that took place is symbolized by the constitutional theories of Locke,88 but it is important to emphasize once more that by contrast to Coke, not a single writing of Locke (with, of course, the notable exception of the constitution of the colony of Carolina, which Locke drafted for Shaftesbury, one of the Lords Proprietors of that colony89) describes or defines a legal norm. Perhaps with the passing of time, and the general acceptance of Lockean theories of consent as being essential to government, Locke’s ideology has come to be viewed as a father to the shift in legal and political norms that happened with the Glorious Revolution. But it is probably more accurate to view Locke’s ideology as the sibling or cousin to that shift, perhaps even the prodigal child (Wootton, for one, suggests that Locke may have been more influenced by that major player in the political developments leading up to the Glorious Revolution, Shaftesbury, than vice versa90).

In fact, aside from the notable constitutional rupture that was so central to the Glorious Revolution, English law and politics remained rather conservative and not at all revolutionary in its view of itself, at least formally. Pocock (in his 1987 addendum to his study that was originally written in 1957) points to subsequent developments in historiography91 that show that Locke and other political theorists of his age were still viewed as dangerously anti-monarchist and Cromwellian by the Whig politicians who were in power for the thirty years subsequent to the Glorious Revolution.92 Even in 1747, in the case of Aeneas Macdonald, an expatriate Scot convicted of treason, his lawyer’s attempt to argue against the Cokean principle of perpetual allegiance by saying that it “seemed to derogate from the principles of the Revolution” was to earn him only a rebuke from the court.93

To conclude this section, then, and finally return to subjecthood, I will contrast the “undiluted” implications for subjecthood of government by consent as Locke

88 ibid., p. 44.
90 ibid., p. 36-37.
91 In particular, Robbins (1959)
CHAPTER 1

might have it, which threatened the underpinnings of Cokean doctrine, to the practical evolution of English constitutional law and subjecthood via the so-called “Whig interpretation” of English constitutional law after the Glorious Revolution. The latter, as Pocock identifies it, hews to Coke’s vision of the common law as being immutable and immemorial: in the Whig interpretation, the “ancient constitution” always postulated a supreme parliament, a limited king and protections for his subjects, and constitutional monarchy was by no means an invention of the Glorious Revolution.

For Coke, as we saw before, the relationship of subject to king was as natural and immutable as the relationship of child to parent, from which neither time, location, nor action could detract. I previously quoted Coke’s ruling that a subject’s being convicted of felony or treason would lead to him losing the protection due him by the king: “yet”, Coke goes on to note, such a person so attainted hath not lost that protection which by the law of nature is given to this King, for that is indelebitis et immutabilis, and therefore the King may protect and pardon him, and if any man kill him without warrant, he shall be punished by the law as a manslayer [...].

In other words, even a disloyal subject is still a subject, just as, one might say, even a disowned child is still his or her parent’s child: Coke asserts this even more clearly in other cases and writings, such as in his First Institutes, where he posits the maxim nemo patriam, in qua natus est, excure, nec ligeantiae debitum ejurare posuit – no one can cast off his native land or abjure his allegiance to his sovereign.

Locke’s ideas clearly contradict this notion. On the one hand, Locke even more explicitly compares the relationship of subject to monarch to that between child and father, but in a very different way. Rather than draw the comparison in order to assert that the relationship between subject and monarch is one of natural law, Locke traces the latter relationship back to an original act of consent, in which the individuals in society appoint a monarch to govern them, but then only because the relationship they had with their own fathers, and the protection they received within it, is so familiar to them. Nothing about this original act implies that the relationship between subject and sovereign should be equally immutable. In fact, Locke notes an important difference between paternal power and political power: the power that parents wield over their children is conditioned by love, and is therefore is not naturally inclined to despotism; while the power that society grants to its governors is only on the basis of the former’s trust in the latter, and so that power must be limited so as not to violate that trust. Therefore, it is difficult to imagine that Locke would have argued that

95 Calvin’s Case, (1608), 14a, cf. supra n. 31
97 See also Resnick (1987), at p. 380-381.
98 Locke (c. 1681), §107.
99 ibid., §170-171.
allegiance of an individual subject to his monarch was perpetual and immutable. In fact, what Kettner could only surmise and extrapolate about Locke’s views on the consensuality of allegiance in 1978 has meanwhile found even more explicit support in a then-undiscovered writing by Locke on subjecthood, “For a General Naturalization” (1693), which we will return to later.

To return to Coke for one more point of comparison: just as only the natural body of the king could command the subject’s allegiance and actually provide protection to the subject, while the body politic of the king could be best seen as an abstract “hieroglyphic” of the rule of law, so too did Coke go on to rule that allegiance could not be owed to any such abstract notion:

\[
\text{no man will affirm, that England itself, taking it for the continent thereof, doth owe any ligeance or faith, or that any faith or ligeance should be due to it: but it manifestly appeareth, that the ligeance or faith of the subject is proprium quarto modo to the King, omni soli et semper.}
\]

Locke, too, could not accept that allegiance could be owed to anything other than a natural person; yet crucially, for Locke, the basis of this allegiance was still ultimately contractual:

\[
\text{But yet it is to be observed, that tho’ oaths of allegiance and fealty are taken to him, it is not to him as supreme legislator, but as supreme executor of the law, made by a joint power of him with others; allegiance being nothing but an obedience according to law, which when he violates, he has no right to obedience, nor can claim it otherwise than as the public person vested with the power of the law, and so is to be considered as the image, phantom, or representative of the common-wealth, acted by the will of the society, declared in its laws; and thus he has no will, no power, but that of the law. But when he quits this representation, this public will, and acts by his own private will, he degrades himself, and is but a single private person without power, and without will, that has any right to obedience; the members owing no obedience but to the public will of the society.}
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It is clear, then, from Parliament’s resolution of 1689, that such a contractual notion of the basis of power was very useful for justifying the replacement of the monarch by parliament acting in its role as the representative of society. However, to go on to the more radical notion that an individual subject might have the right to terminate his allegiance was probably too much to swallow for the politicians of the Glorious Revolution who would go on to become the established order; after all, that would mean that the genie was really out of the bottle, and they could be the next to be overthrown.

The Whigs had only to selectively cite English constitutional history to provide support for the notion that an idea approaching the social contract was nothing new and radical, but had been there all along. This tactic was itself not

100 Kettner (1978), p. 54 and 60.
102 Cf. supra n. 42 and 43
103 Calvin’s Case, (1608), 12a.
new at all: parliaments under Elizabeth I claimed a number of rights that were in fact new, but always on the basis of common-law arguments that those rights had always existed, going all the way back to Magna Carta and before. The Whigs could rely on the fact that much about the limited nature of monarchy had already been settled during that period between commons, lords and the Tudor monarchs. In 1589, Sir Thomas Smith, Secretary of State to Elizabeth I, had already published *De Republica Anglorum*, a book that asserted that

> The most high and absolute power of the realm of England consisteth in the parliament [...] all that ever the people of Rome might do either in *centurias tomitis* or *tributis*, the same may be done by the parliament of England which representeth and hath the power of the whole realm, both the head and body. [...] And the consent of the parliament is taken to be every man’s consent.

It is important to keep in mind that “parliament” refers to the commons, the lords and the monarch acting jointly, where the monarch is the “head” and the Houses are the “body”. All the same, this clearly presumes a limited monarch. And we find here—perhaps quite surprisingly!—that republican notions were already alive and well in English constitutional law.

In fact, to leave all discussion of the legal construction of the subject from above aside, the subject—as citizen was starting to independently play an active role in the eighteenth century. Riesenberg notes that already under the early Stuart monarchs—i.e. starting with James I of England—English political life was becoming more strongly influenced by the further democratization of the election of the commons, which in turn had a mutual influence on an ascendant notion of citizenship. While of course, suffrage was still far from universal, increasing numbers of Englishmen—indeed, more than half the population of some towns—held enough property to qualify for the franchise. Political discussions were becoming an ever more prominent part of public life; it was this nascent republicanism, combined with Protestant ethics of an active life, that contributed to the Civil War and the foundation of the Commonwealth.

Another strain of thought to develop from the same source was represented by the Levellers, religious social activists who petitioned the Long Parliament between 1646 and 1649 for such reforms as direct elections to Parliament, explicitly appealing to a notion of citizenship as central to social justice. The Levellers never gained power, of course, and their democratic ideas of republicanism were clearly anathema to Cromwell’s Commonwealth, which was nominally republican but far from democratic. Obviously, most of their ideas would have been far too radical for the later Whig rulers; yet Riesenberg identifies their ideas as anticipating those of the American and French revolutionaries to come.

108 ibid., p. 244.
The Levellers’ unusual reading of English constitutional law, moreover, is worth noting. It was a quite extreme take on the now-familiar theme in the common-law interpretation that only antiquity can be the source of a legal norm: in the Levellers’ view, only the law that existed in England prior to the Norman Conquest was truly valid.109 Those most inchoate “rights of Englishmen” were supposed to be principles of liberty, a confirmation that resistance to absolute monarchy was ingrained in the primordial English soul. While some of the implications of this “Saxon law” might have gone too far for the Whig rulers (such as that the lords, being descendants of the Norman conquerors, were usurpers that had to be abolished), the Whigs happily drew on the parts of this theory that confirmed the “new conservatism” of parliamentary supremacy.110 Indeed, it is clear from the records that the “original contract” referred to in the Parliamentary resolution of 1689 referred not to a “Lockean” social contract, but ostensibly to the contract implicit in the oath sworn by every king upon coronation, a custom which had existed ever since “[t]he original of government came from Germany.”111

So far in this chapter, we have reviewed roughly a century of political and constitutional development in England in which a prominent role is played by the increasing assertiveness of the subjects, as represented by parliament, toward the monarch. This review began with Calvin’s Case, a case spurred by a monarch trying to consolidate his power over two kingdoms into a union on the one hand and a parliament resisting him on the other. Yet it is striking that once the limited nature of the monarch is settled, Parliament successfully makes a Machiavellian move to consolidate its own power: the Kingdoms of England and Scotland are merged into the Kingdom of Great Britain, by the Act of Union of 1707, a move meant to prevent a Catholic monarch from claiming either throne through divergent English and Scottish lines of succession. We thus end this section at the moment the new Parliament of Great Britain has come to see itself as the true bearer of sovereignty over the subject. In the following and final section of this chapter, the driving historical conflict will turn from one between monarch and parliament (acting at least nominally on behalf of the subjects) to one between parliament and the subjects themselves, at least the subjects in the North American colonies.

110 ibid., p. 232. [Pocock mentions the use of this theory by Thomas Paine, see also infra at n. 197]
111 From the surviving text of a January 1689 speech by William Petyt, Keeper of the Records of the Tower of London, upon being consulted by the House of Lords during its debate on the resolution. Quoted in ibid., p. 229-230.
Subjecthood in the North American dominions

The legal questions pertaining to allegiance previously arose, in *Calvin’s Case*, with the unprecedented situation of one king assuming the crowns of two kingdoms. The subjects of the kingdoms had not gone anywhere; only their monarch had changed. However, a legal issue arising from this situation could not actually be adjudicated until a subject of one kingdom migrated to the other and wished to know what his legal status was relative to the other kingdom.

On the other hand, with a flow of migrants from Continental Europe to England, from England to the British colonies in North America, and from Continental Europe directly to the colonies, there would be no shortage of legal issues of allegiance arising from migration; indeed, a bottom-up movement of migration, rather than a top-down change of monarch, would give the defining momentum to the new legal issues. An analogous interpretation of Cokean doctrine distinguishing between the modes of subjection of conquered peoples and peoples subject to the rule of law was to prove controversial. As well, it would be *given* allegiance (*subditus datus*) rather than *born* or natural allegiance (*subditus natus*) that would become more relevant to legal issues of the time. We shall first explore the issues relating to naturalization and denization in England and the colonies. Furthermore, the distinction of denization versus naturalization, or really which power had granted subjecthood—the king, Parliament, the governor of a colony or its legislature—would be decisive for determining the circumstances of mutual recognition of subjecthood. The special circumstances of colonial life would lead to a proliferation of given subjecthood, infused with an idea of citizenship. At the same time, the rise of citizenship would also be bound up with a weakening of the eternal bond of natural allegiance.

Immigration and naturalization in England

Naturalization, as we have seen before, originally could be accomplished only by Act of Parliament. The first time a political debate had taken place about the desirability of expedited or *en masse* naturalization, in 1607, it was concurrent with the trial of *Calvin’s Case*. In fact, the arguments presented in Parliament against this proposed Naturalization Act were essentially identical to those presented by the defendants, i.e., the parliamentary faction in *Calvin’s Case*. Since the legal status in England of *postnati* Scots had not yet been legally settled, the royal, pro-unionist camp had introduced the bill to naturalize all *postnati* Scots by charter. (Francis Bacon, here participating legislative process on behalf of the royalist camp, gave a speech for “the General Naturalization of the Scottish Nation” in the Commons.112) The bill, along with another even more radical bill simply declaring the *postnati* to be *de jure* English subjects, was defeated. Of course, the bills were primarily a proxy for the political power struggle between James I and

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parliament; but opponents of the bills also argued the England would be flooded with “hungry Scots” who would potentially take away patronage opportunities from (born) English subjects.113

As it happened, Coke’s judicial decision accomplished more or less the same thing for the Scottish postnati in England as the defeated bills would have. All the same, perhaps as a backlash to that development, Parliament passed a Naturalization Act in 1609, which did not liberalize the naturalization procedure but in fact restricted it further: no alien could be naturalized by Act of Parliament without having taken communion, taken an oath of allegiance and taken an oath of supremacy, which excluded Catholics and effectively Jews as well.114 The rest of the procedure prescribed by the act was also quite restrictive, requiring two readings of the bill before Parliament, the swearing and recording of oaths, and the payment of fees: the cost of such a private bill, at least by 1673, was fifty or sixty pounds, quite a prohibitive expense.115

It is to be presumed that the proponents of the 1607 bills probably did not have any other goal in mind than bolstering the unionist cause of James I; after all, if his Scottish subjects could be made into or legally considered to be English subjects, he would have something approaching a unified body of subjects and therefore something approaching a unified kingdom. This points to an incipient political role for the subject-as-citizen: providing a power base for a higher political institution.

However, the next time a general naturalization bill was proposed, in 1664, the reasons presented in support of it were largely economic. Sir John Holland MP gave a speech supporting the bill, which Robbins reprints and analyzes in depth, along with debates on comparable bills in subsequent years. While it is unclear whether England on its own is really experiencing a shortage of skilled labor in absolute terms, it is clear that England’s competitiveness with Holland [the country, not the MP] looms large in the debate. Holland had not only apparently come to be an attractive destination for skilled artisans from various places on the Continent, but had also been attracting emigrants from England, adherents of non-conformist Protestant sects. Of course, greater religious tolerance within England was the legislative solution to the latter problem, but it is clear that proponents of general naturalization bills wished to attract some of the stream of Continental Protestants that Holland had been benefitting from.116 In fact, general naturalization specifically may have been suggested as the solution, rather than merely facilitated admission for aliens, because naturalization would go a step farther than what the Dutch were offering. After all, as Sir John Holland argued, “they will not leave [the Low Countries] to come hither into more bondage” (although he was also arguing here for more

116 ibid., p. 170.
general trade liberalization and religious tolerance). The Dutch, in addition to offering an attractive environment for foreign Protestants, were apparently offering migrants special privileges. Naturalizing migrants to be English subjects would likewise mean that they by definition could not be refused admission to all corporations and trades on account of their alienage, rendering a separate (and potentially precarious) grant of those privileges unnecessary.

The comparison of English migration policy (by way of subjecthood) to Dutch migration policy brings up an interesting point: the Commons, speaking as the voice and the central legislator for the entire kingdom of England, was putting “Holland” on its own level as a basis of comparison. It is true that certain generalizations could be made about the Republic of the Seven United Netherlands, such as that it was attractive in its entirety to foreign Protestants, having freed itself from Spanish rule (and the persecution of Protestantism that was paired with it) in 1581. And it was also true that the Republic overall was experiencing an economic boom, which made it generally attractive to migrants. But the “Dutch” at the level of the Republic, or even at the level of some of the more urbanized provinces, could hardly be said to have made any laws or made any political decisions that specifically affected the position of immigrants. There was no such thing as “subjecthood” to the Republic as a whole, nor anything else approaching a common nationality.

Rather, citizenship, on a local level, was the locus of assignment of rights of residence and equal treatment in the Republic. And within any given town, or within certain provinces (gewesten), all persons were divided into citizens (burgers), non-citizen residents (ingezetenen) and aliens (vreemdelingen). The conditions for acquisition of citizenship varied from town to town in the Republic. In some, it was acquired automatically by birth in the town; in others, and generally as a rule, citizenship had to be purchased, including for native-born children of aliens. Some towns granted citizenship as a gift to persons who were attractive to the town for economic, religious or philosophical reasons. Only citizens were guaranteed access to membership in the guilds and a right to assistance for the poor. Non-citizen residents, on the other hand, could only work in wage labor, not as artisans; and they only earned the right to economic assistance after a certain number of years of economically independent residence.

117 In ibid., p. 177.
118 ibid., p. 170.
119 For a brief review of the Act of Abjuration by which the Dutch had declared their independence, see infra at n. 184 et seq.
120 Although, of course, as Eijsbouts points out, the citizens of Dutch towns created their civic independence within the matrix of a common subjecthood to the Habsburg emperor. Eijsbouts (2011), p. 17. Furthermore, while it is not legally significant, the modern Dutch national anthem, which retells the story of the independence of the Low Countries from a fictional narrative perspective of William of Orange (or William the Silent), still contains the line, curious to modern audiences: “The king of Spain / I have always honored”. For a further discussion of the legal underpinnings of the independence of the Dutch Republic, see infra at n. 184
Despite these variations, citizenship in most Dutch towns must have been considered to be generally attainable enough for migrants, or the privileges granted to non-citizen residents generous enough, to make the English catch a whiff of competition from the Dutch. The mobilization of given subjecthood for economic purposes was nothing new in England. As far back as the 15th century in England, one class of persons (aside from persons enjoying the personal favor of the king) who were particularly frequently denized or naturalized was talented craftsmen; this would imply that their denization or naturalization gave them an equal chance to join the guilds that was seen to serve an important economic interest. Moreover, foreign merchants, once naturalized or denized, were not only entitled to equal access to the trade privileges of English merchants (i.e. a something like a right), but were also restricted from being allowed to join companies of foreign merchants (i.e. something like an obligation).

And in England, despite some evidence that the phenomenon of “denization” at times might have meant a grant of citizenship in a city or borough (the status of “freeman” or “burgess”) to aliens by the mayor of that town, the grant of a legal status entailing access to equal treatment for immigrants generally took place on the level of the kingdom, via the institution of subjecthood or denizenship. In fact, naturalization (by Parliament) or denization (by the king) may have been a necessary legal prerequisite for other, smaller-scope citizenships or memberships in England, such as freemanship in a city or membership in a guild. (It should be noted, of course, that English society was one that was riddled with, if not entirely characterized by, inequality and a myriad of different social statuses and levels of entitlement. If there was any form of equality of entitlement entailed in English subjecthood or denizenship, then at most it was the equal opportunity, at least as far as satisfying one purely formal outer prerequisite, to join one of these citizenships or memberships that did offer something approaching equality within that status.)

In 1667, we see one politician making a case in support of general naturalization of aliens as opposed to merely facilitating their admission. Coke had presented teleological arguments for granting alien friends access, albeit limited, to the courts for disputes involving moveable goods in order to facilitate their residence in England and promote trade, yet not allowing them access to the courts for disputes regarding inheritance and real estate, so as to prevent them and their descendants from gaining a foothold in England. However, MP John Birch noted in the 1667 debate that this type of limited admittance for merchants led to them leaving their families in their home countries and sending their profits abroad.

123 ibid., p. 32.
124 Parry (1957), p. 36-38.
125 At n. 32 supra
126 At n. 33 supra
Robbins notes as an aside that the debate about the pros and cons of naturalization clearly had nothing more to do with the 1607 struggle between the royalists and the parliamentarians, respectively: Birch was more of the “country” camp, the faction descended from the parliamentarians that was to become the Whigs, while an opponent to the bill, MP Heneage Finch, was clearly more of the “court” camp that would evolve into the Tories. However, it is very likely that a tactic of “population politics” similar to the one once pursued by James I was behind the parliamentarians’ support for general naturalization, at least of foreign Protestants. An influx of Protestants (who, almost by definition, would not be Anglican if they were coming from outside England) would lead to a relaxation of the persecution of non-Anglican Protestants, or so non-conformist politicians hoped. Furthermore, swelling the population with Protestants would form more of a bulwark against any Catholic monarchs to come. The Church of England, unsurprisingly, did not support this tactic.

It must, of course, be noted that the roots of anti-Catholic prejudice were just as much political as theological. Indeed, the Church of England was theologically only barely “Protestant”, tracing its origin not to the Lutheran or Calvinist movements but rather to the political decision of Henry VIII to replace the Pope with himself and his heirs as the head of the English Church. As such, much of the concern about barring Catholics would seem to be a move to bar anyone who could be seen as a “subject” of the Pope, still very much a player in the political life of Europe. It was not so much the rite of communion, but more the oaths of supremacy and allegiance that were intended to bar Catholics from naturalization.

Nonetheless, it would appear that pan-Protestant solidarity in Europe may not have been as convincing a motive as many would have hoped. A nascent English nationalism certainly played a role in anti-alien sentiment: one Tory politician’s 1694 speech, laden with disparagements of the French and the Dutch, expressed the fear that immigrants would “sacrifice our English liberties” and “blot out and extinguish the English race.” Others cited the problems that had allegedly ensued from the previous movement of postnati Scots to England. Sir John Holland granted in 1664 that there were ongoing protests on the part of “the poore Artificers of London” about “the Accession of some French men who then told us that they took the very bread out of their mouths”, thereby referring to the demonstrations of artificers against the Walloons of London and Canterbury.

To compare and contrast Locke to his contemporaries, his 1694 essay “For a General Naturalization” shows Locke to be in favor of naturalization purely for

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128 ibid., p. 170–172.
130 ibid., p. 173; quote from p. 177.
reasons of economic liberalism. Locke identifies the wealth of a country in its number of available “hands”, not only the number of hands available for labor but the number of hands available to buy and sell products. Holland, according to Locke, has more than twice as many people as England and can ascribe its wealth to that fact.

Resnick concludes from his analysis of Locke’s essay, in combination with Locke’s other writings, that Locke is not motivated by any positive, republican motives of creating “citizens” from the naturalized immigrants;[131] by contrast, Machiavellian notions of citizenship, drawing on Roman history, did influence many of Locke’s contemporaries,[132] including, most likely, the aforementioned politicians who wished to import Protestants in order to influence the political balance of English society. Locke does mention Ancient Rome, but only with regard to its policies to increase its population and therefore its power: specifically the “Justinian liberorum”[133] [sic], the *jus trium liberorum* granting special privileges to parents of three or more children.

Of the contemporary arguments in favor of migration, Locke does, however, make an economic argument analogous to the one that it is better to have immigrants keep their money in England than send it home. He argues that it is better to have enough affordable labor to process English rapeseed into oil in England rather than send the seed to Holland for processing and buy the oil back from the Dutch. Locke goes on to counter almost all of the going arguments against immigrants: to the objection “that they eat the bread out of our owne peoples mouthes”, Locke reasons that if the natives are put out of work by immigrants, it must mean that there must have been a shortage of native laborers, rendering them more expensive and less efficient; the immigrants are obviously working both more effectively and cheaply.

In the same breath, Locke goes on to note, tautologically: “Besides when they are once naturalized, how can it be said that they eat the bread out of own peoples mouths?” This reveals quite clearly that Locke sees English subjecthood as a purely legal construct, not an ethnic one.[134] In any case, Locke goes on to note that the children of the naturalized will anyhow grow up speaking perfect English, and that “most of even our Ancestors”, since the Normans and before, “were Foreiners”, thus making short shrift of any chauvinistic motives against general naturalization.

As to the charge that opening the doors to migrants would flood England with the idle poor, Locke responds that no one moves to another country “with hopes to live upon other mens labour”. All the same, Locke grants that immigrants could be excluded from the “parish maintenance” that the needy of England are entitled to. This is a curious argument, since it seems to imply that at least one form of discrimination against immigrants is justified. However, Locke

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[132] Ibid., p. 370; in this Resnick cites both Robbins (1962), Robbins (1959).
may be referring to aliens prior to their naturalization. At any rate, Locke seems skeptical about the necessity at all of aid to the needy: “perhaps we have very inconvenient laws for maintaining the poor”.

Finally, Locke’s views stand in implicit contradiction to a “pseudo-liberal” view of English culture: that “liberties” as a value unique to the English soul would come under threat from the admixture of aliens. For Locke, just as liberty is not a good that can only flourish among citizens who had been educated and cultivated toward the republic (i.e., the Platonic/Machiavellian ideal), it could not be so that liberty can only thrive in the matrix of the mystical English temperament. Liberty was, rather, something created and cultivated environmentally, through the lifting of restrictions on economic activity; and everyone who came to live in such an environment would come to cherish liberty out of self-interest.135

On 7 March 1709, Parliament did finally pass an act to enable general naturalization by enrollment for foreign Protestants. Economic considerations of increasing the labor population, as evidenced by MP Wortley Montagu’s argument that “the king of Prussia” had worked wonders for agriculture, trade and the tax base by accepting refugees, did seem to play a role.136 However, the Protestant cause as such appears to have been the most decisive factor. This was, after all, in an era where ensuring a Protestant future for England was a paramount concern. In 1701, the Act of Settlement had been passed, ensuring that the throne could only ever be held by a Protestant monarch; and the 1709 passage of the Act of Union was chiefly in response to Scotland’s indication that it might maintain its own, separate rules of succession.

However, the immediate consequences of the 1709 naturalization act led public opinion to judge it to be an abject failure. Only two months later, a veritable flood of Protestant refugees from the German Palatinate seeking to take advantage of the act washed into England: some 13 500 between May and October. Most of them crowded into London and ended up begging in the streets. The Palatines’ squalid encampments were the target of angry mobs. Supposedly, as a later investigation showed, the Palatine refugees had cost the government over £ 100 000. As such, when the Tories took the government and the Commons in the 1710 elections (which would turn out to be only a brief interruption to Whig rule, lasting only until 1714), they pushed to overturn the act and finally succeeded in 1712. 137

With the opponents of immigration vindicated, Parliament was not take any further measures to facilitate naturalization in England as long as the memory of the Palatine fiasco persisted. Furthermore, the accession of the Hanover line to the throne after the death of Anne, last of the Stuarts, in 1714 meant that the

135 Cf. ibid., 372-373.
Catholic menace had largely been averted, thus obviating much of the desire to stack the population with Protestant immigrants.138

The constitutional position of the colonies

In the British colonies of North America, as well, the acquisition of subjecthood by naturalization or denization would be bound up with both ideals of citizenship and economic perspectives. The colonies139 were, in their constitutional origins, very heterogeneous: a first legal distinction that could be made among them, at least initially, was between the charter colonies (Rhode Island, Connecticut and New Haven, and Massachusetts Bay Colony, including the initially unchartered Plymouth Colony), and the proprietary colonies (Maine, New York, New Jersey, Pennsylvania, Maryland, Virginia, Carolina and Georgia). But the colonies all emerged in one way or another by royal prerogative, since the English territories in America were the domain of the crown. As such, the English Parliament exercised almost no control over them.

However, during the Commonwealth and after the Restoration, the English Parliament had begun to take more of an interest in the colonies, primarily out of economic and military interest. Parliament passed navigation acts in 1651, 1660 and 1663 which provided that all trade with the colonies was to be carried out by English ships with English seamen, and that all products being shipped to Europe first had to go through England. It was in the interest of enforcing this legislation that imperial officials, supervised and controlled by the Privy Council with its Committee of Trade and Plantations, were stationed in all of the colonies, regardless of their divergent constitutional structures.

The frictions that resulted between colonial and imperial government meant that any royal charters to come would more expressly reserve a constitutional role for the English crown—the patent of New York in 1664 and the charter of Pennsylvania of 1681 both designated the Privy Council the highest court of appeal. The crown moved in 1684 to revoke the independent charters of the existing colonies, consolidating them in 1686 into one body, the Dominion of New England. Around 1688, the crown initiated proceedings to revoke the proprietary status of Delaware, Maryland and the Carolinas. However, the Glorious Revolution put a halt to these centralizing developments.140

It was not that the new parliamentarian regime in England was suddenly ideologically disposed to grant the colonists more liberties. It would have preferred to continue the consolidation of the colonies, particularly in light of England’s military interests in North America in countering the influence of the French with a strong united front. Moreover, the influence of English merchants

139 We shall limit our primary analysis to the British colonies that would end up constituting the United States.
140Greene (1905), p. 13-16.
was even greater under the new regime, and they also favored reducing the autonomy of the colonies in order to secure their commercial interests. But the colonies had their own influential lobby in England, and they were able to put up some political resistance. A compromise was struck whereby the consolidation of New England was limited to the placement of Plymouth and Maine under the charter of Massachusetts, which was designated a “royal” colony. The English government would have liked to have rendered all of the colonies royal colonies, but this development was—at least for the time being—limited to the key colonies of Massachusetts, New Hampshire, Virginia, Maryland and New York.141

It should be clear, of course, that in light of the developments of the Glorious Revolution and the establishment of parliamentary sovereignty, a “royal” colony under the ultimate control of the Privy Council was, despite the nomenclature, less and less subject to the personal whims of the monarch. In fact, Charles II had already been pushed in the direction of taking advice on the colonies from parliamentary forces (including John Locke’s patron Shaftesbury), with some success, which was all the more reason for the Glorious Revolution not to herald a change in policy toward the colonies.142

In the history of English constitutional law, the Privy Council had once started out as a council of the king’s hand-picked advisors. But as Maitland notes, it is an “unstable institution”, with powers that vary in roughly inverse proportion to the strength of the king at any given time. If the king is weak (or is a child), then it is essentially the Privy Council that rules England. A strong king, on the other hand, barely has to pay any heed to the advice of his councilors.143 William III, even in the aftermath of the Glorious Revolution, could still be characterized as a strong king. But especially after the placement of the House of Hanover on the throne, the Privy Council would evolve into a political body that could only act with the assent of, and essentially represented the will of, a parliamentary majority.144 (In modern-day British constitutional law, in fact, the Cabinet, i.e. the subcommittee of the Privy Council that effectively governs, is exclusively composed of members of the House of Commons from the party or parties commanding a parliamentary majority.)

As to the colonies, the use of the royal prerogative was increasingly dictated by the Committee of the Privy Council on Trade and Plantations. Its 1696 successor, the Board of Commissioners for Trade and Plantations (or Board of Trade), was formally not a committee of the Privy Council, and in fact the real work was done by members who were not government ministers, including its most prominent member: Locke. However, the influence of these members was slight145—in reality, the Board of Trade should probably be viewed less as an

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141 ibid., p. 17-24.
142 ibid., p. 45
144 ibid., p. 388-390.
executive authority in its own right than as an administrative apparatus to carry out government policy on the colonies.

In the years following the Glorious Revolution, the English, later British government made “vigorous” use of its executive control over the colonies in which legislation was subject to the royal veto: Massachusetts, New Hampshire, New York, Maryland, Virginia, Pennsylvania and (as of 1702, when it became a royal colony) New Jersey. The government attempted to annul laws in Connecticut (in 1705) and South Carolina (in 1706), even though it had no apparent statutory authority to do so by the charters of those colonies.\textsuperscript{146} The Privy Council also increasingly exercised control in its role as a supreme judiciary, including in those colonies where that right had not been expressly reserved, asserting that it was “the inherent right” of the crown “to receive and determine appeals” from the colonies.\textsuperscript{147}

This hinges on a significant development in the constitutional relationship between the colonies and parliament and the further interpretation of settled law such as \textit{Calvin’s Case}. Once, on the eve of the English Civil War, Parliament had claimed this “crown”, in other words the body politic of the King, for its own as a redoubt of justice against the unchecked rule of the person of the king. As the political power of the person of the king ebbed with the developments of the seventeenth century, it remained more or less as a placeholder, a point upon which allegiance (and thus subjecthood) was fixed. As the king’s subjects in America found the control of the English parliament to be increasingly noxious, they would come to claim their subjecthood to the person of the king, not the body politic of the King, as a redoubt of justice against the unchecked rule of parliament.

In \textit{Calvin’s Case}, Coke had not only made pronouncements on the relationship of the king/King to his co-ordinate realms of England and Scotland, and his laws and subjects therein, but also on the relationship of the king to his subordinate realms, in particular Ireland. If a king conquered a Christian nation, so Coke had ruled, the king was free to impose any laws on it or change its laws as he saw fit; in any case, until that point, its extant laws would remain in place. If a king conquered an infidel nation, on the other hand, its laws would automatically be “abrogated, for that they be not only against Christianity, but against the law of God and of nature”, and would be replaced by an absolute rule by the king “according to natural equity”.

In the specific case of the conquest of Ireland, Coke ruled that once King John had granted Ireland the laws of England, any subsequent king could no longer alter the laws of Ireland without the consent of Parliament. The English Parliament, as part of the conquering power, quite admittedly did have legislative

\textsuperscript{146} ibid., p. 49-51. The Connecticut annulment is also mentioned by Fehrenbacher (1981), p. 104 as an example of the tradition of judicial review that the American constitution was to inherit.

\textsuperscript{147} Greene (1905), p. 53-55.
jurisdiction over Ireland; however, Coke ruled, Ireland “might by express words be bound by Act of the Parliament of England”. In other words, Ireland would not be automatically bound by English statutes unless Ireland was expressly named. For the rest, Ireland did in fact have its own parliament and made its own laws.

American colonists did not think of themselves as living in a “conquered” land. For obvious reasons, they preferred to see their respective colonies as co-ordinate realms to Britain, united with Britain only by allegiance to a common monarch, but free to have their own legislature and laws. But in the new era of parliamentary supremacy, the dominant British interpretation of Calvin's Case was that the possibility of the existence of co-ordinate realms was an anachronism dating from an age when the king was less limited. The Act of Union, after all, had abolished the co-ordinate existence of England and Scotland; and anyhow, with the culmination of the ascent of the King-in-Parliament as the true monarch, Parliament, as the representative of the people, could be counted on to provide them with the protection that had been so essential to Coke’s analysis of allegiance. Parliament was sovereign, and sovereignty necessarily implied that there could only be one supreme power in a state; two powers in a state would constitute imperium in imperio, which was made out to be a logical impossibility.

Moreover, it appears that the contemporary personal unions which existed under William and Mary (with William III’s simultaneous stadtholdership of Holland and other Dutch provinces), and later under the House of Hanover (during which George I, II, III and IV, and William IV each simultaneously held the crown of Hanover) would have created sticky political problems—specifically regarding immigration to Great Britain—if Calvin's Case could be applied literally. In the former personal union, all postnati Dutch—i.e., born after William III’s ascent to the English throne—could then conceivably have claimed rights in England. (Although indeed, the oldest of these postnati would have been only thirteen years old at the time William died, thus dividing the “crowns” once more and erasing any claim to common “subjecthood”—and anyhow, it was questionable to what degree stadtholders could be described as “monarchs” or the citizens of the republican Dutch provinces could be described as their “subjects”). There seems to be no record of any Dutchmen trying to claim rights in this way, but it is on record that the very prospect of any Dutch immigration was deeply unpopular, especially in light of Parliament’s suspicions of the Dutch members of William’s court. In fact, the Act of Succession, which Parliament passed at the end of William’s reign, additionally made sure that only subjects born into subjecthood—whether on the territory of England, Scotland, or Ireland or born

148 Calvin's Case, (1608) 18a.
149 This conception was most notably elaborated on in Wilson (1774) (Angermann (1965), p. 72 n. 2; Bailyn (1992), p. 225.)
151 Parry (1957), p. 46-47.
abroad of English parents—could hold high office or be given land grants, to the exclusion of naturalized subjects.152

Nor is there any record of Hanoverian postnati successfully claiming rights in England during the considerably longer-lived personal union of the British and Hanoverian crowns; quite to the contrary, in fact, as there are records of Hanoverians petitioning to be naturalized in England during this personal union.153 Indeed, Parliament had passed the aforementioned provision of the Act of Succession in anticipation of the ascent of the House of Hanover to the throne after the childless William III and Anne, in order to prevent any Hanoverian cohorts of the new monarch from being elevated into positions of power.154 It thus seems likely that Parliament simply assumed that Hanoverian postnati would not be equal subjects in the British kingdoms, since otherwise, banning naturalized subjects (as Hanoverians would then have to be if they were British subjects) from high office would not have that desired effect. Parliament reiterated its concerns in the subsequent 1714 Naturalization Act, passed in the first year of George I’s reign, which provided that all bills of naturalization had to include a clause citing the disabilities provided for in the Act of Settlement.155.

The only court decision that ever directly dealt with this matter, Isaacson v. Durant,156 was handed down much later, during the reign of Victoria, after the crowns had divided due to Victoria’s inability to inherit the Hanoverian crown. In this decision, the Queen’s Bench Division ruled that Hanoverians during the personal union, while not aliens in England, had not been subjects with full rights in England either, as allegiance was owed primarily to the body politic of the King (i.e. the “Crown”) rather than to his person. Subsequent legal commentators went on to try to justify in even more convoluted terms why Hanoverians, by contrast to the Scots after the ascent of James I, had not become true subjects in England.157 But in his conclusion to the decision, Lord Chief Justice Coleridge was refreshingly forthright about the political background to his court’s dissent from Calvin’s Case: the venerable judgment had been handed down “in the time of James I., when the feudal system was still in vigour”, a time in which “the character and consequence of personal allegiance, an allegiance which lay at the very root of the feudal system”, was still relevant to legal reasoning. “This state of things has been changed,” Coleridge went on, specifically citing the Act of Settlement and the 1714 Naturalization Act as evidence that the parliamentarian doctrine of subjecthood now reigned supreme.158

152 ibid., p. 58.
153 ibid., p. 59.
154 ibid., p. 57.
156 In re: the Stepney Election Petition (Isaacson v. Durant) (1886a).
Isaacson was handed down in 1886, long after American independence. But it should be clear that in Britain before American independence, Calvin’s Case, particularly to the extent that it had partly contained a political concession to the interests of the king, was already viewed as obsolete in light of the primacy of Parliament. There was an evolution toward seeing allegiance as being owed not so much to the person of the king, but to the body politic of the king, in other words to the King-in-Parliament. At the same time as the doctrine of personal allegiance began to break down, the notion of the indivisibility of the King’s dominions did as well,159 making room for a more territorially defined notion of subjecthood. Finally, although there is no hard evidence for the following conjecture: the sometimes convoluted legal reasoning for why postnati Dutchmen and Hanoverians were not seen as occupying a comparable position to postnati Scots may have been influenced by political resistance to recognizing any form of common subjecthood with persons from a culture alien to Great Britain.

Naturalization in the colonies

All the while, the precise locus of allegiance was legally relevant to the matter of naturalizing aliens in the colonies.

In practice, colonies had been naturalizing aliens with far less arduous procedures than the procedure that was required in Great Britain, i.e. legislative enactment with a forbidding fee. It was precisely the influx of immigrants to the colonies, and the need to make the colonies more attractive to immigrants (including relative to each other160), that necessitated this practice.

While none of the colonies’ charters offered any basis for their assemblies to pass statutes providing for the naturalization of aliens, the practice was obviously tolerated by the mother country. By an Order-in-Council, the Privy Council only forbade governors of colonies (i.e. the executives of colonies) to endenize aliens by letters patent in 1700;161 thus in this regard, a governor could not be seen as having a prerogative analogous to that of the monarch.162 But within their own domains, colonial assemblies (i.e. the legislatures of colonies) did have an accepted power to naturalize aliens that was analogous to that of the British Parliament. This power, and the limits of it, had already been acknowledged in a 1682 opinion of the Lord Chief Justice in which he held that “naturalization in a colony is only local”, i.e. did not endow the naturalized subject with rights throughout the Empire.163

This was a bit curious, because the naturalization procedure in a colony almost invariably involved swearing an oath of allegiance to the monarch. Was

159 Parry (1957), p. 46-47.
160 Hoyt (1952), p. 262.
161 ibid., p. 248; also Kettner (1978), p. 95.
162 See supra at n. 19 and 40
allegiance to the monarch not territorially undivided, indeed as if a naturalized subject were a postnatus in England or Scotland at the time of Calvin’s Case, “born” into an undivided allegiance to one king? Apparently not. Indeed, it would appear that the newly paramount legal doctrine—that allegiance to the King was allegiance to the King-in-Parliament—meant that this allegiance was to be understood in the context of the legislature representing the subject and the territory in which that legislature’s laws held.

The Parliament of Great Britain claimed the authority to legislate for the entire Empire: thus a natural-born British subject, or one naturalized by the British Parliament, was a subject throughout the Empire. A colonial assembly, on the other hand, could only make laws whose effect was limited to the territory of the colony, and thus could only naturalize aliens to a subjecthood that was limited to the territory of the colony. The relevant enactments of colonial assemblies also acknowledged this with express provisions to the effect that the naturalized aliens would “become his Majesty’s subjects within the said colony” only.164 (Uniquely, the assembly of Georgia chose in a 1759 statute to dispense altogether with the necessity for aliens to swear allegiance to the monarch to gain rights—provided, of course, that they were free, white, and male. More precisely, it dispensed with the necessity to be a subject in order to have the right to own property and thus to vote, which meant that this legislation provided for a situation that was merely “tantamount” to naturalization.165)

The limited effect of colonial naturalization meant that de jure, there were two classes of subjecthood in the colonies: on the one hand English and sometimes Scottish (later: British) subjects who had been naturalized or born in Great Britain, or otherwise were descended from a subject who had been, and on the other hand immigrants of non-British origin who had been naturalized by or pursuant to colonial statutes. The first class of subjecthood was “universal” in nature, entitling the holder to all the rights of subjecthood in the mother country or in any of the colonies. The second class was “unicolonial” and limited in effect to the colony of naturalization,166 although the record shows more that this was simply the accepted legal doctrine than that there were actual cases tried, especially after 1700. The actual cases on record, in which a person who had been naturalized or endenized in one colony encountered legal problems in another colony (specifically, inability to hold or inherit property or to engage in trade as an Englishman), almost all stem from the early days when colonial denization had not yet been banned and regular colonial practices regarding naturalization by enactment and reciprocal recognition of each other’s acts were far from being established. The problems encountered by the affected individuals were often due

164 ibid., p. 252.
165 ibid., p. 250 at n. 9; also Kettner (1978), p. 102-103.
166Roche (1949), p. 2.
to the naturalization or denization being deemed legally defective in the first place.\textsuperscript{167}

Nonetheless, after this doctrine and practice of colonial naturalization became settled, it was increasingly seen as deleterious to the economic interests of the colonies, the Empire and the mother country itself to limit the rights that colonial naturalized subjects enjoyed. Indeed, even opponents of immigration to Great Britain, and therefore of simplified naturalization procedures, recognized that simplified naturalization could be beneficial if it lured immigrants to the colonies, hopefully to stay there. In 1740 Parliament passed a naturalization act which made it possible for “foreign Protestants, and others therein mentioned” (most notably, Jews) to be naturalized in any one of the colonies after residing there for at least seven years, by swearing an oath (or in the case of Quakers: stating an affirmation) before a colonial judge. The name of the newly minted subject was then to be registered with the Board of Trade in London.\textsuperscript{168}

These naturalizations, strikingly, were to be effective Empire-wide, thus at least holding the promise of abolishing the distinction between British subjects born or naturalized in Great Britain and those naturalized in one of the colonies, although the disabilities on holding office in Great Britain remained. However, the naturalization law for the colonies was so liberal, both in its substance and in its procedural requirements (a simple judicial procedure rather than legislative enactment), that the naturalization practice in Great Britain came to be perceived as unjustly restrictive to those who had no access to it, particularly Jews. Indeed, it made little sense why one alien Jew could sail from England to the colonies, become naturalized there after a period of time, and return a more or less full-fledged British subject, while another alien Jew who had stayed behind in England could not.\textsuperscript{169}

More curiously, the practice of local naturalization by enactment within colonies persisted, even though the procedure was often more cumbersome and expensive than the procedure provided for by the British statute, not to mention that it did not provide for any rights of subjecthood in other colonies or in Britain.\textsuperscript{170} The most likely reason for this appears to be that the residency requirement for local naturalization was considerably shorter than seven years in many of the colonies, and was thus more attractive to alien settlers who wished to gain the right to own property.\textsuperscript{171} It was not just in the interest of alien settlers to benefit from a rapid naturalization procedure; it was also in the interest of

\textsuperscript{167} Kettner (1978) reviews the cases on record, including the case of the originally French denizen of New York Arnold Nodine, which led directly to the 1700 order from the Privy Council, on p. 90-97.
\textsuperscript{168} ibid., p. 73-74. This statute is also described in Parry (1957), p. 75.
\textsuperscript{169} Kettner (1978), p. 74-77.
\textsuperscript{170} Parry (1957), speaking very much from the British perspective, can think of no reasonable explanation for this practice other than to identify it as part of a separatist tendency on the part of the colonies, in opposition to the trend toward a common Imperial subjecthood. P. 75-76.
\textsuperscript{171} Kettner (1978), p. 104.
immigration-hungry colonies, whose legislatures wished to attract immigrants by granting them a maximum of rights and legal certainty.

This became especially clear whenever the subject of local naturalization was up for discussion in a colony. A heated debate broke out in the Maryland assembly in 1758 when the upper house blocked a bill to naturalize aliens and protect any land titles they already held. The sponsor of the bill, Daniel Dulany, protested that the seven years’ residency required by the British law was too long, and the lack of a local naturalization law would cause immigrants to avoid Maryland in favor of “those colonies where aliens’ titles were secure.” (Although no naturalization act was ever passed, ultimately, the proprietor and governor of Maryland resolved the problem, if not entirely satisfactorily, by deciding in 1767 to use their discretionary power not to escheat the property of deceased aliens and allow their “heirs” to apply for title to it.172)

The two forms of naturalized subjecthood in the colonies coexisted uneasily for some time. The Board of Trade actively sought legal opinions to try to have the colonial naturalization practices declared incompatible with the British statute. However, the matter did not truly come to a head until 1773, when the British government went ahead and used its executive power to disallow the Pennsylvania and New Jersey naturalization acts, then banned local naturalizations by an order-in-council.173 The order-in-council made clear that for the government, the conflict was not merely about a purely formal usurpation by a lower power of the authority to naturalize. It was about the wealth that the king stood to lose if he could no longer make use of his prerogative to escheat the property of aliens who were deceased or who were discovered to possess defective titles. (Lest we think that the person of the king has completely faded into irrelevance by now, having yielded to the King-in-Parliament, we can remind ourselves that he did still have some personal interests vested in his remaining prerogatives, under which the colonies were his domain.) So the order-in-council aimed to have a substantive effect as well, instructing colonial governors to refuse to sign any bills granting title to property “granted to or purchased by aliens antecedent to naturalization.”174

For the colonists’ part, it was not so much the striking down of their formal ability to naturalize aliens on their own terms that infuriated them as much as this substantial prescription of who was entitled to certain and secure rights of property. Even where the accelerated local naturalization procedures were available in certain colonies, it seemed that many immigrants had found that they were able to get by just fine in practice without applying for formal subjecthood, and went on ahead unperturbed purchasing property (in fact, as we saw in Georgia, they could do so there with the blessing of enacted law). It even seems likely that more than a few immigrants were elected to public office prior to

172 ibid., p. 120.
173 ibid., p. 104-105.
174 ibid., p. 121.
actually getting naturalized, and many more aliens certainly voted in elections.\textsuperscript{175} The order-in-council now prohibited any merely \textit{de facto} citizenship.

The pragmatic American attitude to these matters stood in sharp contrast to British formalism, and now the Americans felt that their ability to absorb immigrants into their ever-growing society was being cramped. This episode would become an additional item on the colonists’ list of grievances. Indeed, the most definitive list of those grievances was to be the indictment of George III in the Declaration of Independence, drafted by Thomas Jefferson. This particular grievance would be phrased as the accusation that the king had “endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; [and] refusing to pass others to encourage their migrations hither”. On this point, we will move on to the Declaration as a whole.

\textsuperscript{175} ibid., p. 121-122.
Conclusion: the Declaration of Independence as the point of departure of the American constitution from the British constitution

Of the five parts of the Declaration—the introduction, the preamble, the indictment, the denunciation of the British people, and the conclusion—it is the Enlightenment-spirited preamble (“We hold these truths to be self-evident, that all men are created equal… that… Governments are instituted among Men, deriving their just powers from the consent of the governed”) that stands out in today’s historical view as the most significant, constitutional part. Yet as historian Erich Angermann notes, based on studies of the contemporary impact of the Declaration: the preamble barely got any attention at the time. It was only after 1800, in the context of American public discourse on revolutionary ideals, that the preamble became a subject of analysis and debate, and a very controversial one at that; by no means was it universally accepted—as it is today—as the philosophical foundation of the American constitution. Instead, it was the indictment—the list of wrongdoings of George III—that made the biggest waves at the time,176 based as it was on a more “Cokean” legal conception of the contract between king and subject.

As a conclusion to this chapter, in which we have explored the various lines of English constitutional thought that were inherited by the revolutionary Americans, I will analyze the Declaration of Independence as a fitting summary of the “Cokean” and “Lockean” lines. We will also see, looking at it from the perspective of critical legal theory and the history of the text itself, that the Declaration may itself have been something of a “patchwork quilt” of the political ideas espoused by various revolutionary thinkers. Moreover, we can discern a third, less obvious legal basis of the Declaration in its (indirect) references to the “rights of Englishmen”.

It may seem curious that the Declaration indicts the King, when the real political struggle was arguably between the colonists and the British Parliament. After all, it had been the passage by Parliament of a series of hated statutes—the Stamp Act, the Tea Act, the Administration of Justice Act, the Massachusetts Government Act, the Quebec Act, and the Quartering Act—that brought the conflict between the colonies and Britain to a head. The direct interference of the king himself had been rather more marginal. Yet Parliament earns no more than an indirect mention in the indictment, the “others” mentioned in the grievance

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation;

and the “legislature” mentioned in the denunciation of the British people

CHAPTER 1

We have been wanting in attentions to our Brittish brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us.

“Obviously,” Becker writes, “the framers of the Declaration make it a point of principle not on any account to pronounce the word Parliament,” as if to pointedly ignore the authority and jurisdiction of that body. But Angermann finds Becker’s reading to be too facile. On the one hand, the textual history does show that where Jefferson had specifically mentioned Parliament twice in his original draft, the Continental Congress struck out these specific references. But on the other hand, the revolutionaries were far from unanimous about the value of pinning all the blame on the King. At the beginning of the conflict, the colonists stressed their allegiance to the king, on the one hand, and their resistance to the tyrannical plans of the ministers and the Parliament, on the other. John Adams, for one, felt a personal attack on the king to be unjustified, since he considered the king merely to have been “deceived by his Courtiers.” But it was probably one single act on the part of George III himself that decisively turned the colonists against him and laid the key to the ultimate legal tactic in Jefferson’s hand: on 26 October 1775, the king proclaimed, in a speech from the throne at the opening of Parliament, that the rebellious colonies would be the target of military operations to bring them to heel. Only a colony which “shall be disposed to return to its allegiance” would once more be deserving of the king’s protection. Implicitly, thus, the king was turning the rebellious colonies out of his protection.

This pronouncement dealt a fatal blow to any illusion that the colonists still owed allegiance to the person of the king. As Samuel Adams wrote on 30 April 1776: “Many of the leading Men see the absurdity of supposing that Allegiance is due to a Sovereign who has already thrown us out of his Protection.” Indeed, the king’s pronouncement fit perfectly—a contrario—into a Cokean conception of the reciprocal contract of allegiance and protection. Moreover, George III had now actively interfered with the well-being of the colonies; in Jefferson’s earlier drafts of the indictments, he had largely accused the king merely of having failed to stop Parliament in its interferences, “by denying,” “by refusing to pass,” etc. But now that the active role of the king had been revealed, Jefferson was inspired to reformulate the list of grievances into a rhetorically rousing catalogue of all of the misdeeds of the king (and the King-in-Parliament) toward the colonies.

177 Becker (1922), p. 18.
179 ibid., p. 72-73.
180 ibid., p. 77.
181 ‘His MAJESTY’s most Gracious SPEECH to both Houses of Parliament, on Thursday the 26th of October, 1775.‘, (b)
183 ibid., p. 78-80.

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In so doing, moreover, Jefferson was able to build up the indictment of George III to culminate in a damning conclusion, consciously referencing other historical acts of independence that had been based on the contract of allegiance and protection. The most strikingly obvious textual parallel to be drawn here, according to Angermann, is to the Act of Abjuration (Plakkaat van Verlatinghe) passed by the States-General of the Netherlands in July 1581, by which the Low Countries declared their independence from Philip II, the King of Spain. The Act begins by citing the reciprocal contract between the king and his subject as one of protection in exchange for allegiance, by the grace of God. But “[i]f a prince does not comply with his duties, but instead, rather than protecting his subjects, tries to oppress them like slaves, then he is not a prince, but a tyrant.” In that case his subjects are entitled to abjure him and choose a new leader. From this simple summary of the law, the Act goes on to extensively catalogue the trespasses of Philip II against his subjects that qualify him as a tyrant. The final straw is his declaring the inhabitants of the Low Countries to be rebels and to be undeserving of his protection. Thus, the Act concludes, “we have rightly abjured the Spanish king”.184 The Declaration draws on precisely the same logic; and to make use of this logic, it was necessary for Jefferson to condemn George III’s deeds, rather than his omissions, in order to cast him as a tyrant and justify the abjuration of him.185

Both the Act and the Declaration take as their starting point a conception of law that is presupposed to be inchoate: the contract of protection in exchange for allegiance between king and subject. Yet this was far from being a newfangled Enlightenment ideal of natural law; rather, this drew on an ancient principle of Germanic, feudal law with regard to the relationship between lord and vassal.186 In England, this legal concept far predated Coke, and even Magna Carta. Indeed, in Calvin’s Case, Coke compares allegiance to the connection between a lord and a tenant by quoting in Latin a passage from Ranulf de Glanvill, the 12th-century Chief Justiciar of England:187 “Nor does the Tenant owe more to his Lord, in respect of Homage, than the Lord owes to the Tenant on account of Dominion, Reverence alone excepted,”188 the lord (saith [Glanvill]) ought to defend his tenant. But between the Sovereign and the subject there is without comparison a higher and greater connexion: for as the subject oweth to the King his true and faithful ligeance and obedience, so the Sovereign is to govern and protect his subjects, […] so as between the Sovereign and subject there is duplex et reciprocum ligamentum […]189

184 ibid., p. 83-84; and ‘Plakkaat van Verlatinghe’, (c). My translations from the Dutch.
186 ibid., p. 87-89.
188 Glanville (1812), p. 225. (Book 9, Chapter 4). Coke quoted this passage as “mutua debet esse domini et fide litatis connexion ita quod quantum debet omino ex homagio, tantum illi debet dominus ex dominio, prater solam reverentiam”.
189 Calvin’s Case, (1608), 4b-5a.
By invoking this inchoate principle in the Declaration, moreover, Jefferson is implicitly declaring the default applicability of the legal system of which that principle is part: the British constitution. Indeed, the colonists generally had a deep admiration for the British constitution, which they genuinely believed to be one of the few systems in the world, if not the only one, that truly guaranteed liberty. The key to this guarantee of liberty, in American thinkers’ view, was to be found in the British constitution’s balance of the interests of the three estates: royalty, nobility, and the commons. The British constitution was not a pure monarchy, in which only royalty ruled, nor was it a pure aristocracy, where only the nobility ruled, nor a pure democracy, where only the commons ruled. Rather, it was a mixed form of government characterized by the joint rule of king, lords and commons, under which no one of them could overrule the others. This is the British constitution that Jefferson invokes when he indicts the king for “combin[ing] with others to subject us to a jurisdiction foreign to our constitution.”

Yet this was a conception of the British constitution that had been increasingly abandoned in the mother country, certainly subsequent to the Glorious Revolution. From the British perspective, American legal thought could be described as fairly behind the times, in fact. After all, the Glorious Revolution could be described as the moment at which the commons had decisively established a form of government—by subjugating to their will the king and, to a lesser extent, the lords—in which democracy had the upper hand over monarchy and aristocracy. Locke, whom we can see as a representative of the spirit of those times, had more or less discarded feudal notions of the immutable and relationship a priori between king and subject from which a contract a posteriori flowed, in favor of a contract a priori between ruler and ruled. Hence one can view the Declaration of Independence, as Angermann does, as a document that is based on an originally feudal and estates-based conception of the constitution, one that is reacting negatively to movements of modernization and rationalization of government.

To be fair to the Americans, of course, they obviously did not intend to knock democracy. It was just that the British parliamentarians’ Whiggish form of democracy—modernizing government by discarding a balance of interests in favor of the will of the supposed majority—was failing to represent the Americans’

191 Angermann (1965), p. 89.
192 See supra at n. 97 et seq.
193 Angermann (1965), p. 81-82.
194 The going doctrine of the parliamentarians was that the Commons “virtually represented” the interests of Britons in the colonies, in precisely the same way as it “virtually represented” the nine-tenths of the people of Britain who lacked the franchise. Daniel Dulany countered this argument by saying that the point of virtual representation was that the interests of those who voted should be bound up with the interests of those who could not vote: a vote to tax the people of Britain affected voters and non-voters there alike, but a vote to tax the people of the colonies did not affect the voters of Britain. Bailyn (1992), p. 166-168.
interests in the legislative process. Nor were they hoping for a return to feudalism: but the fact that the British parliamentarians had discarded Coke’s model of the king had also dashed their hopes for the establishment of parallel but separate dominions under one crown.

Nevertheless, even if one can parry Angermann’s analysis that the Declaration was a fundamentally reactionary document with regard to its conception of the subject in relation to the king, it is equally clear that the Enlightenment-inspired, Lockean preamble (“all men are created equal”, etc.) was not its most legally significant part; indeed, the preamble could be compared to obiter dicta in a court judgment. In fact, it seems likely that Jefferson largely copied the preamble from the opening provisions of the Virginia Declaration of Rights, which had been written by George Mason: further evidence that the preamble was not of central importance for Jefferson and was something of a sewn-on patch in the Declaration of Independence. The indictment, on the other hand, was a text that Jefferson had largely recycled from his own previous writings, including the first draft of the Virginia Constitution, and had thus been working on for longer.

Moreover, the persons on behalf of whom the Declaration claims to speak is of a clearly limited scope, by no means reaching for the soaring universalist heights of the preamble’s “all men”, or even claiming to be effective for all persons within the territory of the colonies. It is very much a declaration on behalf of the Englishmen of the colonies, not only speaking from their personal, contractual relationship to the king as subjects, but also from their ethnic, cultural and historical identity. They speak to their “brethren” in Britain, appealing to “consanguinity”. They resent the threat, presented by the Quebec Act, of being robbed of their “free System of English laws”.

These “rights of Englishmen” were a commonplace in revolutionary discourse. While John Adams, for one, could be counted among the revolutionary theorists who admired the British constitution for its aforementioned balance of powers, i.e. for its abstract legal structure, other revolutionaries saw the wellspring of the British constitution not in its logical structure, but in the spirit of the English nation. Thomas Paine, in Common Sense, identified English liberty as “owing to the constitution of the people, and not to the constitution of the government”, arising as it does “as much or more from national pride than from reason”. James Otis was even more explicit as to the source of liberty in the English constitution, identifying it as derived from “those Saxons” who established a form of government in which conquered lands were distributed equitably and every freeholder was represented in his local “Witan Moot”; this primordial liberty was only disturbed by “the coming in of the first Norman tyrants”. In this, Otis was echoing the line of thinking of the Levellers after the

195 Angermann (1965), p. 75.
197 Bailyn (1992), p. 286 and Paine (1776), Ch. 2
English Civil War,\textsuperscript{199} who in their time would prove to be far too radical for what was to become the Whiggish orthodoxy.

The implicit importance of the “rights of Englishmen” gives the Declaration something of an exclusive, ethnocentric slant that is fundamentally conservative.\textsuperscript{200} (It must be noted, moreover, that the discourse of the age saw the Anglo-Saxons as a “race” apart. In the words of Benjamin Franklin in 1751, the English were the only “purely white People in the World”, compared even to the “swarthy” Germans, Swedes and Russians.\textsuperscript{201}) Native Americans were clearly excluded from the new nation making this declaration, being mentioned only as “the inhabitants of our frontiers, the merciless Indian Savages”. And as to the black slaves in the colonies, the final draft of the Declaration does not mention them at all. Yet in Jefferson’s rough draft of the Declaration, one of the final elements of his indictment of the king\textsuperscript{202} mentions slavery in an exceedingly ambivalent way. On the one hand it reaches into the lofty heights of human rights, an ideal worthy of the preamble, to condemn the institution of slavery:

\begin{quote}
he has waged cruel war against human nature itself, violating it’s most sacred rights of life & liberty in the persons of a distant people who never offended him, captiving & carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither. this piratical warfare, the opprobrium of infidel powers, is the warfare of the CHRISTIAN king of Great Britain. determined to keep open a market where MEN should be bought & sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce …
\end{quote}

But on the other hand, it accuses the king of freeing the slaves to stir them up against their white American masters:

\begin{quote}
exciting those very people to rise in arms among us, and to purchase that liberty of which \textit{he} has deprived them, & murdering the people upon whom \textit{he} also obtruded them; thus paying off former crimes committed against the liberties of one people, with crimes which he urges them to commit against the lives of another.
\end{quote}

Unsurprisingly, this element of the indictment was voted down by the Continental Congress: the first part clearly could not count on unanimous support of all the states, and the second part, even if it could be supposed to have any basis in reality, was too riddled with uncomfortable contradictions.\textsuperscript{203} (In the indictment in Jefferson’s first draft of the Virginia Constitution, the spirit of universal human rights was decidedly less prominent: "by prompting our negroes to rise in arms among us; those very negroes whom by an inhuman use of his

\textsuperscript{199} Supra at n. 108 et seq.
\textsuperscript{200} Indeed, as Arendt notes, the “rights of Englishmen” could be claimed as a completely opposite ideal to universal human rights, as Edmund Burke did in a 1790 writing criticizing the Enlightenment-based French \textit{Declaration des droits de l’homme et du citoyen}. Arendt (1994), p. 299.
\textsuperscript{201} Bell (1980), p. 24.
\textsuperscript{202} Boyd (1930), p. 426.
\textsuperscript{203} Angermann (1965), p. 80.
negative he hath *from time to time* refused us permission to exclude by law".204) Nevertheless, in light of this first draft, the silence on slavery in the final draft can be said to speak volumes, uncertain as it is what to say about it, and certainly unwilling to count the slaves of America among the victims of the king’s tyranny who are declaring their independence.

At the time of writing of this thesis, another piece of the textual history of the Declaration has recently been confirmed. In the rough draft of the Declaration, the king is accused of “incit[ing] treasonable insurrections in our fellow-citizens, with the allurements of forfeiture & confiscation of our property”. However, the word “citizens” is visibly smudged. According to Boyd, the editor of the collected papers of Thomas Jefferson that we refer to here, Jefferson originally wrote “fellow-subjects”, as he had in the indictment contained in the first draft of the Virginia Constitution. But before the ink dried, he erased the word “subjects” and replaced it with “citizens”.205 It was already highly plausible, based on the textual relationship to the Virginia Constitution, that the smudge was a result of this specific erasure and replacement. But this was also definitely confirmed in 2010, when researchers used spectral imaging technology to reconstruct the traces of the original word “subjects” in Jefferson’s handwriting.206

Although that specific element of the indictment did not reappear in the final draft, the word “subjects” to describe the Americans did not either—a different element of the indictment was adopted using the word “citizens”: “He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country”. This seemingly minor evolution in terminology provides at least one bit of evidence to counter Angermann’s analysis that the American revolutionary theorists were operating on the basis of reactionary notions of “subjecthood”, and can further be identified as the one—if ever so barely—legally significant element of the Declaration to reveal American constitutional thinking to truly be diverging from British constitutional thought and into a direction based more on equality.

In the next chapter, we will explore how the notion of American citizenship, and its relationship to allegiance, was to more substantively break with British subjecthood and the legacy of the feudal relationship between lord and vassal. The leap from “subject” to “citizen” would be easy, however, compared to loosening the strictures of any ethnically limited conception of the liberties promised by the American constitution. In the third chapter, we will explore the young republic’s struggle with slavery and its attempt to finally make the preamble of the Declaration of Independence live up to its promise for the constitution.

205 ibid., p. 425, n. 10.
206 Kaufman (2010)
Chapter 2: From Revolution to Constitution to Civil War: US citizenship in its youth

Introduction

We have seen that in *Calvin’s Case*, the position of the subject (or really, all subjects collectively) was, in the political conflict of the day, primarily a proxy for the political power base of the King. Parliament feared that if the Scottish subject had access to protection under English law, and vice versa, the King would be able to claim a consolidated power base, and therefore a consolidated rule in all of Great Britain. There were other, less salient substantial aspects of subjecthood that Coke identified in his ruling: one was related to migration, or the right of permanent settlement and how subjecthood thus constituted a bulwark against the invasion of foreign peoples; and one was related to the subject-as-citizen, in his role as a juror in upholding the commonwealth. Coke also implied that for different types of people (i.e. Christian or infidel), who had acquired subjecthood in different ways (i.e. by birth, by naturalization, by assimilation or by conquest), subjecthood would bring different sets of legal attachments with it.

As time went on, the English and Scottish, later British subjects continued to be primarily the site of a general struggle for dominance between King and Parliament. The subject was ever more consciously a citizen, looked to by his would-be ruler to provide democratic legitimation. With the Glorious Revolution, Parliament won that struggle; subjects were from then on substantially (in any case not formally) subjects of Parliament rather than the King. At the same time, however, other aspects of subjecthood became ever more prominent. The granting of subjecthood became inextricably bound up with immigration. And immigration, in turn, was bound up with increasingly more defined cultural, political and religious notions of the English “people” or “nation”. The English culture was claimed by some to be the necessary matrix for English liberty, in danger of being diluted by foreign languages and values. The English nation was presumed by others to be Protestant, justifying the naturalization of foreign Protestants and the refusal of foreign Catholics (although this, again, was itself largely a proxy for real or imagined struggles between king and Parliament).

An influx of migrants then exposed an economic dimension of the equality that went with subjecthood: the right to participate in the economic community as an owner and a skilled worker, if necessary with equal enjoyment of the protection provided to other subjects (such as access to guild membership), and the right to assistance in case of poverty. If there were economic reasons for the Parliament of Great Britain to restrict naturalization and therefore immigration in the mother country, however, there were also economic benefits to
be reaped by introducing a naturalization procedure specifically for residents of the North American colonies.

Finally, rebellious Americans revived long-dormant paradigms of King-Parliament-subject from *Calvin's Case*, but this time to assert their own power of self-government.

If *Calvin's Case* provided the most suitable legal basis for examining issues of English subjecthood up until American independence, it was to be another court case that would deal with all of the political issues at the root of American citizenship in its youth. *Calvin's Case* marked the beginning of an era, with history unwinding from it and with following generations of jurists trying to make political developments cohere with it. There was to be no such legal “Big Bang” at the start of American citizenship, however; rather, jurists largely tried to make political developments legally cohere in a new liberal tradition, making use of old and new legal instruments as they went along. The old concept that they were building on was allegiance, for which citizenship now took over the mantle from subjecthood. The new concept was equality, which until then had only been an implicit aspect of subjecthood, inherent in “English liberties”, but now was meant to play a prominent role in citizenship. However, the institution of slavery was to prove to be a legally indigestible bit of grit that neither the old institutions nor the new institutions could entirely account for.

Again, it was to be a human being crossing a border between jurisdictions, and the questions of equality engendered by that movement that would bring all of the aspects of citizenship to bear on one fateful court case. And that decision of the United States Supreme Court, *Dred Scott v. Sandford*, would be more of a “Big Crunch”: the bankruptcy of a constitutional order that had failed to properly deal with slavery, and the impetus for a civil war to once and for all resolve the intractable issues that had arisen. We will explore the horizontal and vertical conflicts engendered by slavery and race in the next chapter.

The first issue dealt with by the newly self-governing Americans was how to define the new citizenship of the United States by contrast to British subjecthood, partly untangling themselves from their pre-revolutionary legal arguments, and define the set of United States citizens who were to become the “We the People” of the Constitution of 1789. This dimension of United States citizenship was, again, really its “nationality” dimension: the expression of a citizen as belonging to a State distinct from others on the international scene. To define this dimension, old ideas of allegiance would be updated for new, liberal models of government. In terms of equality, the key aspect of this “nationality” dimension of citizenship was the equal subjection to prosecution for treason, as was implied by the bond of allegiance.

Immigration was a prime concern of the young republic, and thus naturalization was to be one of the first legislative priorities. In this discussion of granting citizenship, all of the political concerns regarding immigration essentially dealt
with equality: to what extent the same conditions were to apply everywhere to the naturalization process, and to what extent naturalized citizens were to be granted equal rights to hold property and to participate in the political process. Ultimately, the federal legislator chose for nearly complete equality for naturalized citizens, to the exclusion of any kind of “second class” or “graduated” citizenship.
Independence: the watershed moment

Let us first return to the triangle: subject – king – parliament. Dissatisfied American colonists, in resisting the jurisdiction of the British Parliament, appealed to their subjecthood to the British king (his physical person). This can be neatly contrasted to the English Parliament during the English civil war, that raised troops against the king (his physical body) in the name of the King (his political body); Parliament claimed to be the true representative of the latter as the source of laws and justice. The Americans’ conflict, on the other hand, was with the heir of that very Parliament; the Americans were already fashioning a political body of their own, making their own laws for themselves, so they were to appeal to the physical king (not to the King-in-Parliament) as a source of physical protection. Once the Americans had abjured the king for failing to provide them with that protection, it meant that they had definitively broken with both the British parliament and the monarchical model of subjecthood. However, it was not, of course, so that the Americans simply discarded the old model because it no longer worked for them: the new model is itself merely a proxy for much deeper ideological changes that had been going on. It is important to explore these underlying ideas in order to come to terms with the issues Americans wrestled with as they defined the “hard outside” of American citizenship, i.e. the definition of the set of American citizens as distinct from the set of British subjects.

I will argue here that the very first form of equality that served as a defining element of American citizenship was not much of a right: it was equal subjection to the law when being prosecuted for treason. Treason, as we saw in Coke’s reasoning in Calvin’s Case, is defined as the violation of the allegiance owed in return for protection. In order to arrive at that point, we will first have to follow the revolutionary Americans’ own doctrinal development: first as they tried to redefine their relationship to the British sovereign, then ultimately dissolved it, then determined what the new allegiance owed consisted of in order to establish who could be prosecuted for treason.

Subjecthood and citizenship: Revolutionary doctrine

For the Parliamentarians in the English Civil War, a country without a supreme sovereign of some sort was scarcely conceivable, which may have accounted for their adoption of the King-in-Parliament as sovereign. In fact, the very idea of “sovereignty” that they based themselves upon was at that time a rather young one, derived largely from the sixteenth-century writings of Jean Bodin. According to this idea, there had to be a supreme power in every political system subject to no other power but itself. By the mid-eighteenth century, Blackstone’s rendition of

1 Cf. supra Ch. 1 at n. 69.
CHAPTER 2

this idea would have been the standard: “a supreme, irresistible, absolute uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty reside.”2 The English Parliamentarians, Bailyn writes, had twisted this notion of sovereignty to their own ends, stripping it of any content as a rule of law and reinterpreting it as a rule of arbitrary power. Hobbes would come to be known as a proponent of this idea that the power to compel obedience was the crucial component of sovereignty. Bailyn takes care to point out that it was not arbitrary power itself that the Parliamentarians found problematic, but the concentration of that power in one man. For them, having accepted the necessity of arbitrary power, it was far preferable to have it located in a parliament, which they presumed would wield that arbitrary power in an eminently reasonable way. This was the core of the Whiggish conception of parliamentary sovereignty.3

Precisely this concept of supreme, indivisible and absolute sovereignty was also central to the impossibility, from the perspective of the British Parliament, of *imperium in imperio*. If the Parliament did not have absolute power to legislate in America, the reasoning went, then that implied that America was its own kingdom.4 However, to the Americans it was obvious, in a pragmatic way, that Parliament’s powers were not unlimited, because Parliament was not capable of regulating day-to-day activities in the colonies, nor did it even try to. Some Americans had in fact tried to work within that very model of the impossibility of *imperium in imperio* to argue that they had a degree of local autonomy. The revolutionary theorist James Otis, Jr. granted freely that Parliament’s power was supreme, but his attempt to elaborate a theory that would allow for a *de facto* division of powers between the local level and the Parliament was doomed to become entangled in its own contradictions. Otis’s theories, did, however, have the germ of two basic principles that were radically distinct from Parliament’s conception of sovereignty: that right, not might, is the essential feature of sovereignty, and that sovereignty is ultimately derived from the people.5

Other theorists would have more success with a distinction between “internal” and “external” powers. Precisely because sovereignty was supreme and indivisible, Dickinson argued, it was impossible that Parliament would have legislative authority in a sphere where local assemblies were already making laws.6 This distinction was most clearly applied to the debate on taxation: Parliament was free to impose duties on trade (a properly “external” sphere), but not to apply taxes on the “internal” dealings of the colonists, which is how they qualified Parliament’s hated Stamp Act of 1765. The “internal”/“external” distinction hinged crucially on a balance between the sovereignty of Parliament, on the one hand, and the “rights of Englishmen” on the other. This balance was most clearly

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4 ibid., p. 223.
5 ibid., p. 205-207.
worded by Richard Bland in 1764, who reasoned that if Englishmen in America were free to make laws relating to their internal administration, Parliament must not be able to deprive them of this freedom.7

In the dispute regarding taxation, we can clearly recognize a parallel between this “vertical” struggle between the colonies and Parliament and the erstwhile “horizontal” struggle between Parliament and Charles I leading up to the English civil war; Parliament asserted its sole right to collect taxes “internally”, while all the king was left with for funding was his ability to collect duties on imports “externally”. Even Coke reasoned that the king had a right to collect duties on imports, since it was within the king’s prerogative to prohibit imports, therefore to tax them as well.8 Even then, one could see that in pragmatic terms, sovereignty was not an exclusive domain.

American political theorists could certainly mine the history of English constitutional law prior to the ascent of the sovereign Parliament in order to support the assertion, in flat contradiction to the Whiggish view, that Parliament was not the sole seat of sovereignty. In his Considerations on the Nature and Extent of the Legislative Authority of the British Parliament (1774), James Wilson cited the age-old principle that an Act of Parliament required the assent of three parties: the king, the Commons, and the Lords.9 The commons, Wilson makes explicit, are assenting on behalf of “those whom they represent”.10 Wilson is certainly not breaking with the dogma of undivided sovereignty; indeed, for Wilson, it is the king who is the seat of sovereignty.

However, crucially, Wilson insinuates the notion of the consent of the people into English constitutional law. This would also seem to be the case in his reading of Calvin’s Case: Coke, after all, had ruled that a conquered realm, specifically Ireland, could be bound by the laws of the English Parliament if those laws specifically mentioned that realm. English jurists, including Blackstone, had extended this notion to the American colonies, reasoning that they had been obtained “either by right of conquest and driving out the natives … or by treaties”.11 Furthermore, Blackstone sees the dependent nature of the American colonies as being more or less coextensive with the state of having been conquered: “The original and true ground of this superiority, in the case of Ireland, is what we usually call, though somewhat improperly, the right of conquest”.12

Wilson disagrees with Blackstone’s qualification of the American colonies as having been obtained by conquest. Significantly, without devoting any thought to the aboriginal population of America, Wilson addresses the colonists, who

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8 Cf. Maitland (1961), p. 306-307; cf. supra Ch. 1 at n. 67, and, as to the fact that this prerogative was later limited, at n. 77.
9 cf. Maitland (1961), p. 302; also cf. supra Ch. 1 at n. 58.
10 Jezierski (1971), p. 102;
11 Blackstone (1832), vol. I, p. 77 (par. 107)
12 ibid., vol. I, p. 73 (par. 103)
[p]ermitted and commissioned by the crown, [...] undertook, at their own expense, expeditions to this distant country, took possession of it, planted it, and cultivated it. Secure under the protection of their king, they grew and multiplied, and diffused British freedom and British spirit, wherever they came. Happy in the enjoyment of liberty, and in reaping the fruits of their toils; but still more happy in the joyful prospect of transmitting their liberty and their fortunes to the latest posterity, they inculcated to their children the warmest sentiments of loyalty to their sovereign, under whose auspices they enjoyed so many blessings, and of affection and esteem for the inhabitants of the mother country, with whom they gloried in being intimately connected. Lessons of loyalty to parliament, indeed, they never gave: they never suspected that such unheard of loyalty would be required. They never suspected that their descendants would be considered and treated as a conquered people; and therefore they never taught them the submission and abject behaviour suited to that character.

Wilson stops short of saying that the colonists consented to their form of government, and that they in that regard can be distinguished from a conquered people, but Wilson’s pointed reference, in the first half of his essay, to the necessity of the Commons’ asent on behalf of those they represent shows this to be a logical consequence of his thinking. In any case, Wilson makes clear what he is arguing for: that the union between the colonies and Great Britain is solely a union of “allegiance to the same prince”, in which the Americans and the British are “fellow subjects”.

Thus, even while they were working within the strictures of received English constitutional thinking on sovereignty, American theorists repeatedly made reference to the inability of Parliament to rule alone by sheer might, on the one hand, and to the consent of the people, on the other. These two ideas would contain the seeds of the destruction of the dogma of undivided sovereignty.

On the eve of, during, and after the revolution, American theorists no longer felt as obliged to couch their distinctions between “internal” and “external” in undivided Parliamentary sovereignty, or to protest, in arguing for separate spheres, that they were not in any way trying to establish an imperium in imperio. In fact, there is some evidence the newly independent Americans felt no need to make use of the concept of “sovereignty” at all, finding only references to the “people” to be acceptable. The Declaration of Independence entirely avoids any mention of “sovereignty”, in favor of “self-evident” “truths” that the colonies could declare themselves independent “by the Authority of the good People of these colonies”, and the assertion that “Governments are instituted among Men, deriving their just powers from the consent of the governed”. W.R. Adams sees a significant contrast here with the French Revolution, after which the Assemblée nationale took the step in 1789 and 1791 of expressly declaring sovereignty to reside entirely in the people.13

The Declaration’s silence on sovereignty may have had as much to do with the very notion of sovereignty as being unpalatable as with the fact that the

Declaration was, in fact, a communal declaration of independence of 13 separate states, united only in their mutual independence. The “united States” were still very much plural, not a unified concept. In fact, as both Kramer and Schütze note, “the United States” would only become grammatically singular in English, a change plausibly reflecting a deeper conceptual shift, some time after the Civil War.\textsuperscript{14}

However, in any case it is clear that the concept of sovereignty had not died out, and “the people” was not to be an entirely amorphous, or arbitrarily divisible source of legitimacy: Adams mentions two revealing situations in Massachusetts in the period of nascent independence. In January 1776, several counties in the west of Massachusetts tried to assert their right to govern their territories. The General Court of Massachusetts delivered a sharp rebuke that only one “supreme, sovereign, absolute, and uncontrollable power” could exist in a given area, since power lay “in the body of the people”, a principle that the British ruler had ignored. In the spring of 1778, the counties of the same region again tried to assert their power by demanding that a state constitution approved by the counties, but not by the town meetings, be adopted; as long as that was not done, the counties threatened to keep the state courthouses closed by force. However, the town of Worcester reminded the counties that decisions on a state level could only be taken by statewide majority, not by county-wide majorities; allowing a county to defy state power would be a case of imperium in imperio.\textsuperscript{15} Thus, it is clear that states (or the people of each state as a whole) had taken over the mantle of sovereignty in its sense of indivisibility.

If a “people” was to be taken as the starting point for a state, however, some maneuvering would be necessary to define who that “people” was. This leads us back to the position of the citizen (the term that was almost universally adopted, in the states subsequent to independence, being considered “better suited to the description of one living under a republican government” than “subject”\textsuperscript{16}) as the atomic unit of a “people”. In fact, all of the deeper semantic implications of “citizen” versus “subject” aside, it is clear once more that this notion of “citizenship” was primarily meant not in the sense of any concrete civic contribution made, but rather was already primarily meant in the “nationality” sense of membership: a citizen of a given state “belonged” to that state.

Before the “citizen” of a state or of the United States crystallized, though, Americans had the more pressing issue of deciding when a person was guilty of treason. Treason, we might recall,\textsuperscript{17} can only be committed against a given entity

\textsuperscript{15} Adams (1973), p. 125.
\textsuperscript{16} Chief Justice Waite in USC \textit{Minor v. Happersett} (1875)cited in Roche (1949), p. 4. See also, of course, Jefferson’s choice of the word “citizen” in the Declaration of Independence, supra in Ch. 1 at n. 205.
\textsuperscript{17} Roche (1949), p. 4.
\textsuperscript{18} cf. supra Ch. 1 at n. 27.
by a person who in some way owes allegiance to that entity, according to the received English constitutional doctrine. Because, likewise, subjecthood is determined by the status of owing allegiance, the set of individuals who can be described as a “subject” (or a “citizen” in the sense of membership) will be at the very least a subset of the set of individuals who are capable of committing treason. Of all of the concepts, both formal and substantive, related to citizenship in its “nationality” dimension, none can have such a tight correspondence with it as treason. Both are derived from the concept of allegiance. Thus, any accusation of treason in one of the newly independent states would also have to clarify what exactly the “allegiance owed” was, thereby implicitly defining the citizens of the states.

This was a thorny question during the phase prior to the Declaration of Independence on July 4, 1776, and its ratification by all of the states between July and October, which once and for all declared the colonies to be “absolved from all allegiance to the British Crown”. After all, until that point, the going legal argument had been that Americans owed allegiance to the British king, just not to the British Parliament. Describing in a letter19 the battles of Lexington and Concord on April 19, 1775, the first open armed conflict between an American colony and Great Britain, Isaac Merrill calls the British forces (in an echo of the language used during the English civil war)20 “the ministerial troops” to emphasize that they are in the “Parliamentary” camp. Since the tie of allegiance to the British king had not yet been cut, it was too soon to formally accuse anyone of treason. In raising the Continental army in June 1775, the Continental Congress avoided the term, providing only for punishment of soldiers for “mutiny and sedition” or “supplying, harboring, or corresponding with the enemy”; in November 1775, the death penalty was instituted for soldiers convicted of “aiding the enemy”. Dealing with military personnel was one thing; in fact, Thomas Hickey, a member of George Washington’s personal guard, was the first American to be executed by Revolutionary authorities, having been convicted of involvement in an espionage and counterfeiting affair.21 After all, for military personnel, it was clear that they had voluntarily entered into and were bound by a contract that could be violated. “Soldiers at enlistment declared merely that they had voluntarily enlisted, and bound themselves to conform to the rules for the government of the Army.”22

However, for civilians it was anything but self-explanatory that they could be accused of violating a bond they had not expressly entered into and might not even have been aware of. Thus the Continental Congress took the step of clarifying the issue of allegiance, resolving first, only ten days before issuing the Declaration of Independence:23

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19 Merrill (1775)
20 cf. supra Ch. 1, at n. 69.
22 Franklin (1902), p. 302
[t]hat all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony; and that all persons passing through, visiting, or make a temporary stay in any of the said colonies, being entitled to the protection of the laws during the time of such passage, visitation or temporary stay, owe, during the same time, allegiance thereto:

We can pause here to compare the Continental Congress’ definition of allegiance to Coke’s exposition of allegiance in *Calvin’s Case.* Crucially, Congress skips over anything resembling Coke’s category of “natural” allegiance, which relies on a metaphysical and *a priori* conception of the relationship between subject and sovereign. Rather, Congress goes straight to the heart of a “contractual” definition of allegiance (which for Coke only partly comes into view, and then for the “local” allegiance owed by friendly aliens): that which is owed in return for protection. Congress does seem to make a distinction in the former and latter degrees of allegiance owed, roughly approximating a dichotomy between “citizen” and “friendly alien” (corresponding to Coke’s “natural” allegiance and “local” allegiance): but strikingly, it makes no assumptions about the membership implied by citizenship as being defined *a priori.* Rather, it makes residence the defining criterion of the (stronger) allegiance owed by the former type of persons named, who as a result of abiding in a colony and enjoying the protection of its laws are members of it. Having settled the question of allegiance, Congress could go on to define treason:

That all persons, members of, or owing allegiance to any of the United Colonies, as before described, who shall levy war against any of the said colonies within the same, or be adherent to the king of Great Britain, or others the enemies of the said colonies, or any of them, within the same, giving to him or them aid and comfort, are guilty of treason against such colony:

Notably, Congress has abandoned any pretense of allegiance to the king of Great Britain by now, defining those adherent to him as an enemy. Finally, Congress shows deference to the legislative processes of the colonies:

That it be recommended to the legislatures of the several United Colonies, to pass laws for punishing, in such manner as to them shall seem fit, such persons before described, as shall be proveably attainted of open deed, by people of their condition, of any of the treasons before described.

The states (as they were to become ten days later) would take this recommendation seriously, as Kettner writes: “The ensuing torrent of legislation from the state legislatures would not cease until the end of the war. Every state established oaths and declarations to test the loyalty of its inhabitants.” And for

24 *Supra* in Ch. 1, starting at n. 13.
every indictment of treason, the existence of allegiance would have to be carefully
demonstrated, since there could be no treason without allegiance: “a British
soldier,” as Kettner writes, “who “levied war” against the colonies obviously was no
traitor”. Most typically, the elements establishing allegiance in a state’s indictment
were residence in the state and enjoyment of the protection of that state’s laws.
Mere profession of loyalty to the British monarch, in American eyes, could not
make a “real British subject” (who was therefore immune to a charge of treason) of
a loyalist who voluntarily continued to reside in a state; that person could only be
qualified as a disloyal citizen.25

In terms of equality, equal subjection to prosecution for treason was the key aspect
of the citizenship of an American state. I would also note that this particular state
of equality, prior to any codification of or reference to citizenship of the United
States as a whole, was the sole element of an incipient form of that citizenship.
Which was the primary citizenship, then? Was it state citizenship or US
citizenship? Formally, only state citizenship existed. To the extent one could
already speak of US citizenship, it could only be the derived form of citizenship:
state citizenship was the prerequisite. And this was, in fact, a reversal (from top-
down to bottom-up) of the pre-revolutionary order, in which it was subjecthood
to the British monarch that was the prerequisite for citizenship of a colony.
Substantively, however, we have seen an interesting phenomenon: the
definition of what constituted allegiance, thus who is liable to prosecution for
treason, and thus who is a citizen of a state, was issued by a federal body, the
Continental Congress. While Congress’ resolution was by no means
ipso facto
legally binding on the states, their legislatures all eagerly adopted the
recommendation. In effect, then, this was the first federal legislation, although it
was only implemented in the states by means of pure political will.

While the treason statutes of various states may have slightly diverged
from each other in form,26 it does not appear, for instance, that an American
suspected of aiding the British King could have fled from, say, New York to
Virginia in the hope of getting more lenient treatment. In their unanimous
adoption of a common standard, the states established a remarkably uniform field
of equality for all of the citizens of the states which, by its very provenance, could
be said to have created a citizenship of the United States
avant la lettre.

We see that at this point, a yawning abyss has opened between the British concept
of subjecthood and the American concept of citizenship, since both are based on
completely different underlying ideas. British subjecthood, based as it is on
"natural" allegiance, is not simply territorial, either by birth or by residence, but
rather has something to do with parentage and being born into the pre-existing,

26 Hurst (1971), p. 84.
involuntary relationship between a sovereign and his subjects. Professing allegiance to the sovereign (Coke’s “legal” allegiance) is of some importance, but is not itself constitutive of subjecthood.

For American citizenship, on the other hand, we see that consent, and the voluntary nature of the relationship between ruler and ruled, were the very wedge that brought about the final separation of the United States from the British Empire; consent is of significance all the way down to the level of the individual citizen. And this consent was expressed implicitly, by mere residence. Anyone enjoying the protection of the laws by residence in one of the United States was presumed to owe such a debt of allegiance as to be fully liable for treason. Persons who did not see themselves as citizens of a state, it was implicitly reasoned, were free to “vote with their feet” by moving away, thus revealing the conservative battle cry “America: Love It or Leave It” to have surprisingly deep roots in the American political order.27

The American conception was a complete up-ending of the hierarchy of allegiance described by Coke, in which the "local allegiance" owed by resident aliens, purely by virtue of enjoying the protection of the laws, was the weakest form. The only thing that the Cokean and American conceptions of allegiance could agree on was that the profession of an oath could only serve to underscore the existence of allegiance, but not constitute it.

The postwar years: tying up loose ends

The split between Britain’s definition of subjecthood and American states’ definition of citizenship was to create a messy situation in the post-revolutionary years, with Britain, from its own constitutional perspective, theoretically being able to claim almost all American citizens as its own subjects. After all, a British subject could not voluntarily abjure his sovereign.28 Article IV of the Treaty of Paris, the peace treaty of 1783 between Britain and the United States, provided that “creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted”; and Article V provided, among other things, that Congress shall earnestly recommend it to the legislatures of the respective states to provide for the restitution of all estates, rights, and properties, which have been confiscated belonging to real British subjects … And it is agreed that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights.

Finally, Article VI provided

27 Kettner explores dissident opinions in the post-revolutionary United States that reveal just how tenuous this notion of "consent" can be, based as it is on the will of a majority rather than the will of the individual. What of the individual who does not consent to allegiance and also does not wish to move away? Kettner (1978), p. 187-190.
28 Cf. supra Ch. 1 at n. 96.
[t]hat there shall be no future confiscations made nor any prosecutions
commenced against any person or persons for, or by reason of, the part
which he or they may have taken in the present war, and that no person
shall on that account suffer any future loss or damage, either in his person,
liberty, or property; and that those who may be in confinement on such
charges at the time of the ratification of the treaty in America shall be
immediately set at liberty, and the prosecutions so commenced be
discontinued.

Much of the interpretation of these articles hinged crucially on who was “on
either side” (Article IV), or who “real British subjects” (Article V) were. The
Treaty makes no attempt to define this, acknowledging only the territorial
sovereignty of the several states (Article I). Americans loyal to the British
monarch, who found themselves in the gray area of considering themselves British
subjects, but yet were seen as American citizens by the states, were able to obtain
little relief for the real damages they suffered for their loyalties in terms of
confiscated properties.

While Article VI provided for relief without reference to allegiance, its
execution was dependent on the several state legislatures. After all, the
Continental Congress could not legally mandate the states to do anything; it
could only make recommendations. And the same political will that had once led
the states to unanimously adopt treason statutes on the recommendation of the
Congress (thus creating the first form of United States citizenship, as we
determined above) now worked against harmonization: the states lacked the
political appetite to implement Article VI in the face of popular hatred of loyalists.
Thus the states largely maintained laws limiting loyalists’ ability to recover
property.29

The conflict would continue to smolder after the signing of Jay’s Treaty
in 1794, the treaty that was intended to settle outstanding problems with the
Treaty of Paris. One of the problems that it was intended to settle (by the
establishment of a joint claims commission) was that, as the British claimed,
American state laws punishing disloyalty were “lawful impediments” to the
recovery of prewar debts. This disagreement arose from the differing conceptions
of allegiance and their implications: for the British, loyalists were, in fact, “real
British subjects” until the point in time that the Treaty of Paris was signed, thus
rendering them theoretically immune to wartime acts punishing “disloyalty” and
giving them the standing to recover their debts and property that the States were
denying them. The Americans refused to accept this, since it effectively denied
the United States’ independence from 1776 to 1783; in the end, the problem of
the prewar debts was not resolved until 1802, when the United States made a
payoff to Britain of 600,000 pounds to settle all claims once and for all. Britain
was free to distribute the money as it saw fit to those whom it saw as British
subjects, thereby absolving the United States from having to make such an
acknowledgment.30

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30 ibid., p. 186-187.
If the removal of “lawful impediments” without a loss of face for both sides was the problem, then twice there was a proposal that would have offered an extraordinary solution. When John Adams was in Paris in 1780, he wrote a letter to Congress telling of a British proposal at the negotiating table: “For facilitating the return of commerce they will wish to have it stipulated by the treaty, that the subjects of Great Britain shall have the rights of citizens in America, and the citizens of the United States the rights of subjects in the British dominions.” And during the negotiations for Jay’s Treaty of 1794, a British negotiator proposed, according to the memoirs of John Quincy Adams, “that in either country, the subjects or citizens of the other shall be exempted from all the disabilities of alienage”. Franklin mentions these proposals in the context of the formal history of naturalization in the United States: the younger Adams, although intrigued with the proposal, was of the opinion that the Constitution probably barred introducing such a measure by treaty due to Congress’ monopoly on naturalization (to be examined in the following section of this chapter).31

However, in this proposal, done in the context of the negotiations for Jay’s Treaty, we can recognize one of the core forms of equality entailed in citizenship, or subjecthood, as the case may be: the equal right to own property, and more importantly the equal right to go to court to enforce that right.32 Such a measure, if it had been possible to implement, might have been a much more efficient means of ensuring citizens, loyalists, and “real” British subjects access to American courts—without ever having to touch the live wire of first determining a claimant’s citizenship or subjecthood—than for Congress to coax state legislatures to remove legal obstacles.

One of the most significant court cases to touch on the issues of consent and citizenship or subjecthood was McIlvaine v. Coxe, which was argued before the US Supreme Court in 1805.33 In particular, it dealt with the voluntary nature of not only acquisition of American citizenship, but renunciation of American citizenship as well. Just as in Calvin’s Case, it was a property dispute that gave rise to the need to examine someone’s citizenship and determine if he had therefore been unjustly excluded from an equal right to property. The question at hand was, [...], in substance, whether a person born in the U.S. while they were British colonies, and who took no part in favour of the revolution but joined the British army in an early stage of the war, and from that time to this, by the whole tenor of his actions and declarations, has shewn his election not to be a citizen of the U.S. but to adhere to the British empire, was capable of taking land in New Jersey by descent in the year 1802.34

32 cf. supra Ch. 1 starting at n. 9.
34 McIlvaine vs. Coxe (1808), 280
It is not in dispute that before the Revolution, Daniel Coxe would have been entitled to inherit the property of his aunt Rebecca, who died in 1802. However, Coxe had clearly chosen the side of the British during the Revolution, fighting for the British. Among many other things, Coxe collected a British officer’s pension and repeatedly presented himself as a British subject, including in his petition for recovery of his assets under the provisions of the Treaty of Paris. He had also been convicted of treason in Pennsylvania, although he was later pardoned pursuant to the Treaty of Paris. The legal question at hand, thus, was whether Coxe was a citizen or a British subject; in the former case, he could inherit property, in the latter case, he was disabled from doing so.

Coxe’s counsel, arguing in favor of citizenship, noted that despite all of his behavior claiming allegiance to Britain, Coxe remained resident in New Jersey. Thus, under the law of New Jersey, he was a citizen whether he liked it or not: the constitution of New Jersey of July 2, 1776, and an act of the New Jersey legislature of October 4, 1776, had declared all persons abiding in New Jersey and enjoying the protection of its laws to be members owing allegiance. In order to argue in favor of Coxe’s possession of a citizenship based on voluntary allegiance, quite strikingly, his counsel argued at least partially against the principle of voluntary allegiance, arguing that the laws of New Jersey forbade Coxe to unilaterally renounce his citizenship.

The counsel for Coxe’s opponents, on the other hand, saw in this an appeal to the old English constitutional rule of perpetual allegiance, as it had been presented in *Calvin’s Case*. They argued that the rule of perpetual allegiance had lost its validity, since an individual’s allegiance could only be based on his consent. Furthermore, they argued, the entry into force of the Treaty of Paris, mentioning as it did the rights of British subjects on the one hand and citizens on the other, marked a watershed moment at which any American was free to choose for subjecthood or citizenship. Thus while New Jersey could claim Coxe as its citizen before the signing of the Treaty, this claim had lost its effect after the Treaty.

However, the Court, in its majority opinion by Justice Cushing, ruled that the Treaty of Paris, specifying as it did only which territories had become sovereign states, had not contained any provision by which any persons became either citizen or subject. Moreover, the Treaty had not brought about any change whatsoever in the world of the law internal to the states, as it was merely an acknowledgment of the states’ independence and did not grant the states independence. However, the Court would not rule on abstract principles of consent: ultimately, the Court’s decision was to turn on deference to state law and to the will of the legislator. New Jersey had seen Coxe as a citizen since before the Treaty; and by its statutes, New Jersey had created no possibility for him to renounce his citizenship. Thus, Coxe was a citizen of New Jersey and not disabled to inherit. However, it is clear from these holdings, and from the arguments for both sides, that the notion of absolutely perpetual allegiance had been discarded.
once and for all; the will of the individual, or of the state, or of both, always played a role. Thus the same notion of consent that the Declaration of Independence used in declaring the people's contract with their sovereign to be void had now been brought to its logical conclusion on the level of the individual citizen.

The further articulation of citizenship: immigration and naturalization

With the American Revolution, an entire population (or thirteen entire populations) changed allegiance *en masse* as an expression of the will of the (presumed) majority. Dissident individuals who wished to remain “real” British subjects, i.e. remain British subjects in the eyes of American law, had no choice but to emigrate. The operative definition of citizenship was a remarkably formally pure one, based solely on residence in a given state (which was seen as an expression of the will to be a member of that state) and the enjoyment of the protection of that state’s laws. There was surprisingly little reference to an individual’s other qualities, such as an individual’s ethnicity, religion or belonging to a given culture. While the English constitutional concept of “natural” allegiance was technically based on a metaphysical relationship between subject and sovereign, it probably also largely overlapped, in everyday experience, with an “I know it when I see it” definition of Englishness, based on dress, physiognomy and speech. In the immediate aftermath of the American Revolution, though, there was presumably no way to guess with prima facie methods of perception whether someone was American or British; it could only be determined analytically from a person’s express actions and statements. In particular, whether a person migrated, or not, would be seen as a central determiner of whether a person had entered the contract of citizenship.

Such an analysis would be too convenient, however, if it failed to confront the truth that the “persons” addressed in the laws we have discussed so far, and all of the theorists speaking on behalf of the “people”, were almost inevitably white, Christian Europeans of British origin, or were presumed to be. We already touched on the lacuna in James Wilson’s rebuttal of Blackstone, in which he fails to directly address Blackstone’s definition of America as a “conquered land” based on the conquest of the natives; Wilson seems to imply that America was *terra nullius*, a “discovered” or empty land before the British came. Likewise, in the history of the American Revolution and the new discourse on citizenship, the Native Americans scarcely register a mention. They were not reliably considered to be British subjects before the revolution—one member of a royal commission ruling in on a property dispute between colonists and Mohegan Indians in 1743 declared the Indians to be “a distinct people (for no act has been shown whereby they can become subjects)”, although it is not clear whether this statement ultimately became a final legal holding of the ruling.36 Nor is there any evidence that the set of new American citizens, derived as it was from the pre-existing set of British subjects residing in the colonies, was subsequently expanded upon with the addition of the Indians; citizenship, crucially, was still not granted territorially, at least not in areas that did not have a system of government that

36 ibid., p. 289-290.
could be argued to “protect” its residents. (Besides, as Calloway writes,37 most of the Native Americans involved in the Revolution had fought on the side of the British, as they saw the colonists as posing a much greater threat to their independence.)

Arguably, the criterion of "enjoying the protection of the laws" of a given state was the formal or practical bar to citizenship for all but a few non-whites. This is most acutely obvious in the case of black slaves, but for black freemen it was very much the question whether this criterion was meant to "designate only those active partners in a sovereign community who possessed all its civil and political privileges, including suffrage and eligibility to hold public office." Of course, Fehrenbacher grants, such a strict definition would mean that women were excluded from citizenship, while the evidence shows that they were recognized as citizens for the purpose of bringing suit in federal courts. Ultimately, Fehrenbacher concludes, “the evidence is that by implication, sufferance, and inadvertence” laws made by the founding fathers often classified the black freeman as a citizen.38 It was different states' widely varying recognition of this formal citizenship, and their attitudes toward slavery, that would ultimately lead to a clash between the legal orders of the states severally and the states and the Union, a clash that will be analyzed in the following section. However, whatever the formal legal status of black freemen was in even the freest states after the Revolution, it is clear that in everyday practice, they were held back by social customs and laws that saw them as something less than full American citizens. The fact that the Revolution had redefined citizenship in formal and contractual terms could not eradicate the everyday practice of primarily recognizing the rights of individuals based on other, more perceptible qualities.

After all, while the states had formally dispensed with the notion of “natural” allegiance for the purpose of declaring independence, it is worth investigating to what extent the starting set of American citizens, having originally been defined by their British subjecthood, might have been contaminated by the British constitutional concept, and by extension by primarily genetic and cultural conceptions of membership in the polis. American citizenship would be at pains to distinguish itself from a membership based on “natural” allegiance; this would even formally make a re-entry into American law in derivative form, in discussions of naturalization and the “natural-born citizen”. Postbellum immigrants, and the problems attributed to them, would thus form the initial political site of these legal debates.

Citizenship under the Articles of Confederation and the Constitution

As to the set of former British subjects who had lived through the Revolution, and who had aided the Patriotic cause or at least not hindered it, it was easy to apply the formal criteria for volitional, contractual allegiance to define them all as citizens. They had all made their will clear, either expressly or implicitly. It was the common experience of the war, as well, that arguably “blurred the sense of the individuality of the separate colonial societies and made the idea of a common nationality more convincing.” This was articulated in the “comity clause” of the Articles of Confederation (approved by Congress in 1778 and ratified by the states in 1781), Article IV of which provided:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the united States, or either of them.

If any person guilty of, or charged with, treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the united States, he shall, upon demand of the Governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense.

Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

Nowhere else would the Articles of Confederation mention citizens: and Article IV was the first definition of anything approaching a codified United States citizenship.

At the outbreak of the Revolution, the most incipient form of United States citizenship entailed only equality in terms of equal subjection to prosecution for treason. Now, new forms of equality (at least, notably, for the “free”) had been added that were privileges rather than obligations: equal rights to movement and residence (except for “vagabonds” and “paupers”), all of the “privileges and immunities of the free citizens of the several States”, and rights of trade and commerce equal to those enjoyed by the citizens of a destination state.

In any case, the rights of trade and commerce were defined largely locally, by reference to the law of a given state; whatever rights citizens of that state enjoyed were to be enjoyed by immigrating citizens of any other state. However, this clause contained one vertical component, i.e. a component restricting the latitude of state law, which was that immigrating citizens would in no case be subject to any restrictions placed on local citizens as to the import or export of property from or into other states. We thus see here a theoretical potential for discord in terms of equality enjoyed: on the one hand, migrating citizens are equal to sedentary citizens insofar as they enjoy the same privileges of trade and commerce. As far as those privileges go, each state is thus a uniform zone of equality for all United States citizens in it. But migrating citizens, without reference to the law of any destination state, are exempt from any restrictions on interstate import and export of property placed on sedentary citizens. In this regard, only all migrating United States citizens are equal; all sedentary United States citizens and aliens are excluded from this guarantee of equality.

As to the "privileges and immunities", their content and nature (i.e., whether horizontal in nature, and defined by reference to the privileges and immunities of the citizens of a destination state, or vertical in nature, and equally applicable to all United States citizens) were to become a subject of an enormous legal debate, which we will return to later. For now, however, we can note the most uncontroversial and unvarying of these privileges: the equal right to property, which implied equal access to legal procedures to transfer and recover property.

It is important to note that the exclusion of "vagabonds" and "paupers" probably would not have operated, in practice, as a ban on entry or exit for such persons (border controls between the states, one would imagine, were nonexistent). Anyhow, there could be no objective prima facie qualification of what a "vagabond" or "pauper" was. But what this ban clearly formulates, in an indirect way, is that citizens of a "foreign" U.S. state were in any case excluded from equality when it came to privileges of social assistance, at least if those citizens were not engaged in any economic activity. After all, if one state had provided particularly generous poor relief in the form of handouts or housing, and a citizen of another state arrived with no other apparent goal than to take advantage of that poor relief, then that "foreign" citizen could be qualified, by definition, as a "pauper" or "vagabond" and legally excluded from equal entitlement to relief.

We already noted in Chapter 1 (at n. 33) how in English law, the exclusion of aliens from equality functioned as a form of immigration control in an era that did not know passports or border surveillance. Aliens could, one

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40 The potential exclusion of (non-US) aliens from equality with migrating US citizens—and, remarkably, the potential of inclusion of certain aliens in equality with the sedentary citizens—is made clear by Art. IX, which restricts Congress: "The United States in Congress assembled, shall have the sole and exclusive right and power of […] entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to […]"
presumes, disembark from a ship onto British shores without being detected or stopped—indeed, Britain did not have a single law regulating the actual entry of aliens until 1836.41 Before that time, the barriers that an alien resident of Britain would have encountered would have been legal ones, far inland from the shore. At best, an alien may have been granted some limited equality in terms of the right to real property, specifically the right to purchase a home for the practical purpose of living in it. But his right to equality, or specifically that of his children, ended in any case upon his death, when the heirs were excluded from inheritance. This exclusion from equality, in addition to exclusion from equal rights of trade and commerce, would have exerted something of a dissuasive effect on the long-term settlement of aliens.

Likewise, we can see how exclusion from equality for “paupers” and “vagabonds” under the Articles of Confederation functioned as a form of internal migration control, at least in theory, for the states signing the Articles that were jittery about unlimited admission of other states’ citizens.42 As to the ban on “fugitives from justice”, greater detail on how this operated is provided in the second paragraph of Article IV, covering extradition. Unlike the ban on “paupers” and “vagabonds”, which excludes certain citizens from equality, this ban can be read as the introduction of a new form of equality for all United States citizens. Specifically, equal subjection to prosecution was expanded in the sense that a citizen of one state could not escape prosecution by fleeing to another state; that citizen would be extradited to the prosecuting state. Put otherwise: a claim to asylum, or the right not to be extradited to the state of one’s citizenship (assuming that that is the prosecuting state), is a right that is reserved by its very nature to aliens. A categorical bar on asylum for citizens of fellow states effectively denies the alienage of citizens of fellow states.43

With Article IV of the Articles of Confederation, United States citizenship (still, of course, avant la lettre) has been considerably fleshed out as more than a mere nationality. Schönberger describes this “comity citizenship”, which is dependent on the horizontal relationship of the states to each other, as an Indigenat, borrowing the term for the comparable institution introduced for the North German Federation almost a century later. Schönberger describes an Indigenat as a form of citizenship in an association of states in which any given member state grants the other member states’ citizens reciprocal rights of freedom of movement and establishment and the right of non-discrimination relative to its own.

42 Maryland, in particular, appears to have been one of them. On June 22, 1778, the Maryland delegates moved to strike out the word “paupers” and add the text to the end of the first paragraph “That one State shall not be burthened with the maintenance of the poor who may remove into it from any of the others in this union.” Not a single one of the other states voted for this change, which can be seen as an indication that the provision about “paupers” was already understood to work that way. Journals of the Continental Congress, (1789), Vol. XI, p. 631; also referred to by Antieau (1967), p. 3–4.
43 Schönberger (2005), p. 240 et seq.
citizens. What’s more, the limitation of member state sovereignty implied in an Indigenat also can mean, as we see in Article IV, that states can no longer protect anyone, not even their own citizens, from extradition to another state that is seeking to prosecute them.

United States citizenship under the Articles was largely horizontal, or based on reciprocity and reference to state law. The only uncontroversial vertically conferred form of equality, creating a uniform zone of equality for all United States citizens, was equal subjection to prosecution by any state, regardless of place of residence. The rights of United States citizenship were granted to state citizens, and the Articles, in turn, made few substantial assumptions about what state citizenship entailed, leaving U.S. citizenship a largely formal construct. While Article IV appears to leave it up to the states to define who their citizens are, it does, like the resolution on treason of 1775, appear to presuppose a common assumption that these are coextensive with the “free inhabitants” of a state. That the majority of the states’ representatives, likewise, preferred to impose no further conditions on United States citizenship is partly evidenced by the record: South Carolina had proposed to replace this phrase with “free white inhabitants”, but it was defeated by a vote of eight states to two.

Bancroft breathlessly proclaimed in 1882 that “[i]ntercitizenship now took the place of consanguinity; the Americans had become not only one people, but one nation.” But Franklin provides a rather more hard-headed account of the introduction of comity citizenship (italics added):

> While there is here doubtless the original expression of this character by the lawmaking body common to the new union, and is perhaps a new quality in federations, yet there must be taken into account the earlier common English citizenship of the great majority of the members of the Confederation, and the common rights that it involved. Those, whether continued or not throughout the preliminary states of their combination, must have done much to render intercitizenship in the federation inevitable.

In other words, the formalism of inter-citizenship may only have been a way to achieve, on a confederal level, the same freedom of movement and reciprocal rights that British subjects had had among the colonies without having to rely on tainted concepts of natural allegiance or a common sovereign.

And in practical terms, some may have only envisaged these rights going to the same people who had those rights before the revolution. After all, “locally” naturalized citizens of colonies before the Revolution, it seems clear, did not enjoy reciprocal rights in other colonies; only the “full” British subjects who also had full rights of equality in Great Britain did.

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44 ibid., p. 100 et seq.
47 Franklin (1906), p. 16.
James Madison famously criticized the inter-citizenship provision of the Articles of Confederation in 1788:

The dissimilarity in the rules of naturalization has long been remarked as a fault in our system, and as laying a foundation for intricate and delicate questions. In the fourth article of the Confederation, it is declared "that the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice, excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall, in every other, enjoy all the privileges of trade and commerce," etc. There is a confusion of language here, which is remarkable. Why the terms free inhabitants are used in one part of the article, free citizens in another, and people in another; or what was meant by superadding to "all privileges and immunities of free citizens," "all the privileges of trade and commerce," cannot easily be determined. It seems to be a construction scarcely avoidable, however, that those who come under the denomination of free inhabitants of a State, although not citizens of such State, are entitled, in every other State, to all the privileges of free citizens of the latter; that is, to greater privileges than they may be entitled to in their own State: so that it may be in the power of a particular State, or rather every State is laid under a necessity, not only to confer the rights of citizenship in other States upon any whom it may admit to such rights within itself, but upon any whom it may allow to become inhabitants within its jurisdiction.48

Madison is, to start with, pointing out an obvious formal flaw in the comity clause: that its interchangeable use of "citizen" and "inhabitant" is confusing. In his reading, this leads to a presumed violation of state sovereignty by the Articles: if a given state does not automatically consider all of its "free inhabitants" to be "citizens", then a non-citizen inhabitant of such a state can simply move to another state to enjoy the same privileges of citizenship (or more, even) that natives of the destination state enjoy and thereby circumvent the need to get naturalized in the original state.

Madison’s opposition to automatically considering all free inhabitants to be citizens may evidence a certain political drift in the eleven years since Congress’ treason resolution, the very source of that definition, had passed. At that time, there had been no apparent objection to that resolution regulating the substance of state citizenship, perhaps because the states were swept up in a feeling of solidarity against a common enemy; or perhaps because no state felt threatened by Congress, at that time a body essentially limited to issuing legally non-binding resolutions and coordinating military action.

Antieau is of the opinion that it was no accident that the authors of Article IV really did wish to grant rights to any “free inhabitants”; he sees it as in keeping with the “natural rights” theory of the time that the enjoyment of those rights was not meant to be denied to anyone (although he does grant that the coincidence of the terms “citizens” and “free inhabitants” is probably the result of an editing error).49 Indeed, one can compare the developments in contemporary

48 'Federalist', (1788) 42
49 Antieau (1967), p. 3-5.
France, where the formulations of the Republican constitutions after 1792 were quite cosmopolitan in their outlook: it was not so much Frenchness that was a condition for rights of citizenship, but agreement with the political program, and in fact foreigners like Thomas Paine were elected to the Assemblée nationale.

Yet in revolutionary France, a truly universal conception of legal and political equality would not last. Not long after 1792, the new regime stepped up persecution of foreigners considerably, arresting Paine and others in a fit of paranoia about enemies both within and without. In Brubaker’s view, “the Revolution … invented the foreigner” at the same time as it created a uniform category of membership: previously, the division between “French” and “alien” had not mattered much, being a much less significant axis of discrimination than all of the other divisions based on class, wealth, and feudal relationships. The notion of what a “citizen” or an “alien” was in this convulsive period of the Revolution, in fact, was not yet necessarily ethnic, but could also be ideological: French enemies of the new nation state were regularly accused of being étrangers.

Madison’s essay exudes a kindred, if somewhat more moderate spirit: he alludes to a threat from immigrant aliens who might take exploit a loophole in the system, even if not all free inhabitants of a state were automatically to be considered citizens.

But were an exposition of the term “inhabitants” to be admitted which would confine the stipulated privileges to citizens alone, the difficulty is diminished only, not removed. The very improper power would still be retained by each State, of naturalizing aliens in every other State. In one State, residence for a short term confirms all the rights of citizenship: in another, qualifications of greater importance are required. An alien, therefore, legally incapacitated for certain rights in the latter, may, by previous residence only in the former, elude his incapacity; and thus the law of one State be preposterously rendered paramount to the law of another, within the jurisdiction of the other. We owe it to mere casualty, that very serious embarrassments on this subject have been hitherto escaped. By the laws of several States, certain descriptions of aliens, who had rendered themselves obnoxious, were laid under interdicts inconsistent not only with the rights of citizenship but with the privilege of residence. Whatever the legal consequences might have been, other consequences would probably have resulted, of too serious a nature not to be provided against. The new Constitution has accordingly, with great propriety, made provision against them, and all others proceeding from the defect of the Confederation on this head, by authorizing the general government to establish a uniform rule of naturalization throughout the United States.

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52 'Federalist', (1788) 42
There was in fact considerable diversity in the naturalization laws of the several states. North Carolina’s was arguably the most liberal: its constitution granted property rights to any foreigner settled in the state who swore an oath of allegiance, and deemed that foreigner to be a “free citizen” after one year’s residence. Pennsylvania’s provision was similar, but phrased the distinction between a newly arrived foreigner and one who had satisfied the residence requirement differently, in negative terms of expressly removing a disability rather than in positive terms of granting full citizenship:

Every foreigner of good character who comes to settle in this state, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means acquire, hold, and transfer land or other real estate; and after one year’s residence, shall be deemed a free denizen thereof, and entitled to all the rights of a natural born subject of this state, except that he shall not be capable of being elected a representative until after two years residence.

The drafters of Vermont’s constitution, in turn, copied Pennsylvania’s provision. The New York constitution delegated the responsibility for establishing rules of naturalization to the legislature, establishing only the minimum requirements of settlement in the state and the swearing of an oath of abjuration and renunciation. Maryland, Virginia, South Carolina, and Georgia maintained the more restrictive and cumbersome British practice of naturalization by legislative enactment.

An oath of allegiance or attachment was common to almost all of the states, thus establishing a minimal test of an immigrant’s attachment to republican values. However, some states had additional requirements relating to other qualities. Maryland required a declaration of “belief in the christian religion”. Virginia, South Carolina, and Georgia limited naturalization to whites (and more specifically “free white persons” in the case of South Carolina and Georgia, thus excluding indentured servants). South Carolina’s provision echoed North Carolina’s, but then went on in the same breath to, somewhat contradictorily, maintain disabilities on the newly minted “free citizen”: the citizen could not vote for the legislature or the city corporation of Charleston for two more years. Furthermore, the naturalized citizen could not be elected to high office until an act of naturalization had been passed by the legislature. Thus, Kettner concludes, South Carolina maintained an “English” distinction between different degrees of entitlement to equality (“subject”, “denizen”, etc.) with its “second-class citizens”.

Massachusetts’ legislature maintained naturalization by enactment, and did not make a general provision for naturalization until 1787, when it resolved that petitions for admission had to be accompanied by recommendations and a certificate of length of residence in Massachusetts. New Hampshire, Connecticut, and Rhode Island were similarly slow to establish a general procedure. This may

54 ‘Constitution of the Commonwealth of Pennsylvania’, (1776), section 42
56 ibid., p. 217.
have had something to do with the fact that, as Parker points out, towns were historically the central political unit in colonial Massachusetts (and in the other colonies of New England, it might be added). 57 In particular, individuals possessed a much stronger political tie to their hometown than to the province of Massachusetts as a whole, and in fact, colonial towns had maintained strict ordinances to restrict immigration and to establish who had a right of permanent residence and who did not. This had everything to do with the fact that a town dweller had a right to poor relief in that town; and towns’ restrictions on migration were directed more against needy denizens of other towns in Massachusetts than against aliens from other states or beyond. The fact that the Massachusetts legislature took so long to address the issue of naturalization might have had something to do with the slow pace of shifting the concern with citizens from the local to the state level; indeed, Parker notes, Massachusetts had to build up a state poor relief operation starting from 1780. 58 Maintaining strict naturalization requirements on a state level, furthermore, probably had everything to do with a continued desire to keep out “paupers”.

Thus, to return to Madison’s criticism of a horizontal United States citizenship, we can see that a more vertically determined United States citizenship would resolve these (theoretical) problems of divergent state requirements for naturalization. Not only would a uniform rule of naturalization establish equality for all immigrants in becoming United States citizens, but no one state could be a disproportionate source of immigrants to the United States as a whole.

Furthermore, if we look at the record of Madison’s participation in the Constitutional Convention, we can see that Madison (along with other delegates) was concerned with another dimension of equality: ensuring that the citizenship to be gained by immigrants was as equal as possible to that of pre-existing citizens. In the debate of August 9, 1787 on Article V, Section 3 (ultimately article I, Section 3 of the Constitution), establishing the requirements for election to the Senate, 59 Madison argued against establishing any Constitutional rule at all that a Senator would have to have been a United States citizen for a minimum number of years: the proposal was seven in the original draft, but some delegates suggested a period of fourteen years.

The proponents of the more restrictive requirement claimed that it was in order to, in the words of Charles Pinckney of South Carolina, keep “those who have foreign attachments” from having a say in treaties and foreign affairs. But Madison thought it more desirable, on formal grounds, to leave it to Congress to set different periods of residence as conditions for various privileges of citizenship by ordinary statute, since the Constitution would grant Congress the power to

57 Cf. the way in which some local governments in Massachusetts tried to resist the centralization of state authority, supra at n. 15
regulate naturalization. Substantially, Madison thought any introduction at all of varying classes of citizenship to be undesirable, since it will give a tincture of illiberality to the Constitution: because it will put it out of the power of the Natl Legislature even by special acts of naturalization to confer the full rank of Citizens on meritorious strangers & because it will discourage the most desirable class of people from emigrating to the U. S. Should the proposed Constitution have the intended effect of giving stability & reputation to our Govts. great numbers of respectable Europeans; men who love liberty and wish to partake its blessings, will be ready to transfer their fortunes hither. All such would feel the mortification of being marked with suspicious incapacitations though they sd. not covet the public honors [Madison] was not apprehensive that any dangerous number of strangers would be appointed by the State Legislatures, if they were left at liberty to do so: nor that foreign powers would make use of strangers as instruments for their purposes.

Madison reveals himself here to be quite favorable toward immigration, albeit immigration of Europeans. (And he repeats his pro-immigration argument in the debate on the requirement for Representatives on August 13.61)

Benjamin Franklin of Pennsylvania seconds Madison’s sentiments with the same liberal vision we saw in Locke’s statements on naturalization, although Franklin has no qualms with a required number of years of citizenship:

We found in the Course of the Revolution, that many strangers served us faithfully — and that many natives took part agst. their Country. When foreigners after looking about for some other Country in which they can obtain more happiness, give a preference to ours, it is a proof of attachment which ought to excite our confidence & affection.

And James Wilson, by now a fellow Pennsylvania delegate to the Convention, speaks from his own experience as an immigrant from Scotland, noting the “mortification” he had experienced due to the legal incapacities placed on him before he had satisfied his residence requirement in colonial Pennsylvania. Later on, in the debate on the citizenship requirement for Representatives, Wilson praises Pennsylvania’s liberal naturalization law “as a proof of the advantage of encouraging emigrations. […] Pennsylvania] was at least among the foremost in population & prosperity.”63

The exact meaning of the “uniform rule of naturalization” clause in the Constitution, and what it implies for the equality of United States citizens, would be debated and elaborated over the course of decades, both in the legislative and

60 Roche reads Madison’s statement as a remarkable application of the implied powers doctrine avant la lettre, seeming to reflect Madison’s view that United States citizenship would be directly granted by the Union. However, none of the other Framers save Hamilton would have seen Congress as having that power: it was understood that the uniform rule of naturalization would be set by Congress, but executed by the states. Roche (1949), p. 7-8.
62 Cf. supra Ch. 1, starting at n. 131
63 Farrand and Matteson (1966), vol II, p. 269.
judicial processes, which we will explore in the remainder of this section. However, we can already see that the uniform rule of naturalization represents a dual ideal of equality: one is to render naturalized citizens as equal as possible to pre-existing citizens. This ideal of equality underscores the equality that is already presumed to exist among pre-existing citizens. And the other is to make the conditions for being naturalized as equal as possible among the several states, i.e. to grant access to citizenship on equal terms.

We can also take note of small, but not insignificant changes in the equality of United States citizens that were introduced by the Constitution: part of the “comity” clause of Article IV of the Articles was adopted by the Constitutional Convention in a dramatically stripped-down form (Article 4, Section 2), with almost no debate:

64 The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

This change represented, first of all, a tidying up of the interchangeable reference to the “inhabitants”, “citizens” and “peoples” of the states, clearly establishing the citizens of states as the bearers of the rights of United States citizenship. Any restriction of these rights to the “free” was dropped, although it was probably understood that citizenship of any state (and the equality that that implied within that state) would be restricted to the free, since slaves and indentured servants were obviously excluded from equality. And significantly, the exclusion of “paupers” and “vagabonds” from equality was now dropped, as was any formal reference to states’ laws.

Of course, the Articles’ formal reference to states’ laws, and entitlement to equality with the citizens of a destination state, could be dropped because that particular form of equality had only applied to rights of trade and commerce, as well as to the admissibility of restrictions on interstate import and export. Clearly, Article 1, Section 8 of the Constitution had granted Congress the power to regulate interstate commerce, so it was to be expected that any state restrictions on interstate import and export would soon be superseded by federal legislation. Thus the threat of inequality between migrating and sedentary United States citizens with regard to rights of interstate import and export was now removed. If Congress were to introduce any legislation restricting interstate commerce, all United States citizens would be equally affected by it.

But what was the nature of the new privileges and immunities clause? Although it did not formally refer to the law or the citizens of any one state, it was unclear whether it established a set of privileges and immunities that all citizens of the United States were uniformly entitled to (i.e., a vertically conferred set of rights), or whether it meant that migrating citizens were only entitled to equality with the citizens of a destination state (i.e., horizontally conferred rights). Or, even more controversially: whether it meant that migrating citizens could take privileges and immunities from their home state with them to a destination state

where those did not exist for that state's own citizens, thus implying, again, a fundamental inequality of United States citizens within one and the same state.

This latter potential dimension of the privileges and immunities clause was at its most inflammatory when it came to slavery, of course, as the right to own a human being in one state would directly clash with another state's prohibition of slavery. We will return to the privileges and immunities clause when we deal with slavery and its implications for equality. For the time being, though, the only uncontroversial analysis possible of the privileges and immunities clause, and what it meant for equality of all United States citizens, is that of Chief Justice Johns of the Delaware Chancery Court in the 1821 case Douglas v. Stevens:55

65 Douglas v. Stevens (1821), 469


The privileges and immunities secured to all citizens of the United States are such only as belong to the citizens of the several States; which includes the whole United States, and must be understood to mean, such privileges as should be common, or the same in every State.

Specifically, according to his colleague Justice Ridgely: rights to enjoy and defend life and liberty, rights to acquire and protect reputation and property, the contract right, the right to sue, the right of locomotion.66 This analysis is uncontroversial because it does not have the Constitution vertically confer rights (i.e. constitutively) upon all United States citizens; rather, this analysis points out (i.e., declaratively) what rights are already conferred by all the states in common.

Before moving on from citizenship in the Constitution, it is also worth examining the debate on the citizenship requirement for the Presidency, since this would amount to the establishment of the sole area in which naturalized citizens were less than fully equal to other citizens: the requirement that a President be a “natural born” citizen (Article II, Section 1). The original draft of the Constitution, it must be noted, did not provide for this requirement (in its Article IX, Section 1), and indeed, does not even provide that the President must be a citizen. This can probably be accounted for by the fact that the original draft envisaged the President being elected by the legislature; and the original draft did already provide for a citizenship requirement for Senators and Representatives. Without a doubt, the original drafters presumed that the Senate and House would not be so unreasonable as to elect a non-citizen to the Presidency, or that if they
did, they would have valid reasons to do so; a reflection of an apparently still-vigorous Whiggish idea that “Parliament can do no wrong.”

It was the manner of election of the President that made up the bulk of the debate about the Executive; any debate about citizenship and residence requirements for the President is entirely absent from the record of the Constitutional Convention. The addition of a citizenship and residence requirement appears suddenly in a report from the Committee of Detail on August 22, 1787: “he shall be of the age of thirty five years, and a Citizen of the United States, and shall have been an Inhabitant thereof for Twenty one years.”

However, when the proposed change resurfaces again on September 4, as part of a package of proposed changes by the [Third] “Committee of eleven”, it is now in the form of “natural born Citizen” with a residence requirement of fourteen years, and it survives the final stretch to signing on September 17 undisputed and unchanged. Thus it seems that the change was suggested and generally assented to during the more informal negotiation rounds at the Convention, probably at the behest of no less a person than George Washington. After all, on July 25, John Jay had sent George Washington a letter from New York:

Permit me to hint, whether it would not be wise & seasonable to provide a strong check to the admission of Foreigners into the administration of our national Government; and to declare expressly that the Command in chief of the american army shall not be given to, nor devolve on, any but a natural born Citizen.

If there are few clues beyond this one as to the history of the provision, it is still noteworthy that this is the first time that something directly implying the existence of “natural allegiance” comes up in the law of the United States assembled.

The specific mention of this requirement for the President implies that naturalization, which is also named in the Constitution, can never make an alien entirely equal to a natural born citizen. In this we already see a rupture with Coke-era English constitutional doctrine, in which naturalization has the full (and retroactive) value that the word implies, and a certain alignment with the

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67 In a number of modern parliamentary systems in which membership of the executive is constitutionally incompatible with membership of parliament (so-called “dualistic” systems, by contrast to “monistic” systems such as the United Kingdom, where the executive is composed of elected members of parliament), it is constitutionally conceivable that non-citizens can be appointed minister, even prime minister. While citizenship, and the right of passive suffrage that goes with it, is generally a requirement to be elected to parliament, a minister in a dualistic parliamentary system is generally appointed by the head of state, formally at the latter’s discretion, and therefore with no prerequisite of citizenship. One example is Gustáv Slamečka, minister of transport in the Czech Republic from 2009 to 2010, who for at least the first few months of his term was a Slovak citizen—this was not uncontroversial, however, and he did ultimately become a naturalized Czech citizen. (Source: [http://en.wikipedia.org/wiki/Gustáv_Slamečka](http://en.wikipedia.org/wiki/Gustáv_Slamečka), last visited on 30 December 2013)


71 Cf. supra in Ch. 1, at n. 39 et seq..
English Parliament’s belief that it had the power to impose disabilities on naturalized subjects, as with the Act of Settlement. When one considers that the very notion of being born already lies at the Latin root of the word “natural” (cf. *subditus natus*), it constitutes a clear exclusion of any abstract sense to qualify it with the word “born”, as Jay does emphatically. (Aside from this textual analysis, it is rather obvious that the Act of Settlement, and the disabilities on holding political office that it imposes on naturalized citizens, is the inspiration for the “natural born citizen” requirement.) The naturalized citizen clearly retains the one disability of not being able to be President.

Of course, as Kettner writes, the Americans had never really broken with the notion of “natural allegiance”. One state had seen fit to statutorily regulate the acquisition of citizenship by birth: Virginia, which at first declared all white persons born on the territory of the state to be citizens; in 1783 it repealed that act and replaced it with one granting citizenship to “all free persons born within the territory of this commonwealth”. In most, if not all the remaining states, it appears, “Americans merely continued to assume that “birth within the allegiance” conferred the status and its accompanying rights.” And it can probably be safely assumed that no state went so far as to enact the *ius soli* acquisition that Virginia did: the child of an alien father born on the soil of most states may well have been seen, at least initially, as an alien if the British constitutional casuistry was applied.

To the credit of the Framers, a grandfather clause was inserted in Article II, Section 1 that can be seen as evidence that they did not see “natural allegiance” to a U.S. state as being derived in an unbroken line from, or being a natural successor to, the British subjecthood of Americans born before the Revolution: “No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President” (italics added). Obviously, then, the Framers did not even qualify themselves as “natural born” citizens; each of them presumably traced his allegiance back *ab initio* not to birth, but to his individually expressed will during the Revolution. Thus, at least formally, the contamination of British natural allegiance as such was neatly excised from the founding moment; American citizenship could not be considered to have been directly derived from the matrix of British subjecthood.

Finally, it is important to note that the Framers envisaged United States citizenship as being derived from and dependent on state citizenship, not as a status that could exist independently. Roche reads this in the implications of the citizenship requirements for Senators and Representatives: if, as Art. I Sec. 2 provides, “No Person shall be a Representative who shall not have […] been seven Years a Citizen of the United States”, and if one considered citizenship of the

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72 Cf. *supra* in Ch. 1, at n. 152.
United States only to have been created by the ratification of the Constitution, then it would be Constitutionally impossible to elect a House of Representatives for seven years after ratification, and a Senate for nine years. Thus, clearly, Roche writes, citizenship of one of the states under the Articles of Confederation was to be understood as citizenship of the United States.\textsuperscript{76}

\textsuperscript{76} Roche (1949), p. 6-7.
The Naturalization Act of 1790

We will now examine the history of Congress’ early legislation passed on the basis of the uniform rule of naturalization, in order to get at what Congress thought it meant in terms of equality.

After ratification, one of the first orders of business for the newly constituted Congress was to pass the Naturalization Act of 1790, of which the original bill provided that

all free white persons who have, or shall migrate into the United States, and shall give satisfactory proof, before a magistrate, by oath, that they intend to reside therein, and shall take an oath of allegiance, and shall have resided in the United States for one whole year, shall be entitled to all the rights of citizenship, except being capable of holding an office under the State or General Government, which capacity they are to acquire after a residence of two years or more.

The House held an extensive debate on the bill in which all of the going issues relating to immigration and naturalization came up. Madison, now a representative from Virginia, repeated his opposition to such “progressive” naturalization (i.e., granting the rights of citizenship gradually) on the same grounds that he had opposed a minimum length of citizenship for Senators and Representatives: he was of the opinion that citizenship should be an all-or-nothing proposition without disability. The equality implied by citizenship, therefore, was to be absolute and not subject to gradations. He did not, however, oppose a minimum length of residence prior to being able to swear an oath and be naturalized, as this would prevent aliens from coming to the US, acquiring citizenship, and returning to their home countries, thereby evading “the laws intended to encourage the commerce and industry of the real citizens and inhabitants of America”. In his opposition to “gradual” citizenship (essentially: a temporary second-class citizenship), Madison was primarily concerned that excluding new citizens from active political life would discourage immigrants from coming. Thomas Tudor Tucker of South Carolina, on the other hand, had appeared to be concerned that it was economic, not political disabilities that would dissuade immigration. Tucker had proposed striking out the initial period of residence, allowing immigrants to be naturalized immediately to “enable foreigners to hold lands in their own right”; but had absolutely no objection to disabling them from holding political office for a period of three years. John Laurance (spelled “Lawrence” in the Annals) of New York had his doubts on

79 ibid., p. 1150.
80 ibid., p. 1147. Rep. William Maclay of Pennsylvania noted in his journal entry for March 19, however, that it was only due to the reception of the common law of England that aliens were barred from holding property; “all over Europe, where the civil law prevails, aliens hold property”. Maclay and Maclay (1890), p. 218, cited in Franklin (1906), p. 47.
formal grounds as to whether Congress even had the power to set minimum citizenship requirements for public office, since the Constitution had already established rules for the House and Senate; and he cited the link between political life and economics, reminding his colleagues that “taxation and representation ought to go hand in hand”.81

The debate went on and on with every possible permutation of these substantive issues. (There were also, of course, the expected arguments that the very presence, and not just the political participation, of certain immigrants—"criminals" and "paupers"—was undesirable.) As to the right to hold office, the proponents of abolishing or reducing disabilities, such as John Page of Virginia, generally cited liberal doctrine:

It is nothing to us, whether Jews or Roman Catholics settle amongst us; whether subjects of Kings, or citizens of free States wish to reside in the United States, they will find it their interest to be good citizens, and neither their religious nor political opinions can injure us, if we have good laws, well executed.82

Proponents of maintaining or extending disabilities, on the other hand, typically cited the unsuitability of foreigners to running a liberal society. A typical speech in the latter vein was delivered by Theodore Sedgwick of Massachusetts, who was against the indiscriminate admission of foreigners to the highest rights of human nature, upon terms so incompetent to secure the society from being overrun with the outcasts of Europe […] their sensations, impregnated with prejudices of education, acquired under monarchical and aristocratical Governments, may deprive them of that zest for pure republicanism […] Some kind of probation, as it has been termed, is absolutely requisite, to enable them to feel and be sensible of the blessing. Without that probation, he should be sorry to see them exercise a right which we have gloriously struggled to attain.83

We can see here an echo of the English political debate of a century prior, in which pro-immigration sentiment, claiming liberalism itself to be highly infectious, was opposed by the notion that foreigners might dilute “English liberties”.84

In that regard, one of the more curious arguments in favor of maintaining a disability on new citizens evidences something of a short memory for the constitutional conflict that sparked the Revolution. James Jackson of Georgia cites “the learned Judge” Blackstone as noting that the naturalized subject is incapacitated from “being a member of the Privy Council, or Parliament, holding offices, grants, &c.” […] So that here we find, in the nation from which we derive most of our ideas on the subject, not only that citizens are made progressively, but that such a mode is absolutely necessary to be pursued in every act of Parliament for the naturalization of foreigners.85

82 ibid., p. 1149.
83 ibid., p. 1155–1156.
84 Cf. supra Ch. 1 at n. 129.
Jackson fails to note that this rule, as a careful reading of Blackstone would have revealed, was not derived from evolved British constitutional doctrine or case law. Rather, the rule obliging Parliament to place this disability on naturalized subjects in its acts of naturalization was a statute (reiterating a provision of the Act of Settlement) passed by the same Whiggish Parliament that had become increasingly overweening after the Glorious Revolution, by whose statutes the Americans would later claim not to be bound, and whose notion of subjecthood the American colonial subjects vigorously dissented from. Jackson could perhaps be forgiven for not being well versed in Revolutionary doctrine—he himself only immigrated to Georgia from England in 1772, at the age of 15, and mainly experienced the military side of the Revolution, as a member of the Georgia Militia. But Jackson’s perspective would be telling for the kind of drift from pure liberal doctrine that American politics would experience as the Revolution receded from recent memory.

Another significant aspect of the House debate foreshadowed a “vertical” conflict between federal law and states’ rights, in which proponents of the latter openly doubted Congress’ authority to dictate conditions for holding state office. The Senate debate, for its part, was unremarkable but for the comments of Sen. William Maclay of Pennsylvania (the uncle of the Representative William Maclay of Pennsylvania cited supra at note 80), who, as Kettner writes, “saw in [the bill] a poorly disguised thrust by jealous and xenophobic New Englanders against the liberal and prosperity-producing admission policy” of his own state. In the end, however, Congress imposed as a requirement for naturalization (without disability) of “free white persons” that they first reside for two years “within the limits and under the jurisdiction of the United States”, thereby settling on the notion that some time was necessary for aliens to gain a taste for liberal society. The final law passed also established ius sanguinis acquisition of citizenship by children born of citizen fathers abroad, unless the father had never resided in the United States. Remarkably, Congress still omitted any positive pronouncement on birthright citizenship on the territory of the United States. This silence, in conjunction with the pronouncement that only “free white persons” could become naturalized, would cloud, in particular, the status of free blacks born in the postbellum United States.

86 Blackstone (1832), vol. I, p. 131 (par. 175), n. 45
87 Supra Ch. 1 at n. 156.
88 Cf. supra Ch. 1, at n. 149 et seq.
90 Roche (1949), p. 10.
92 Franklin (1906), p. 48.
The Naturalization Acts of 1795, 1798, and 1800

If the requirement of two years’ residence in the Act of 1790 had struck some at the time as too strict, then by 1795, conventional wisdom would judge it to be far too lax. Historical developments immediately subsequent to 1790 were the cause of this change in public opinion, as numerous immigrants began arriving in the United States fleeing upheaval in Europe (which had been set off by the French Revolution) and the Caribbean (which had been set off by the Haitian Revolution). Few of these refugees could be described as simple folk merely seeking a plot to quietly farm: ranging from French aristocrats and plantation owners to Irishmen fleeing English oppression, their causes for flight were more often than not political, meaning that they brought passionate political standpoints with them. By this time, as well, a partisan system was emerging in American politics around the two poles of the “pro-Administration” Federalists on the one hand and the “anti-Administration” Jeffersonians on the other. But the Federalists, suspicious as they were of revolutionary rabble-rousers and “Jacobins”, and the Jeffersonians, equally suspicious of the “anti-republican” mercantilists and aristocrats, were able to close ranks on the necessity of introducing more restrictions on naturalization.

The House debate on the bill to replace the Act of 1790 showed that nearly all of the representatives shared one central assumption: naturalization was an instrument to form the character of the American nation, one citizen at a time. If debates in the past had gone on the Lockean assumption that a liberal way of life was inherently conducive to the formation of liberal character on the part of immigrants, then by now, the more persistent assumption was that some types of immigrants were incorrigible to the values of the young republic, and that more heavy-handed measures were necessary.

The political concerns of the Federalists were represented by Rep. Samuel Dexter of Massachusetts, who in his introduction to the bill noted that America was the “last and only asylum for vagabonds and fugitives”; Dexter subsequently moved to require that only those aliens be admitted as to whom two credible witnesses had sworn to their good moral character and attachment to the welfare of the country. After some debate, the latter criterion was amended to require attachment “to the principles of the constitution of the United States”. Madison, who might be said to be speaking for the concerns of the Jeffersonian, “anti-Administration” camp, objected to the oath on the grounds that such a requirement was of greater disadvantage to those of “humble origin”, who might have been more itinerant and therefore unable to find two reputable witnesses. Nevertheless, the amendment passed.

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94 For an exploration of the legal-ideological fissures that pervaded the Constitutional Convention, and how these developed into the partisan system, see Scheiber (1978).
96 Cf. Ch. 1 starting at n. 131.
97 Franklin (1906), p. 49-53.
The Jeffersonians, for their part, insisted on the necessity of aliens renouncing any and all titles of nobility in an amendment introduced by William B. Giles of Virginia. Many members were initially unconvinced. However, the amendment ultimately passed, perhaps as much on its merits—a decisive edge may have been provided by Madison’s assertion that an English Revolution was immanent, and that America would be flooded with English nobles who might try to hold political office—as due to a certain spirit of partisan horse-trading. After all, as Giles noted, he had voted for the Federalist camp’s “clauses to guard against Jacobin extremes”.

The bill finally passed by the House is a prime example of law as a patchwork quilt, incorporating the concerns of polarized political parties. It additionally reflected a broad consensus, on which there was virtually no debate, that in any case, the minimum period of residence had to be increased from the previous period of two years; it was ultimately set at five, where in any case, an alien had to first swear a declaration of intention in a state or federal court three years before filing the actual application for naturalization.

It is worth mentioning one amendment that did not make it in the final compromise, as it touched a truly live wire in the division between the Federalists and the Jeffersonians, or more accurately between the North and the South. In a pointed response to Giles’ anti-nobility amendment, Dexter had attempted to introduce a requirement that any alien who held slaves be required to free his slaves upon being naturalized. Slave-owning members of the House responded either apologetically, with a claim that slavery was dying out anyhow (Giles, Madison) or furiously, essentially deeming any debate on the subject to be beyond the pale (Nicholas and Heath, both of Virginia). As a matter of fact, that debate was beyond the pale of the uneasy Constitutional consensus of the time on slavery, to which we will return in the next chapter. The amendment was defeated in a roll call, effectively burying the subject.

The Senate had no objections to the substantive requirements for naturalization in the bill passed by the House. However, the Senate (whose members, after all, were elected by the respective state legislatures) was less influenced by partisanship than it was by an interest in protecting states’ rights against the Union. By a vote showing no particular partisan bias, it inserted into the first section of the bill the text: “That any alien, being a free white person, may be admitted to become a citizen of any of the United States, on the following conditions, and not otherwise” (italics added). With this text (which was an amendment from “a citizen of the United States, or any of them”), the Senate made clear that although the federal legislature had the power to “establish a uniform
“rule of naturalization”, it still did not envisage United States citizenship as an independent status, but rather one derived exclusively from the citizenship of a state; and naturalization was an act to be carried out by the states.103

However, the Senate subsequently passed an amendment to deal with the vexing question of naturalization in the federal territories “southwest and northwest of the Ohio”, and this amendment revealed that the doctrine could not be consistently upheld. The amendment empowered federal courts in the territories to naturalize aliens and changed the text back to “a citizen of the United States, or any of them”.104 As Roche points out, these territorial naturalizations would result in citizens of the United States who were not citizens of any state.105 It is still clear from the text of the final law passed on January 26, 1795, however, that United States citizenship always implied a dual attachment: in addition to the proviso of five years residence in the United States, the law required that the alien have been resident for at least one year within the state or territory where the naturalizing court is located. Thus it is clear that Congress presumed that there could be no U.S. citizenship without some form of substantial attachment to a smaller community, whether that community was formally a state or not.

The uneasy consensus between the pro-Administration Federalists and the anti-Administration Jeffersonians (or “Republicans”, or “Democratic-Republicans”, or “Democrats”) that had been stitched together in the Act of 1795 would not hold up for long. Federalists were already grumbling that new citizens were too often biased toward the Democrats. Moreover, the Federalists thought the five-year requirement to be insufficient to integrate new arrivals and to screen out undesirable aliens. But the Federalists gained a majority in the House in the election of 1796, at the same time as Federalist John Adams became President (defeating Jefferson) in the first partisan presidential election; thus they had a mandate to make their own mark on American nationality law. The feverish run-up to a war with revolutionary France and the revelation of the XYZ Affair turned public opinion against foreigners and aided the Federalists in passing a wave of repressive legislation at the end of the Fifth Congress: the Alien and Sedition Acts and the Naturalization Act of 1798.107

The main substantive accomplishment of the Naturalization Act of 1798 was an increase in the required period of residence to fourteen years. Furthermore, on the axis of state-federal relations, the Act introduced a requirement that formally slid naturalization more toward the pole of (at least

103 ibid., p. 66-67.
104 ibid., p. 68-69.
105 Roche (1949), p. 11.
106 An Act to establish a uniform rule of Naturalization; and to repeal the act heretofore passed on that subject. (United States Congress 1795)
Notably, one suggested amendment to the bill, by Harrison Gray Otis of Massachusetts (the nephew of the revolutionary theorist Otis referred to supra at n. 5), did not make it: Otis wished to bar all but natural-born citizens from public office, thereby instituting the same disability on naturalized citizens that Great Britain had. However, support for this notion could not even be mustered in the jingoistic Fifth Congress. As Abraham Venable of Virginia pointed out, to the general assent of the House, the Constitution ruled out the institution of second-class citizenship: “Foreigners must … be refused the privilege of becoming citizens altogether, or admitted to the rights of citizens.”

Otis tried to counter that the Constitution did not bar Congress from increasing the residency requirement for citizenship to “the life of a man”, and thus did not bar it from excluding new citizens from certain privileges, but the House did not follow his argument.

Nevertheless, the substance of the Act, as it was ultimately passed, exposed a formal problem leading to varying degrees of citizenship. Most states conferred state citizenship on aliens after they satisfied a residence requirement of two to five years. The divergence between the states’ requirements and the previous federal residence requirement was therefore either nil (meaning an alien would become a state and a federal citizen at the same time) or relatively short (meaning an alien could become a state citizen first, then become a federal citizen just a few years later after satisfying the requirements of filing a statement of intent and additional residence). A federal requirement of fourteen years, however, opened up such a yawning gap with the state requirements that it raised the question of whether such a divergence was even allowed by the Constitution, or whether Congress’s power to establish a uniform rule of naturalization “restrained” states in their admission of state citizens without federal effect. (This potential conflict over the power to naturalize strikingly echoed the conflict over naturalization that had arisen between the British government and the colonists just 25 years earlier in 1773, where certain colonies sought to be able to continue to naturalize aliens under more lenient terms than those required for Imperial effect.)

The Act of 1795 as well as the Act of 1798 both made an exclusive claim to prescribing the conditions under which the citizenship of “any of the

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108 Roche (1949), p. 12; Ch. 5 of Franklin (1906), p. 72-96, provides a detailed account of the legislative process leading up to the passage of the Act
109 See Blackstone (1832), supra at n. 86.
111 Kettner (1978), p. 244-245
112 Franklin (1906), p. 78-79.
113 Cf. supra in Ch. 1 at n. 173.
United States” could be acquired.\textsuperscript{114} But in the reading of the day, it seemed that the Constitution did in fact allow the anomaly of distinct conditions for acquiring state citizenship, due to its provision for the election of the House of Representatives (Art. I, Sec. 2) that “the Electors in each State shall have the Qualifications requisite for Electors in the most numerous Branch of the State Legislature”; this clearly implied that since states could independently decide what the qualifications were for voting, they could independently determine the qualifications for state citizenship. The uniform naturalization rule could only restrain states in their power to make federal citizens. Thus a status that Roche calls “domestic citizenship” had hereby come into existence: this was held by state citizens who were not United States citizens and could not be elected to the House, the Senate, or the Presidency; even though oddly enough, as Senator Bayard of Delaware, pointed out, they did have the right to vote for members of the House.\textsuperscript{115}

In any case, the Naturalization Act of 1798 did not remain in force long enough for anyone to litigate over this legal dilemma. (One federal circuit court ruling in 1797—namely, dealing with the question of whether the defendant could be convicted of treason—had implied with \emph{obiter dicta} that a naturalization based on Pennsylvania’s own rules, performed subsequent to the ratification of the U.S. Constitution, could not make a United States citizen, which still did not entirely rule out the existence of domestic citizenship.\textsuperscript{116}) Jefferson was elected President in 1800, and at the same time his Democratic-Republicans gained a majority in the House, riding on a public backlash to the Alien and Sedition Acts. On April 14, 1802 the Naturalization Act of 1802 was passed on Jefferson’s initiative, largely restoring the more relaxed requirements of the Act of 1795. Federal statute law on naturalization was to remain largely unchanged for the rest of the 19\textsuperscript{th} century.\textsuperscript{117}

It was the courts that would continue the development of US citizenship, and indeed of the relationship between the Union and the states, interpretively. In the early Congresses, we can see the currency of Whiggish ideas of Parliamentary sovereignty, which was only to be expected at the heady beginning of a new democracy. Moreover, as Pound writes, post-revolutionary Americans were more inclined to trust the legislative branch than the judiciary: where in England, it had

\begin{itemize}
\item[A\textsuperscript{114}] “any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions, \textit{and not otherwise}” (Section I, Act of 1795); “no alien shall be admitted to become a citizen of the United States, or of any state, \textit{unless in the manner prescribed by the act} [of 1795, as amended by the Act of 1798]” (Section I, Act of 1798)
\item[A\textsuperscript{115}] Roche (1949), p. 13 and Franklin (1906), p. 78-79.
\item[A\textsuperscript{116}] The United States \textit{v. Villato} (1797); cited by Kettner (1978), p. 250 n. 2 and Roche (1949), p. 15-16.
\item[A\textsuperscript{117}] Kettner (1978), p. 245-246; Roche (1949), p. 13-14; and, in detail, Ch. 6 of Franklin (1902), p. 97-106
\end{itemize}
been the courts that defended the rights of Englishmen against the crown, in colonial America this role had been filled by the colonial legislatures, as royal judges defended the prerogative of the crown. Politics, and the ability of the majority to accomplish what it wanted, was still having its day. And the Whiggish Blackstone was the favored legal manual for the political lawmaker.

However, the US Supreme Court, in particular, would soon begin to take the sharp edges off of the will of the majority by asserting the supremacy of the rule of law, and in particular its spirit in the Constitution. Chief Justice John Marshall let this sound be heard, which owed more to Cokean notions of the judge’s role as the final arbiter of the law than to Blackstone, in the Court’s groundbreaking decision *Marbury v. Madison* in 1803.

As to the uniform rule of naturalization, the first pronouncement of the US Supreme Court was in 1817 in the case *Chirac v. Tenants of Chirac*. Once more, it was a property dispute that had everything to do with the fact that aliens could not, as a rule, inherit property. However, the central issue at hand was not whether the deceased, was or was not a US citizen—he was, having been naturalized by Federal law in 1798, on top of having been naturalized by Maryland law in 1795. Rather, it had to do with a point of international law that was important for the French heirs of the deceased: the interpretation of a treaty between the US and France (the Convention of 1800) ending the Quasi-War, which had reciprocally granted both parties’ citizens inheritance and other property rights. Nevertheless, Marshall seized the opportunity to state, in a somewhat extraneous point concerning the naturalization of the deceased: “that the power of naturalization is exclusively in Congress does not seem to be, and certainly ought not to be, controverted”. This *obiter dictum* implicitly adopted the plaintiff’s argument, cited by Marshall, that Maryland’s own naturalization law had been “virtually repealed by the Constitution of the United States and the act of naturalization enacted by Congress”.

State and federal courts subsequently fell into line with this ruling, declaring state naturalizations based on divergent rules to be void. At least one lawyer before the Supreme Court in 1820 advanced a teleological argument for the nullity of state naturalization statutes, which seemed to echo Madison’s argument in *Federalist* 42, in light of the Constitution’s comity clause, which essentially preserved the *Indigenat* established by the Articles of Confederation, it would defeat the supposed purpose of a uniform rule of naturalization if aliens could be more easily naturalized in one state and then gain full reciprocal rights in

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119 *Marbury v. Madison* (1803)
120 *Chirac v. Tenants of Chirac* (1817)
121 ibid., p. 269
122 *Supra* at n. 47
123 *Supra* at n. 44
all of the others. And for many state courts, it made sense to stop interpreting the comity clause as the complicated “intercitizenship” that had existed under the Articles of Confederation, but analyze it in a national spirit of simply making all state citizens United States citizens. In this spirit, citizens of one state, when moving to other states, would not be seen merely as aliens being granted reciprocal rights and being relieved of disabilities, but simply as citizens.

But by now, Marshall had already offered a more legal-formal interpretive basis for his statement in Chirac. In McCulloch v. Maryland, he had introduced his doctrine of implied powers. Because Article 1, Section 8 of the Constitution grants Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers”, Marshall reasoned, the Constitution grants Congress implied powers to do what is necessary to make use of its express powers. The flip side of the coin is that that Constitution can also contain implied limitations. Read in this light, Marshall’s statement in Chirac is not so much teleological (i.e., based on divining the intent of the Framers behind the text) as it is purely systemic (i.e., based on the organization of the text itself, without any deeper speculation): the constitution grants Congress the power to set a uniform rule of naturalization, thus there is an implied limitation on the states to set their own rules for naturalizing aliens.

However, Marshall would go on to apply the doctrine of implied limitations to Congress as well, and specifically with regard to the substance of citizenship. In Osborn v. Bank of the United States, Marshall devoted an obiter dictum to the position of naturalized citizens, noting that the “Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it so far as respects the individual”. He went on to say that the naturalized citizen “is distinguishable in nothing from a native citizen except so far as the Constitution makes the distinction”. And the only distinction that the Constitution makes is that the naturalized citizen cannot be President; therefore, there could be no other limitations.

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125 ibid., p. 255.
126 McCulloch v. Maryland (1819)
127 ibid., p. 411-412.
Conclusion: immigration and naturalization

So far, we have seen that at the beginning of the development of US citizenship, migration is essential to any analysis of who should be considered to be a citizen and on what grounds. In the time immediately following the revolution, a former British colonial subject would be considered to have become a US citizen (in the “external” sense of nationality) by not migrating.

The Framers of the Constitution and the members of the first Congresses after its ratification, for their part, use the issue of migration, specifically immigrants from Europe, to define what they politically wanted a US citizen (in the “internal” sense of citizenship) to be, and what degree of equality they want to grant naturalized citizens. In these debates, we see the first rejection of the notion of “classes” of citizenship whose bearers are entitled to different rights, although the Constitution does de jure define one privileged class of United States citizens: only those who are natural-born citizens or citizens at the time of entry into force of the Constitution can be President.

One issue that continually comes to the forefront in this political analysis was the problem of divergent rules of state naturalization and whether this made it possible for an immigrant to too easily become a United States citizen, or to go on to enjoy the rights of one through inter-state migration. It is noteworthy that the scope of this “problem” was never empirically identified: it remained on the level of a formal thought experiment.

As the Congress made use of the power to set a uniform rule of naturalization, more real and imagined concerns about the admission of immigrants to US citizenship, and what kind of people US citizens were meant to be, played a role. As the Congress became more partisan, moreover, these substantive concerns became polarized: the Federalists were more concerned with poor rabble-rousers, while the Republicans were more concerned with European nobles and wealthy patricians.

However, the substantive analysis of citizenship as defined by immigration would soon be eclipsed by a more formal issue: how citizenship was to express the relationship between the Union and the states, as defined by the Constitution. The site of this struggle for control over citizenship was ever less the legislature, and ever more the courts. The Marshall Court increasingly centralized the granting of US citizenship; and importantly, it did so on purely formal grounds of the implied powers of the Congress, not by analyzing citizenship in terms of its teleology against a background of migration.

The legal problems supposedly engendered by the (prospect of) immigration of European settlers would in retrospect turn out to be simple when compared to a much stickier problem: the population of largely native-born non-citizens held as slaves. The Marshall Court’s case law on naturalization, and indeed the text of the Constitution, would turn out to provide an inadequate basis
for dealing with the position of slaves. And in particular, it was to be the interstate migration of slaves that would expose the inadequacy of a purely legal-formal federal-state analysis of citizenship.
Chapter 3: Horizontal conflict in United States citizenship before the Civil War

Introduction

It is considered to be one of the great paradoxes of early United States history that a polity based on the casting off of tyranny and the equality of all men could tolerate the abominable institution of slavery. Indeed, the revolution almost predictably brought a wave of abolitionist sentiment in its wake: Pennsylvania and the New England states were the first to abolish slavery in 1782, and New York and New Jersey were well on their way. And Congress, under the Articles of Confederation, would almost unanimously ban slavery in the Northwest Territories with the Northwest Ordinance in 1787. Indeed, it seemed likely that slavery, as many of the liberal revolutionaries who happened to be slaveholders would almost sheepishly claim, would eventually be abolished or that it would otherwise simply fade away. Yet the abolitionist movement was never to gain any traction at all in the states south of Virginia, nor would it ever reach its ultimate goal in Virginia, Maryland or Delaware. Thus it was an “incomplete revolution”, in the words of Fehrenbacher, that was to neatly divide the United States in two at the time of the Constitutional Convention.1

In this section, we will start from the time of the framing of the Constitution and trace the political and legal developments leading up to Dred Scott, one of the factors touching off the constitutional crisis that became the Civil War.

Again, I will work on two planes of analysis of citizenship, one formal and one substantive. On the one hand, alienage can be defined formally as the opposite of citizenship in the sense of nationality, subjecthood and allegiance; for white immigrants, it was this formal definition of citizenship that always ultimately won out in legal and political developments. Once a white immigrant was formally admitted to citizenship, the legal barriers he or she would encounter were presumably few, at least to the extent that she or he could pass unnoticed for his or her alien origin. Native-born blacks in United States history, on the other hand, were prima facie considered to be “anti-citizens” or permanent aliens, even where they formally were in fact citizens;2 for them it would be difficult, even by seeking legal remedies, to escape persistent substantive notions of what a United States citizen was supposed to look like.

The problem was compounded by the fact that the Constitution, by contrast to its assertion of Congress’ authority for the naturalization of aliens, did not take a clear stand on slavery and the position of black Americans. The role of

the federal courts in conflicts on the citizenship of black Americans was largely to consist of mediating the claims of states that categorically excluded blacks from state citizenship, those that emphatically or implicitly admitted blacks to state citizenship, and the ambiguous position of federal law, particularly in the territories where federal law presumably had original jurisdiction. Every one of these legal conflicts would be touched off by a concrete case of a black American asserting the freedom of movement and residence inherent in US citizenship by crossing a jurisdictional border within the United States.

Entirely new formal problems were to arise: the question of a federal citizenship for all Americans on the “vertical” plane, and the relationship among citizenships of the several states on the “horizontal” plane. Issues of comity that had never properly been dealt with in the colonial era would arise. Furthermore, Western expansion would confound these otherwise simple perpendicular axes. What was the nature of the jurisdiction in territories of the United States where no state had yet been established, and what was the role of citizenship in it?

Slavery would prove to be the flashpoint of the conflict between the equality implied by the “vertical” United States citizenship, on the one hand, and on the other the equality to be guaranteed by states to each other’s citizens reciprocally, on the “horizontal” plane. The notion of human beings as property was obviously inconsistent with the nation’s liberal ideals of self-government and the promise of equality for all. On the one hand, the federal legislature had clearly decided to grant nearly full equality to those (usually European) immigrants who became naturalized citizens. Yet at the same time, slaves were being permanently maintained as aliens within the legal systems of the Southern states; this while slaves were, in fact, themselves immigrants or the native-born descendants of immigrants. The federal Constitution did not directly condone slavery, yet it did not vertically prohibit it either, and in fact it supported it on one crucial point of horizontal equality. The three orders of federal law, state law, and territorial law were to clash over incompatibilities in the vision of equality that each of them guaranteed their citizens (or failed to guarantee to black Americans). And the link between state and federal citizenship, which had never quite been firmly established, was shattered by the *Dred Scott* decision.

At the conclusion of the Civil War, three Amendments to the Constitution would be adopted to abolish slavery, establish a solid federal citizenship, and guarantee that the right of suffrage would not be abridged for any United States citizens. But as we will see in the next chapter, the formal status of United States citizenship would not be enough to guarantee equality.

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3 ibid., in particular p. 89-92.
Slavery and the Constitution: three provisions

A textual analysis of the Constitution of 1789 reveals no direct reference to race or slavery. Yet at least three provisions were always unambiguously understood to refer to slavery in other ways (italics added):

- Article I, Section 2 (The House): Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

- Article I, Section 9 (Limits on Congress): The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person. [And, in conjunction with it, Article V (Amendment): no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article;]

- Article IV, Section 2 (State citizens, extradition): No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, But shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Fehrenbacher attributes the lack of direct references to slavery, in fact, to a kind of embarrassment about the institution on the part of the Framers: how could slavery be reconciled to their revolutionary ideals of liberty? Yet one can make no mistake about what the italicized clauses were indirectly referring to. “It is,” as Fehrenbacher eloquently phrases it, “as though the framers were half-consciously trying to frame two constitutions, one for their own time and the other for the ages, with slavery viewed bifocally—that is, plainly visible at their feet, but disappearing when they lifted their eyes.”

In his later, posthumously published book *The Slaveholding Republic*, Fehrenbacher defends his view that the Constitution was essentially an anti-slavery document. In this, he actively disputes the views of many modern legal scholars, including no less a figure than the late Supreme Court Justice Thurgood Marshall, who see the original draft of the Constitution as indelibly stained by the

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5 Fehrenbacher (2003)
persistence of slavery for over seventy years after its enactment. Fehrenbacher, to support his view, distinguishes constitutional intent from constitutional practice; he claims that if the goings-on at the Constitutional Convention and prior to it provide any indication of the framers’ intent, then the Constitution is clearly oriented toward either the abolition or the expected obsolescence of slavery. I will review Fehrenbacher’s arguments and respond to them here, raising objections from the points of view of both constitutional practice and constitutional intent.

The Apportionment Clause

To start with the apportionment clause: the fact that every slave was counted as three-fifths of a person was indeed not necessarily an endorsement of slavery, or even of a categorical exclusion of blacks from citizenship. Today’s citizen of the United States might anachronistically view the purpose of the apportionment clause as ensuring that the citizens of the states are represented in Congress proportionately to their numbers (since, it stands to reason, “no taxation without representation” was a Revolutionary rallying cry); and might thus draw the retrospective conclusion that the Constitution qualified a slave as something less than a full inhabitant or citizen deserving of equal political representation. However, as Fehrenbacher points out, two notions were widely accepted at the time: first, that taxation was to be proportional to wealth and second, that population was a reliable measure of wealth. One might also add that the contemporary notions of “representation” were tied up with wealth as well; and indeed, in almost all states at the time, only property owners had voting rights. (The Constitution, notably, was entirely silent about who had the right to vote for Congress or for the president, leaving this up to the states; there was no direct link between United States citizenship and rights of active suffrage.) All the same, the history of how each slave came to be counted as three-fifths of a person for purposes of representation was a remarkably non-straightforward journey from how slaves were counted for purposes of taxation.

It was during the drafting of the Articles of Confederation that the subject first came up of what each state’s contribution to the common treasury would be, and how to calculate each state’s wealth. If wealth was to be calculated on the basis of population, and if taxes were to be paid according to that wealth, then it was to the southern states’ advantage for slaves not to be counted and to

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7 ibid., p. 21.
9 Cf., as to the fact that the right to vote for the House of Representatives was determined by state law, supra in Ch. 2 at n. 115.
the northern states' advantage for slaves to be fully counted. For either side, it was more a nakedly economic calculation rather than a judgment of the justness of slavery or of counting persons as property, although James Wilson of Pennsylvania noted bitterly that not counting slaves would encourage the continuation of the slave trade, presumably since there would then be no financial pressure on slaveholding states to restrict the importation of slaves. In the end, the southern delegates won out in that population was entirely discarded as a measure of wealth, and according to Article VIII of the Articles of Confederation, the states were to contribute taxes "in proportion to the value of all land within each State, granted or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the united States in congress assembled, shall from time to time direct and appoint".10

After independence, Congress set about the task of deciding just how exactly the value of the land and buildings would be calculated, only to conclude that it would be fiendishly difficult. A calculation based on population would be much easier; thus the question of how to count slaves returned to the table. In reality, it was a matter of pure political tug-of-war between the polarized positions of the northern delegates (1 slave = 1 inhabitant) and the southern delegates (1 slave = 0 inhabitants). The beginning of the solution was ultimately to be found in a pseudo-scientific conjecture that had already been made during the drafting of the Articles of Confederation in 1776 by Virginia delegate Benjamin Harrison, that ‘two blacks be rated as equal to one freeman’: this was in accordance with the southern delegates’ insistence that slave labor was less productive than free labor, and therefore generated less wealth. Once the southern delegates had put the value of one-half on the table, the northern delegates countered with a value of two-thirds. Ultimately, Congress settled on three-fifths as a compromise between those two positions. This proposed amendment to Article VIII, to calculate wealth, and therefore the share of the tax burden, based on the full number of free inhabitants and three-fifths of the slave inhabitants, did not actually pass in the end. But the so-called “federal ratio” had now been established as a useful constant, a crystallized quantification of the compromise the northern states and the southern states were capable of reaching with each other.11

The question of how to apportion congressional seats, as it arose at the Constitutional Convention, was originally a debate on whether states were to be represented equally in Congress (each with an equal number of votes, favored by “small” states) or whether they were to be represented proportionally (with a number of votes allocated based either on population or contributions to the national treasury, favored by “big” states). Crucially, this debate did not at all split cleanly along the line between the North and the South, as both contained big states in terms of wealth or population (Massachusetts, Pennsylvania, Virginia) as

10 Fehrenbacher (2001), p. 23-24. The southern delegates achieved an additional victory, Fehrenbacher notes, in that each state’s obligation to contribute soldiers and sailors to the common military was to be proportional to its number of ‘white inhabitants’ (Article IX).
well as small states (Rhode Island, Georgia, South Carolina). The “great compromise” in this case was to institute two houses of Congress, one with equal representation, and one with proportional representation. The question of proportional representation in the House of Representatives would then necessarily involve a debate on how to count slaves. This time it was an antislavery representative of a big state who would cut the Gordian knot. James Wilson, mindful of the clout that Pennsylvania stood to gain through proportional representation, suggested that the federal ratio be employed for counting slaves, and his proposal was immediately accepted by the committee of the whole. This, ultimately, is the source of the apportionment clause for the House in the Constitution.

It would be a stretch to suggest that Wilson was behaving cynically by placing his state’s interests ahead of his antislavery principles. For the question of how to count a slave was not at all one of quantifying a slave’s human dignity or equality. In fact, this was proven by the fact that at the Constitutional Convention, the northern states’ and the southern states’ ideal positions on counting slaves were both the complete opposites of what they had been during the drafting of the Articles of Confederation. In the negotiations on the Articles, the population of a state would have determined what its relative tax burden would be, and so it was in the North’s interest to have each slave counted as a full person and in the South’s interest to have each slave counted as zero persons. But for the apportionment of seats in the House, on the other hand, having a relatively large population was to a state’s advantage: the North, then, strove to count each slave as zero persons while the South strove to count each slave as a full person. Such a calculation directly contradicts what one might expect if one were to attribute emancipatory and racist motives to the North and the South, respectively, in determining how to count slaves. In fact, Wilson’s proposal arguably advanced the position of the South in the standing compromise, since a truly equivalent application of the federal ratio to counting slaves, in light of the reversed interests of the North and the South, would have been two-fifths and not three-fifths. But such was the interest of the big states in securing proportional representation that a northern big state’s advantage was thought to be little diluted by a more heavily weighted counting of slaves.

Thus, we can conclude, the apportionment clause expressed an essentially neutral attitude toward slavery, originating as it did from the vagaries of negotiations on the axes between the northern and southern states, on the one hand, and the big states and the small states on the other. To go beyond Fehrenbacher’s analysis of pure constitutional intent (or lack of intent), however, and look at the constitutional practice it enabled, it certainly granted the southern states, and thus the interests of slaveholders, more influence in the long run—in

12 Fehrenbacher (2001), p. 29-30
the form of more seats in the House—than it would have if slaves had not been counted at all.

The Slave-Trade Clause

The slave-trade clause, on the other hand, reveals an anti-slavery thrust in the original Constitution, or at least casts such a thrust into sharp relief. For there was another provision of the Constitution that was unambiguously understood to apply to slavery, or at least to the slave trade:

(Art. I, Section 8): The Congress shall have Power [...] to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Delegates from the South immediately recognized, upon the passage of the Commerce Clause, that it would give Congress the power to outlaw the importation of slaves, since it gave Congress a blanket power to regulate all imports and exports. South Carolina, in particular, agitated for the introduction of the slave-trade clause as an explicit derogation from the Commerce Clause to protect the lower South’s interest. (The South was not a united bloc on this issue: Maryland and Virginia, despite maintaining slavery, had developed a rather strong distaste for the importation of slaves.) The Carolinas and Georgia enlisted the help of the New England states in voting in the slave-trade clause; it is unclear, in Fehrenbacher’s analysis, what exactly New England was getting out of the deal. Trade-dependent New England needed the South’s help in defeating proposals to require two-thirds majorities in Congress for acts relating to navigation and commerce. Nevertheless, the lower South did not appear to reciprocate in helping New England achieve its goals later on, although all proposals for a two-thirds majority requirement for commerce acts were ultimately defeated.13

Despite the fact that the slave-trade clause had been voted in, and even had been granted immunity from Constitutional amendment (in Article V), Fehrenbacher analyzes it as a compromise that is ultimately anti-slavery. It left little doubt that ultimately, the importation of slaves was definitely to be banned by Congress, and that it would be banned with the express consent of the deep South. And subsequent practice bore out this Constitutional intent, as well: in 1807, Congress duly passed the slave-trade act to ban it.14

13 ibid., p. 33-35.
14 ibid., p. 41-43.
The Fugitive Slave Clause

The fugitive slave clause, finally, was “the one unambiguously proslavery provision of the Constitution”. 15 Even Fehrenbacher recognizes that in practice, this clause was to have a “corrosive effect on national unity”.16 Nevertheless, Fehrenbacher goes on to make a claim that clearly betrays a fundamentally different understanding of federal constitutionalism that the one that this thesis is based on. Fehrenbacher advances a legal-systemic argument that the fugitive slave clause was not in Article I, which enumerates the powers of Congress, but in Article IV, Section 2, which is about interstate comity. Thus, Fehrenbacher argues, the framers saw the fugitive slave clause as nothing more than a “declaratory limitation of state authority,” and the Constitution did not accord slavery any legitimacy in federal law.17

I will sharply diverge from that point of view. As to the legal-systemic argument: whether or not the fugitive slave clause could be enforced by Congress is beside the point. The point was that a legal norm had been established, superior to the legal norms of the states, that insisted that a state, possibly in violation of its own laws, would have to recognize and enforce one person’s ownership of another if another state’s laws provided for such ownership. In fact, the fugitive slave clause is to be found in the same article that provides—virtually identically to the Articles of Confederation—for extradition of persons from one state to another for prosecution. As I already noted,18 that norm introduced a crucial form of equality to U.S. citizenship—equality in subjection to prosecution by any state—and can hardly be described as a “soft” norm. Indeed, in 1793, Congress passed a statute19 implementing both the interstate extradition clause and the fugitive slave clause at once; although there is some evidence of controversy in the Congressional debates,20 the passage of the bill cemented a constitutional consensus that both clauses did essentially enumerate powers for Congress. We will explore the Act implementing the Clauses in greater detail below.

Indeed, if our analysis of United States citizenship so far has relied heavily on the horizontal aspects of citizenship—U.S. citizenship was exclusively horizontal in nature under the Articles, and the “uniform rule of naturalization” clause of the Constitution only partially colored it in vertically—it would be impossible to state that slavery did not exist on a federal level, merely because it only affected legal relationships among the several states. Indeed, slavery could almost be viewed as the complete antithesis of citizenship in the federal order,

15 ibid., p. 44.
16 ibid., p. 35-36.
17 ibid., p. 44.
18 Supra Ch. 2 before n. 43.
19 Fugitive Slave Act, (United States Congress 1793)
indeed as a sort of permanent alienage or “anti-citizenship”,21 one whose legal
effects were transmitted with the same reciprocity as citizenship. Just as Madison
might have feared that just one state with overly lax naturalization requirements
would lead to a flood of undesirable migrant citizens for other states, it took only
one state to allow slavery for that legal institution to at least have dormant validity
in all of the other states under the fugitive slave clause.

Let us pause at this point to note that the fugitive slave clause introduced a
paradoxical form of equality for United States citizens, much as the clause of
Article IX of the Articles of Confederation did, which exempted migrating
citizens from any state restrictions on interstate import and export.22 Arguably,
the fugitive slave clause presented a more uniform guarantee of equality for all
United States citizens than the aforementioned clause. The fugitive slave clause
guaranteed a specific right to property. Especially in the common law (i.e., the
English legal tradition) of that era, a right to property was technically analyzed in
terms of the owner’s access to court proceedings—actions—to enforce that right.23
In particular, the fugitive slave clause guarantees access to an action of recovery of
“unjustly detained” property in the form of a human being.24 If one formulates the
fugitive slave clause in highly abstract, formal terms, then the equality it makes
available to all United States citizens is uniform: every United States citizen has
an equal right to recover human property in any other state to the exact same
extent that the citizen has that right in his or her home state. Thus, unlike Article
IX of the Articles, the fugitive slave clause does not entitle only migrating United
States citizens to a form of equality.

However, that uniformity holds up only when such a high level of
formal abstraction is maintained. Substantially, since the fugitive slave clause
defines the right by reference to the laws of the home state, any United States
citizen is only as “equal” under the fugitive slave clause as the law of his or her
home state allows him to be. In fact, this represents an inversion of the form of
equality for federal citizens that the non-discrimination principle upholds. The
non-discrimination principle means that a citizen of one state, upon migrating to
another state, is entitled to the same rights that a citizen of the destination state is

21 Buckner Inniss’ term: she explores the history of the legal presumption of slavery for
22 See supra in Ch. 2 before n. 40.
24 Morris (1996) provides an extensive analysis of the paradoxes and contradictions inherent
in the laws of Southern states regarding slavery, particularly in the way in which they
attempted to reconcile slavery with the common law, to which the institution of slavery was
largely alien. Legal apologists for slavery sometimes tried to insist that slavery was not
ownership of a human being, but rather ownership of or contractual creditorship with regard
to a human being’s labor (p. 62). With this reading, of course, the application of the fugitive
slave clause to slaves can be made to chime with its (at least theoretical) application to
indentured servants. In this thesis, however, we will simply deal directly with the most
abhorrent legal implications of slavery, i.e. as a right of property in a living human being that
is legally barely distinguishable from a right of property in an inanimate object.
entitled to, thus ensuring a uniform field of equality for all federal citizens within the destination state. The fugitive slave clause, on the other hand, means that a citizen can have rights in his or her home state that are “portable” to other states, even those which do not guarantee those rights to their own citizens. Thus within one state, there is no substantial uniformity of equality: different federal citizens are entitled to different degrees of equality. In fact, this form of equality does not have a territorial effect at all, but is personal in nature, existing only among citizens of a given state (or, as an agglomerate set in this case, all of the citizens of all of the states that have slavery): in this regard, this “right of citizenship” begins to resemble the sets of laws (i.e. systems of “right”, rather than individual rights) that were personally applicable to citizens of various poleis in ancient times wherever they went, domestically or abroad.

I must, of course, grant that the fugitive slave clause is not at all addressed to citizens. It is theoretically conceivable that a free alien, i.e. an immigrant who had not yet been naturalized in the United States, or any one of them, living in a Southern state could have been a slave owner and could have made use of the fugitive slave clause if his or her slave had fled to a Northern state. In order to get at what the fugitive slave clause means for the equality implied by citizenship, are we then merely conflating all the “free inhabitants” of a state with the citizens of that state? As to the holder of the right of property in a slave, perhaps: the equality in terms of a right to property guaranteed by the fugitive slave clause does not necessarily inhere in citizenship.

But the fugitive slave clause does specifically mean something for United States citizens that it does not mean for aliens. It means that a person whom one state sees as a citizen, but whom the laws of another state may see as a slave, is not safe in her or his state of citizenship; the right of the person claiming a right of property in the citizen can derogate the citizen’s right of freedom and unmolested residence in his or her state. This aspect of the fugitive slave clause, then, is entirely comparable to the interstate extradition clause: just as all state citizens are equally subject to prosecution for a crime committed in any state, regardless of their state of residence, so are all state citizens also equally subject to a claim of property that someone from a slaveholding state may lay on them.

In practice, however, only black citizens of non-slaveholding states could be even be claimed as a slave in a slaveholding state; indentured servitude of whites had long become such a marginal institution by the beginning of the nineteenth
century\textsuperscript{25} that it was unlikely that any interstate claim of being a fugitive indentured servant would be laid on a white citizen. Slavery and race were so inextricably bound up with each other, in fact, that in most Southern states any black person was legally presumed to be a slave, and bore the burden of proof for proving that she or he was in fact free. For “persons of color” (the term used for anyone of mixed descent with perceptibly “African” features) the legal presumption varied from state to state, but everywhere in the South it was so that only persons who were “evidently white” enjoyed a presumption of freedom.\textsuperscript{26} Thus, in practice, only black United States citizens were “equally” subject to claims under the fugitive slave clause.

\textsuperscript{25} ibid., p. 440. Bell (1980) notes (p. 25) that at the beginning of colonial society, the experience of white indentured servants was not so different than that of black slaves; both were subjected to equally hard working conditions and also lodged together. But as white indentured servants increasingly became free, they came to constitute a class of poor whites in the colonies whose political support the wealthy white plantation owners sought to enlist. Servitude thus became racialized in order to create a subclass of blacks and “elevate” poor whites. See also Buckner Inniss (1999), p. 93.

\textsuperscript{26} Morris (1996), p. 25-29.
Equality and the Constitution: four forms

Let us now revisit the four forms of equality that I am using to analyze any given citizenship and apply them to an analysis of the US Constitution.

The first one, uniform equality, is the simplest and the most uniform: where federal law mandates equality for all federal citizens without any reference—formal or substantial—to state law. This must necessarily be an area in which federal law has exclusive authority, and ideally one that is also enforced and adjudicated by federal bodies. In the original Constitution, the only unambiguous example of this is again the first one: equal subjection to prosecution for treason. While originally (i.e., on the eve of the revolution), this was a legal norm that was adopted, implemented and enforced by the states, Congress wasted no time after the adoption of the Constitution in taking advantage of the relevant Constitutional provision (Art. III, Sec. 3, par. 2) to make this a directly enforceable federal statute:

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death. 28

Subjection to prosecution for treason is a clear form of this type of equality for all US citizens provided for by the Constitution. Although the statute is not expressly addressed to citizens, it codifies the English constitutional definition of treason as a breach of allegiance. Thus while the set of those who could be argued to owe allegiance to the United States is somewhat larger than only citizens (indeed, resident aliens and even slaves could be subject to prosecution for treason), citizens are the only persons who invariably owe allegiance, therefore only citizens are equally subject to prosecution for treason.

The Constitution also allows Congress to legislate this first type of uniform equality for all US citizens: an ability to go to federal court in areas covered by federal law or to sue citizens of other states (the “diversity jurisdiction”), to sue citizens of the same state claiming lands under grants of different states, and to sue aliens and foreign states (Article III, Sec. 2, paragraph 1; the possibility

27 Cf. supra in Ch. 2 before n. 25.
28 An Act for the Punishment of certain Crimes against the United States (30 April 1790), (United States Congress 1790)
of granting US citizens the right to sue other states and vice versa was swiftly abolished by the 11\textsuperscript{th} Amendment, ratified in 1795). Congress did in fact institute this ability for certain types of civil disputes, with varying accessibility and varying defined jurisdictions for the federal district courts, the circuit courts, and the Supreme Court, with the Judiciary Act of 1789.\textsuperscript{29} Again, this is (by its very definition) a right that is enforced and adjudicated solely by federal bodies.

Other Constitutional provisions that do expressly mention citizenship, specifically with regard to eligibility for the House (Art. I, Sect. 2, par. 2), the Senate (Art. I, Sect. 3, par. 3) and the Presidency (Art. II, Sect. 1, par. 5) do not so much guarantee equality for all US citizens in this regard as they equally exclude all non-citizens (and in the case of the Presidency, all naturalized citizens as well) from those offices. It should be clear that just as the Constitution does not yet guarantee all adult citizens an equal right to vote, nor does it guarantee all adult citizens an equal right to be elected—both rights would still be subject to state-imposed conditions and restrictions based on property ownership, race and sex for more than a century to come.

Aside from Art. III, Sec. 2 (access to federal courts in the diversity jurisdiction), the only direct mention of citizenship in the Constitution that guarantees some form of equality to all citizens is the one that is most ambiguous: the Privileges and Immunities Clause (Art. IV, Sec. 2), which we already briefly touched on above (\textit{supra} in Ch. 2 at n. 64). By analyzing this single clause in terms of its possible readings, we can review almost all the forms of equality it might be said to guarantee to federal citizens, and at what intersection, if any, of federal and state law a given form of equality exists. And in fact, all four of the forms of equality listed above have been read into the Privileges and Immunities Clause. Combinations of these readings are also possible if different forms of equality are thought to be applicable to different privileges and immunities.

The first, “uniform equality” reading is typically identified\textsuperscript{30} as the “substantive protection” reading of the Privileges and Immunities Clause: in other words, that the Privileges and Immunities Clause guarantees a fixed package of privileges and immunities that is invariable from state to state. As noted above (\textit{supra} in Ch. 2 after n. 66), this reading is fully uncontroversial if it is seen to be declaratory in nature, i.e. merely confirming the pre-existence of a bundle of rights that the legal systems of all of the states grant their citizens, especially the right to real property and the right of access to legal proceedings. These rights or, put otherwise, limitations on the power of the sovereign, make up the hard core of the English legal tradition as known to the Framers, going back to Magna Carta and before, repeatedly cited by Coke as the “law of the land”.\textsuperscript{31}

A reading of the Privileges and Immunities clause as \textit{constitutive} of substantive protection, on the other hand, must necessarily be controversial, because it would mean that the Constitution mandates uniform equality for all

\textsuperscript{29} The Judiciary Act of 1789, (United States Congress 24 September 1789)

\textsuperscript{30} as in Smith (1997), p. 828 \textit{et seq.}

federal citizens, possibly to the derogation of state law. Admittedly, any
distinction between declaratory and constitutive statements of the law is hazy in
the common law tradition (see supra Ch. 1 after n. 60): a judge who is, in fact,
making new law will phrase that action in terms of pointing to the pre-existence
of the norm in old law. And even if a judge states the law declaratively, that does
not necessarily mean that that law is not binding.

Possibly the most explicit statement of the rights entailed in the
Privileges and Immunities was made by Supreme Court Justice Bushrod
Washington in the federal circuit court decision *Corfield v. Coryell*, a case dealing
with the permissibility of a New Jersey regulation prohibiting non-residents from
gathering oysters and clams:

Protection by the government; the enjoyment of life and liberty, with the
right to acquire and possess property of every kind, and to pursue and
obtain happiness and safety; subject nevertheless to such restraints as the
government may justly prescribe for the general good of the whole.

The right of a citizen of one state to pass through, or to reside in any other
state, for purposes of trade, agriculture, professional pursuits, or otherwise;
to claim the benefit of the writ of habeas corpus; to institute and maintain
actions of any kind in the courts of the state; to take, hold and dispose of
property, either real or personal; and an exemption from higher taxes or
impositions than are paid by the other citizens of the state; may be
mentioned as some of the particular privileges and immunities of citizens,
which are clearly embraced by the general description of privileges deemed
to be fundamental: to which may be added, the elective franchise, as
regulated and established by the laws or constitution of the state in which
it is to be exercised.

Upham extensively explores Justice Washington’s legal education and personal
contact with the principles of the Constitution (Washington had been a delegate
to the Virginia ratifying convention of the Constitution) and of the Revolution
(Washington was the nephew of George Washington) in order to get at what
kind of substantive equality Washington envisaged the Privileges and Immunities
Clause as providing.

As to Washington’s selection of privileges, his list excludes the liberties
such as freedom of speech, freedom of the press, and the right to bear arms that
had been enumerated in the Bill of Rights. This may be because Washington
considered those liberties to be more basic human rights rather than civil rights
(i.e., where the latter are restricted to citizens). That may at first appear to be an
arbitrary distinction: James Wilson, who was Washington’s law teacher, had
explicitly associated, in particular, the freedom of speech and of the press with the

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32 *Corfield v. Coryell* (1823)
33 ibid., at 380-381.
35 ibid., p. 1524.
rights of the “citizen under a free government”.36 Indeed, certain rights and liberties that are essential to the healthy functioning of a democracy (to which can be added freedom of assembly) can be described more specifically as political rights, and then it would make sense to place those under the heading of civil rights if one were to consider the right of political participation to be a core aspect of citizenship.

But it appears that Washington was drawing a different line of distinction: the privileges that he selected were not so much the positive core of citizenship, but the negative of the traditional disabilities of alienage.37 As we have noted countless times before, the most prominent disabilities placed on aliens in Anglo-Saxon legal systems were the inability to hold or inherit real property or to fully participate in the economy and the legal system. Thus, in this reading, the Privileges and Immunities clause establishes, if not exactly an equal citizenship, then an equal right to have the disabilities of alienage lifted. Can this be described as a form of substantially uniform equality for federal citizens?

It does appear that Washington meant almost all of these privileges to have equal substantive content in all states, without reference to the law of any given state; he notably excepts the exemption from higher taxes than those paid by the citizens of a host state, which of course can only be determined by reference to the law of the host state.38 (We will return to a discussion of non-discrimination, as well as of political rights, which Washington names last, and sets somewhat apart, shortly.) It thus remains to be determined whether the absolute, federally defined privileges would be a uniform equality, guaranteed to all federal citizens; or a cross-border equality, guaranteed only to migrating federal citizens.

The historical record does show that the federal judicability of the Privileges and Immunities Clause was meant to be limited. To be sure, Hamilton had espoused a view of the privileges and immunities guaranteed by the Clause, almost certainly uniform for all federal citizens, which possibly verged on the constitutive, referring to “the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled”; yet in the same breath he noted that in order to protect this equality, “the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens”, in order to avoid potential bias on the part of the judiciary of one state.39

In and of itself, that determination does not yet point to a lack of uniform substantive equality for all federal citizens in terms of the rights to be enjoyed under the Privileges and Immunities Clause. But it is clear from the context, and generally from the known concerns of the Framers, that this equality was precisely not intended to be federally judiciable by citizens of a state against

36 ibid., p. 1523.
37 ibid., p. 1493-1494.
39 'Federalist', (1788) 80, referred to by Antieau (1967) p. 7-8, both of which, in turn, are referred to by Smith (1997) p. 836-837.
their own state. Indeed, the Framers appeared to generally trust states to protect the rights of their own citizens, and were more concerned with federal interference with citizens’ rights. The trust in states is illuminated, or at least cast into relief by the fact that the first Congress, and in particular the Antifederalist faction, felt that the Constitution failed to explicitly limit the powers of the federal government; these concerns led to the proposal and later ratification of the Bill of Rights, inspired by similar provisions in various state constitutions. The Bill of Rights provided for express limitations on Congress and guarantees of individual freedoms and procedural protections within the areas in which Congress had legislative powers.

Thus we can reasonably discard a “uniform equality” reading of the Privileges and Immunities Clause, at least in a constitutive, normative sense: it cannot be read to guarantee a package of substantial equality for all federal citizens, uniform over the entire federal territory, although it may assume the pre-existence of such equality for citizens of states. Indeed, this would seem to be the view of Justice Washington, to whom it was completely self-evident that any “free government” would guarantee those rights to its own citizens. (Traditionally, including in the later case law of the Supreme Court, this was called the “natural rights” doctrine of fundamental rights, but Upham rather disagrees with that term as applied to Washington’s dictum in Corfield v. Coryell: for the reasons cited above, among others, it is clear that Washington saw those rights not as what we would call human rights, but as rights of citizenship granted by positive law.)

What is left, to the extent that the Privileges and Immunities clause guarantees a certain consistent package of rights, is a guarantee of protection solely for citizens of one state against other states. In other words, a cross-border equality such as this would be a guarantee reserved to migrating federal citizens, since it can be considered unlikely that a state would try to reach beyond its own borders to interfere with the rights of a sedentary citizen of another state. This is the same form of equality as the one that had been guaranteed by Article IX of the Articles of Confederation: there, federal law guaranteed in no uncertain terms that all migrating federal citizens were equally exempt from state restrictions on import and export.

In this thesis, I will advance the point of view that wherever this type of substantive equality is guaranteed solely to migrating federal citizens, it generally has a functional, not merely idealistic goal: specifically, not merely to ease freedom

40 ibid., p. 828-829.
44 Despite the fact that the United States under the Articles are not generally considered to be a true “federal” order, we will call it federal for the purpose of analyzing the (proto-)federal citizenship that it entailed, as Schönberger does: Schönberger (2005), p. 61-64.
of movement for federal citizens, but to encourage it. Pure non-discrimination of migrating federal citizens entails an obligation on receiving states merely to apply their own laws equally to migrating federal citizens. But a cross-border equality imposes an obligation on receiving states to apply a vertical norm equally to migrating citizens of other states, a norm of equality that the receiving state possibly might not even apply to its own citizens. (In the case of the Privileges and Immunities Clause, Tribe considers that such a form of inequality within a state would be “anomalous in the extreme”, while Upham notes that there could be no substantive inequality “as long as the Founders’ consensus as to the rights of citizens dominated”. However, as we will see, any consensus regarding slavery and the rights of black Americans was still sorely lacking.) The cost—potential inequality between federal citizens within a given state—is balanced by a benefit, a goal that the vertical norm aims to achieve with regard to migration between component states.

If the Privileges and Immunities Clause could be said to have guaranteed a certain cross-border equality, or uniform equality solely for migrating citizens, then the ability to enforce this equality in federal court against a host state was somewhat limited by the ratification of the Eleventh Amendment in 1795. This amendment aimed to invalidate the holding of the Supreme Court in Chisholm v. Georgia that the provision of Article III, Section 2 authorized citizens of one state, or of a foreign state outside the United States, to sue any one of the United States in federal court. However, as we saw in Corfield (a private citizen of Delaware) v. Coryell (a citizen of New Jersey who, as a state official, had detained Corfield’s boat on the basis of the New Jersey regulation), disputes between citizens of different states regarding the permissibility of a state law could still provide a federal court with the necessary diversity jurisdiction.

It was further conceivable that Congress could introduce an additional cross-border equality, applying solely to migrating citizens, with legislation based on the Interstate Commerce Clause. Indeed, a certain complementarity between the Interstate Commerce Clause and the Privileges and Immunities, and the teleology of both, were argued before the Supreme Court in the case Gibbons v. Ogden, the groundbreaking case in which the Supreme Court ultimately ruled that the Interstate Commerce Clause gave Congress a power to regulate interstate navigation.

We now arrive at a direct examination of non-discrimination—the form of equality which, according to the greatest consensus, is guaranteed to varying extents by the Privileges and Immunities Clause. In an ideal world, if one presumes uniformity of equality among all federal citizens to be the greatest ideal,

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47 Chisholm v. Georgia (1793)
48 Gibbons v. Ogden (1824a)
then the packages of equality enjoyed by citizens of each state would be identical between all states, and the reciprocity of the right to the same package of equality for foreign state citizens would be complete. A mandate of equality based on non-discrimination would thus be substantially identical in its results to a federally uniform mandate of equality. In practice, however, under a mandate of equality based on non-discrimination, uniformity is limited by variations between the packages of equality enjoyed by citizens in their own states, on the one hand, and limitations on the rights of reciprocity granted to foreign citizens, on the other. Any debate about the functioning of non-discrimination based on the Privileges and Immunities Clause was always to go along one of these two lines.

We have already explored the extent to which all of the states were considered to offer identical packages of equality to their own citizens. The most uncontroversial inventory of those rights is, of course, the most minimal and declaratory: that advanced by Ridgely of the Delaware Chancery Court,49 while Washington's somewhat constitutive and uniform reading in Corfield v. Coryell, on the other hand, never quite gained unambiguous support, least of all from the Supreme Court.50 A distinction was often made between fundamental privileges, which were to be reciprocally granted to foreign state citizens, and special privileges, which states reserved to their own citizens. D.G. Smith advances the argument that fundamental privileges were seen as those powers of citizens that existed independently of or prior to the establishment of government, while special privileges exist by virtue of government action.51 This reading dovetails with the accepted understanding of the fundamental rights, e.g. as enumerated in Magna Carta, as being a form of natural law.52 Even with regard to the fundamental privileges, however, it was accepted doctrine that states were free to "regulate" these rights and their exercise divergently, as long as they were not essentially abridged.53

Not coincidentally, the fact that a certain package of fundamental rights was determined to be shared by all states also meant that the reciprocal enjoyment of those rights in a given state by citizens of another state (at least, notably, if they were white) was more or less uncontroversial. However, automatic enjoyment of, in particular, electoral rights on the part of foreign state citizens was anything but uncontroversial: the Privileges and Immunities Clause was generally seen not to apply to electoral rights.54 We see, even in Justice Washington's expansive inventory of the privileges and immunities, that electoral rights are named last, and hedged by the possibility of state regulation of those rights. There are two

49 Supra in Ch. 2 at n. 66.
52 See supra at n. 31
54 ibid., p. 887.
possible readings of electoral rights: one as a fundamental privilege (indeed, the right of free men to self-government could be said to be anterior to the existence of a state) subject to divergent state regulation, and one as a special privilege reserved to citizens of a state (considering that the state had to set up the electoral apparatus by its constitution and statutes before the privilege of voting could exist).

However, because American notions of citizenship and rights of political participation were often largely based on residence\(^{55}\) rather than on formal criteria, these two readings did not at all have to exclude each other. Indeed, D.G. Smith quotes Daniel Webster in his arguments before the Supreme Court in the 1839 case *Bank of Augusta v. Earle*, who summed up this pragmatic overlap quite succinctly:

> That this article in the Constitution does not confer on the citizens of each state political rights in every other state, is admitted. A citizen of Pennsylvania cannot go into Virginia and vote at an election in that state; though, when he has acquired a residence in Virginia, and is otherwise qualified as required by her constitution, he becomes, without formal adoption as a citizen of Virginia, a citizen of that state politically.\(^{56}\)

Webster hereby presents a reading of electoral rights as a fundamental privilege to be enjoyed reciprocally, subject to state regulation. He grants, however, that there is then virtually no difference between being *treated like* a state citizen in this regard and formally *becoming* a state citizen, which would entail electoral rights as a special privilege.

As it happens, if we check Webster’s specific example against the background of state law, Virginia had adopted a revised constitution\(^{57}\) only nine years prior to this case that appears to have no formal definition of state citizenship. Art. III, Sec. 14 of Virginia’s 1830 constitution establishes extensive requirements for determining who has the right to vote: in any case, as this provision opens, “Every white male citizen of the Commonwealth, resident therein, aged twenty-one years and upwards,” who additionally owns property or rents property and has paid property tax (to only very roughly summarize what are actually extremely detailed conditions, making this Section almost 500 words in length, concerning the value of the property, the status of head of household, etc.). However, nowhere does the constitution define who a citizen is to start with, i.e. whether there is an additional formal prerequisite for citizenship of the Commonwealth of Virginia, such as swearing an oath of allegiance.\(^{58}\)

Article IV, Sec. 2 defines the requirement for eligibility for the office of governor as follows:

> No person shall be eligible to the office of Governor, unless he shall have attained the age of thirty years, shall be a native citizen of the United States, \(^{59}\)

\(^{55}\) Indeed, compare how the initial set of citizens of the United states, at the outbreak of the Revolution, was defined as those who remained resident in the states, *supra* in Ch. 2 at n. 25.


\(^{57}\) Virginia Constitution (1830), (1830)

\(^{58}\) According to Neuman, in any case Virginia was continuing to naturalize *aliens* based on its own rules. This was disputed, though, and by 1849 Virginia had clearly made its citizenship a derivative of US citizenship. Neuman (1996), p. 64, n. 91
States, or shall have been a citizen thereof at the adoption of the Federal Constitution, and shall have been a citizen of this Commonwealth for five years next preceding his election.

One very strongly suspects, reading these two provisions in parallel, that “citizen of this Commonwealth” can effectively be read as “resident of this Commonwealth”. One requirement for the governorship, in particular, is striking: that the formal status of being a United States citizen (and a natural-born one, at that) is a necessary prerequisite makes it seem unlikely that Virginia still would have had any additional formal requirement for citizenship for United States citizens originally from other states. Indeed, by this point in time it seems likely that the exclusivity of Congress’ power to set a uniform rule of naturalization (i.e. of aliens from outside the United States), as implicitly confirmed in Chirac v. Tenants of Chirac59 and subsequent case law, had rendered all naturalization practices by state law moot, including the naturalization of citizens of other states. Thus any distinction between a citizen of another state becoming like a citizen of Virginia on the basis of non-discrimination, without actually becoming a citizen of Virginia, was probably already approaching nil, at least in cases where a foreign state citizen satisfied the stringent state conditions for suffrage.

Thus the state law of Virginia, for one, voluntarily drew on United States citizenship to contribute to its own notion of state citizenship. Federal law, for its part, also increasingly read state citizenship as a local derivative of United States citizenship, at least on the turf of the federal court system. It was necessary, after all, to determine in what situations citizens had access to the diversity jurisdiction of the federal courts,60 i.e. when a citizen of one state was suing a citizen of another. Strikingly, if all federal citizens were to be guaranteed this uniform federal equality in terms of access to federal courts in the diversity jurisdiction, then the federal courts would precisely have to recognize a distinction between citizenships of different states.

And at the same time, federal courts sometimes had to be able to use their own vertically defined criteria to determine when a United States citizen was a citizen of one state and not another. By 1848, these criteria had crystallized in the case law. If person could not be considered to be a citizen by state law (for instance, if he had not acquired and made use of the right of suffrage in that state), then the determination could be made by federal law: a United States citizen, upon moving to a different state, could be considered to be a citizen of that state if he or she had the bona fide intention to be permanently resident there.61 (As to United States citizens permanently resident in the District of Columbia or other non-state territories of the United States: while the Supreme Court admitted that they could be United States citizens without being citizens of a state, they were

59 Supra in Ch. 2 n. 120.
60 See supra at n. 29.
CHAPTER 3

not considered to have access to the diversity jurisdiction at all.62 This anomaly would remain in effect until 1940, at least for citizens of the District of Columbia, when Congress passed an Act63 to amend the statute64 defining the diversity jurisdiction to regard citizens of the District as citizens of a "state" for purposes of that statute.65

Excursion: federal citizenship and allegiance

To explain this evolution – to state citizenship increasingly looking more like a derivative of United States citizenship instead of vice versa – it may be illustrative to temporarily leave the basis of a strictly equality-based analysis of duplex citizenship and return to the root of citizenship avant la lettre: allegiance, which had been the core concern for Coke in coming to grips with subjecthood. We already vaguely sensed that the establishment of a uniform rule of naturalization, i.e. of equal conditions for naturalization for all aliens, had some relationship to the establishment of some form of equality for citizens of all states when visiting other states. And yet on the surface, there is no compelling logical link between equal rules for passing through the front door of citizenship, on the one hand, and equal treatment for everyone already inside that edifice, on the other. If we directly confront the issue of allegiance at the core of citizenship, on the other hand, and how United States citizenship came to take up the mantle of constituting the citizen's primary allegiance, to the detriment of allegiance to the states, we can more clearly understand the development as it happened, e.g., in Virginia.

For this, I can provide a vivid counter-example: of South Carolina during the so-called Nullification Crisis, when a South Carolina state convention in November 1832 declared a tariff set by Congress to be null and void within the state of South Carolina. The doctrine of nullification owed a great deal to the political theory of South Carolina's own "states' rights" theorist John C. Calhoun, who happened to also be the Vice President at the time. The crisis came to a head when Congress passed a Force Bill, authorizing President Andrew Jackson to use military force against South Carolina if necessary, but also passed a law setting a tariff that was more acceptable to South Carolina. A new state convention in March 1833 and repealed the Nullification Ordinance. At the same time, however, the state convention acted to create a nettlesome legal problem: under the influence of those who had been for nullification, it authorized the state legislature to introduce a new oath of allegiance for state militia officers, providing that "[the] allegiance of the citizens … is due to the … State, and … obedience

62 ibid., p. 263-264.
63 Apr. 20, 1940, ch. 117, 54 Stat. 143
64 28 USC § 1332
65 Purcell, p. 1831-1832.
only, and not allegiance is due … to any other power or authority, to whom a control over them has been or may be delegated by the state.”

The state legislature duly passed an act introducing an oath that all militia officers “be faithful and true allegiance bear to the State of South Carolina.” When the constitutionality of this act was challenged, the South Carolina Court of Appeals was divided. The unionist Justice O’Neall asserted the implicit primacy of allegiance to the United States as established by the federal Constitution, or at least explicitly asserted that citizens owed allegiance to both governments concurrently, which together constituted a single sovereign. Thus an oath demanding exclusive allegiance to the state had to be void. Justice Harper, from the nullificationist camp, on the other hand, refused to accept that the citizens of a state would not be free to decide to secede from the Union because of a conflict with any other allegiance they owed. He explicitly argued that the primary, if not sole allegiance was owed to the state. The remaining justice, Johnson, provided the swing vote to support O’Neall’s point of view, without however acceding to the view that this was a direct consequence of the Federal Constitution. Thus the oath was declared void, but without dealing directly with the troublesome issue of allegiance.

When viewed in light of this conflict, then, the wording of Virginia’s 1830 constitution, and its definition of state citizenship, would appear to be similarly beating around the bush: implicitly admitting United States citizenship to be primary, but nevertheless allowing for the residual existence of an at least conceptually independent state citizenship. The developments in both of these Southern states, especially in South Carolina, were ominous harbingers of the great constitutional conflict yet to arise.

Equality at the point of collision with slavery

We have discussed to what extent the Constitution, and in particular the Privileges and Immunities Clause may or may not have guaranteed a uniform federal equality, non-discrimination, or a cross-border equality, or combinations thereof, to all federal citizens. There was never any clear consensus on what the exact form of equality was to be enjoyed by all United States citizens; yet it seems clear that for white, male, property-owning United States citizens, both natural-born and naturalized, sedentary and mobile, the substantive equality to be enjoyed throughout all of the states was roughly uniform. Or at least: there were few legal conflicts about the issue of equality of the aforementioned United States citizens
that necessitated binding clarification on the part of the courts or the
(Constitutional) lawmaker. (One notable exception was the conflict behind the
1841-1842 Dorr's Rebellion in the state of Rhode Island, in which non-property-
holding citizens protested the state’s property requirement for suffrage; the
Supreme Court, in Luther v. Borden,70 declined to intervene in the state political
process that had produced this inequality in electoral rights.)

This probably owed less to any provision of the Federal Constitution, or
of federal law as set by Congress, than to the pre-existing similarity in the legal
systems and notions of human and civil rights in all of the states, dating back to
the Revolution and before. Thus while in particular, a "cross-border" reading of
the Privileges and Immunities Clause had the theoretical possibility of creating
substantive inequality between migrating and sedentary federal citizens, the pre-
existing similarities between the principles informing both federal law and the
laws of the several states made its invocation either unnecessary (because
migrating federal citizens could adequately rely on non-discrimination) or
thoroughly unobtrusive.

Before examining the Privileges and Immunities Clause, and laying out
the four forms of equality to be used in our analysis, we examined the
Constitutional provisions that accommodated slavery. As to the last of those, the
Fugitive Slave Clause, we could possibly qualify the equality that it guaranteed
either as a horizontal equality in terms of portability, which obliges non-
slaveholding states to grant reciprocity to the rights of slaveholders from
slaveholding states, or as a vertical cross-border equality, to the extent that a
federal norm guarantees the equal rights of slaveholders in states other than their
own, even states that do not provide their own citizens a right to own slaves. We
can further subdivide the "cross-border" reading into two visions of judiciability
and enforcement: one by state bodies, and one by federal bodies.

Horizontal norms regarding slavery: comity and the Full Faith and
Credit Clause

I will conclude that a “portability” reading of the Fugitive Slave Clause, positively
obliging non-slaveholding states to accord comity to rights of property in a human
being on the part of immigrating citizens of slaveholding states, is not tenable.
We will first explore what exactly comity is, and how it works in making
portability of rights possible, so that we can see why the Fugitive Slave Clause
presented a more binding, consistent legal norm.

Comity among states—a concept of reciprocal recognition of private
rights that traces its roots to the Roman jus gentium and was developed in the
modern era by the 17th-century Dutch legal scholars Paul Voet and Ulricus
Huber—was already operational in the British legal tradition prior to the
promulgation of the U.S. Constitution. Every claim of property in a slave in a

70 Luther v. Borden (1849)
non-slaveholding state, if it were based on comity, would have to be decided on a case-by-case basis under the rules of “conflict of laws” (or, as it is called in the Continental tradition, “private international law”). This involved weighing the claim under the laws of the foreign state against the public policy interest of the forum state. If the forum state had no compelling public policy interest in denying recognition to the rights enjoyed in the foreign state, then the court of the forum state could decide to grant legal effect to those rights.

Joseph Story was an erstwhile Supreme Court justice (from 1811 to 1845) and author of what would be the authoritative guide to conflict of laws in American legal practice for almost a century. Comity, stressed Story, is by its very nature voluntary.71 (Scholten exposes the philosophical and theological roots of comity for Voet and Huber, whose treatises Story cites extensively. Scholten shows that those Dutch scholars understood comity [comitas] to be not so much a binding legal norm as a moral virtue, related to brotherly love.) However, the United States Constitution also provided in Article IV, Section 1:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

This provision had its roots in Section 3 of Article IV of the Articles of Confederation,73 the same Article or “comity clause” that the Privileges and Immunities Clause could trace its origins to:

> Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

As Story wrote in his equally influential Commentaries on the Constitution:

> The reasonable construction of the article of the confederation on this subject is, that it was intended to give the same conclusive effect to judgments of all the states, so as to promote uniformity, as well as certainty, in the rule among them.74

In other words, the Full Faith and Credit Clause aimed to make the rules of comity more binding to ensure greater uniformity and certainty. Whenever citizens were concerned, i.e. when their personal status or private rights were the subject of the “public Acts, Records, and judicial Proceedings” of any state, the effect of the Clause was to ensure “portable” equalities for migrating citizens.

As noted above, however, with regard to slavery this would create a paradoxical form of equality, or a purely formal form of equality, given that the laws of the states on that subject were substantively so radically divergent. An additional dimension to the functioning of comity in any given case was not just whether a given forum state did or did not have slavery, but what its public policy

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71 Story (1852), p. 37 (§ 38).
72 Scholten (1952), p. 79-126, and in particular p. 124 as to the non-compelling nature of comity in international law
73 See supra in Ch. 2 after n. 39.
74 Story (1833), p. 177 (§ 1302)
was toward the laws of states with the opposite position. For instance, in the absence of any statute in the laws of the forum state clearly expressing a non-slaveholding state’s public policy position toward slavery, it could very well be that a court in that state would recognize the right of property in a slave of a citizen of a slaveholding state. For that matter, comity could work the other way as well, if the forum state had statutes allowing slavery but did not at the same have a statute denying legal effect to the emancipatory laws of a non-slaveholding state or territory where a slave had resided with his or her master and which the slave had returned from. Many courts of slaveholding states did in fact give effect to emancipation by that route. In most cases, the question of whether a slave had become emancipated by the natural operation of law in a non-slaveholding state turned on the question of whether the slave had had more than a merely temporary sojourn in that state with his or her master.\(^75\)

Any equality based on portability of rights, even if it is horizontally binding, is bound to be the least substantively uniform of all forms of equality, both over the entire federal territory and within the territory of any given state, if the laws of the states substantively diverge from one another. To compare an equality based on equal portability of rights to an equality based on non-discrimination: given 13 hypothetical states, all with divergent legal norms on a given matter that are equally territorially applicable (i.e., based on non-discrimination), there still can be no more than 13 different norms that federal citizens are equally subject to on that matter, dependent only on their state of current residence. If the legal standards of a given state are personally applicable (and portable), on the other hand, i.e. are activated by a citizen’s state of citizenship or last permanent residence, then there are potentially at least 169 (13\(^3\)) outcomes for the selection of a norm possible: one for each state of origin and each host state, further depending on each host state’s public policy as to recognition of the legal norm from the state of origin. If one additionally considers that the rules of conflict of laws—since they are applied on a case-by-case basis—might not even be consistently applied by courts within a given host state with regard to citizens of the same foreign state, then the potential substantive inequality is even more manifold with portability.

At any rate, it is important to note that well into the first half of the nineteenth century, the emancipatory effect of genuine residence of a slave—with his or her master’s consent—in a state with emancipatory laws was generally not viewed as problematic in slaveholding states.\(^76\) The abolition statute passed by Pennsylvania in 1780, which became a model for other Northern states, only provided for gradual abolition and recognized a right of “recaption” for owners of fugitive


slaves from other states; and for their part, none of the slaveholding states had passed statutes barring recognition of emancipation under the laws of other states. In other words: slavery and abolitionism were not yet issues that stoked the passions of public policy within states. Furthermore, as we noted at the beginning of this section, many Americans during the first generation of the Constitutional republic may still have felt that slavery was bound to fade away on its own. Thus it seems that comity would have still worked relatively unencumbered in state courts when it came to slavery, and in fact with something of an emancipatory bias overall.

Vertical norms regarding slavery: the Northwest Ordinance and the Fugitive Slave Clause

At the time of the Constitutional Convention in 1787, slaves crossing state boundaries (with or without permission), and the legal problems engendered by them, were not yet seen as a significant national problem. For that matter, the issue of slavery had not yet become an absolute deal-breaker for the southern states: the Northwest Ordinance, by which slavery had been prohibited in the Northwest Territory, had easily passed a majority-southern Confederation Congress in 1787. Northern abolitionism was far from reaching the fever pitch that it was to reach later, and the southern states did not feel that they were defending a threatened institution. Yet two seeds of future constitutional conflict had already been planted by the Congress’ breezy passage of the Ordinance: one was its ban on slavery in the Territory, and the other was its confederal nod to states’ rights to maintain slavery with its clause that a fugitive into the Northwest Territory, “from whom labor or service is lawfully claimed in any one of the original States, […] may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.”

The reason that the first of these provisions would be constitutionally problematic was because it was based on no express authority of the Confederation Congress to directly administer a non-state territory. Madison, in particular, raised objections to this “usurpation” of powers, in *Federalist* 38, his polemic alludes to the republics of the ancient world that allowed themselves to become dictatorships.

80 ibid., p. 42-43.
81 *Federalist*, (1788) 38
Yet as with the rest of the Federalist Papers, this too can be read as merely pointing out one of the flaws of the Articles of Confederation. The Constitution had filled this lacuna somewhat, although not with Madison’s suggested text for two of the enumerated powers of Congress—

To dispose of the unappropriated lands of the U. States.
To institute temporary Governments for New States arising therein.

—but rather with the somewhat vaguer clause (of Article IV, Sect. 3):

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States […]

As Fehrenbacher notes, this left a question of textual interpretation open as to whether Congress had the power to establish territorial government and substantive laws in a territory, even though all the evidence points to a consensus on the part of the Convention that it did. Based on this clause, the first Congress under the Constitution re-enacted the Northwest Ordinance, with its provisions on slavery intact, and President Washington duly signed it into law.82

The second seed of constitutional conflict was planted not so much by the Northwest Ordinance itself, but the fact that its fugitive slave clause was to inspire the Fugitive Slave Clause of the Constitution. Again, the subject of fugitive slaves had barely been an issue at the Constitutional Convention in Philadelphia until the Northwest Ordinance was passed by the Congress sitting in New York on July 13, 1787. But on August 28, when the Interstate Extradition Clause came on the agenda of the Convention, Butler and Pinckney of South Carolina seized the opportunity to add fugitive servants and slaves to the pre-existing clause in Article IV of the Articles of Confederation, which was otherwise going to be adopted virtually unchanged. They moved to require fugitive slaves “to be delivered up like criminals”; but their motion was rejected over objections to the expense that this would bring state governments.83 The next day, Butler introduced a new proposal for a clause:

If any Person bound to service or labor in any of the United States shall escape into another State, He or She shall not be discharged from such service or labor in consequence of any regulations subsisting in the State to which they escape; but shall be delivered up to the person justly claiming their service or labor.

The proposal passed unanimously, on a day when the delegates were apparently exhausted, since the record does not show any debate on proposals, only votes.84 Two relatively minor stylistic revisions later,85 this was to become the Fugitive Slave Clause.

This history of the Clause reveals that Butler employed two tactics: one was to use as a template a concept that had originally been agreed upon in a

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85 In the Report of the Committee of Style presented on September 12, 1787, Farrand and Matteson (1966), Vol. II, p. 601; and the final draft by Gouverneur Morris.
completely different context, much as James Wilson had done with the “federal ratio.” For any of the delegates vaguely familiar with the text of the Northwest Ordinance, and aware of the fact that it had already passed the Congress by a reasonable majority, the similarity that Butler’s proposal bore to it may have made it sound reassuring and uncontroversial. However, the text of the Northwest Ordinance was crucially different: it had only guaranteed an individual’s right to independently “recapture” a fugitive slave in the Northwest Territory without government interference. Butler’s proposal, on the other hand, added an implied obligation of action for state governments (“shall be delivered up”) and a limitation on states’ application of the conflict of laws: there were to be no abolitionist public-policy exceptions to comity for slavery (“shall not be discharged in consequence of any regulations subsisting in the State to which they escape”).

To sum up the ominous implications of the literal text of the Clause in terms of equality: the Clause introduced a vertical norm of equality, a “cross-border” equality applicable only to migrating federal citizens, which derogated state norms. (Of course, the person who was doing the migrating in the first place was ostensibly the person claimed to be a slave; but the legal claim laid by the sedentary citizen of another state who claimed to be the purported slave’s owner was also a “migrating” or cross-border claim.) It is important to note, as Kettner does, that the Clause, and the 1793 Fugitive Slave Act Congress passed to implement it (along with the Interstate Extradition Clause), “imposed obligations on free states that were not the subject of comity.” Once more, Fehrenbacher’s claim—that the legal-systemic location of the Clause in Article IV, Section 2, an article dealing with interstate comity, meant that the Clause did not properly institute a binding vertical norm—does not hold water when viewed from the perspective of constitutional practice.

Indeed, if I return to my argument that the Extradition Clause was just as little a declaratory statement of comity, and rephrase it in terms of equality: the literal text of the Extradition Clause presented formally a vertical, federally uniform equality for United States citizens, i.e. equal subjection to prosecution in any state, or more practically a cross-border form of equality for (ostensibly) migrating citizens, since only claims with a cross-border element would have been covered by it. The only formal requirement to activate an obligation of extradition on the part of a state’s executive was a “Demand of the executive Authority of the State from which he fled”, which in the Fugitive Slave Act of 1793 was worked out as follows:

[a] copy of an indictment found, or an affidavit made before a magistrate of any State or Territory as aforesaid, charging the person so demanded

86 See supra at n. 12
89 Supra at n. 17
with having committed treason, felony, or other crime, certified as
authentic by the Governor or Chief Magistrate of the State or Territory
from whence the person so charged fled [...]. 90

Clearly, this was not, on the surface of it, an obligation based on comity, i.e. on an
application by the host state of the substantive penal law of the state demanding
extradition. It was an obligation based purely on federal law, triggered by the
formal say-so of the executive of the state demanding extradition, with no room
for judicial review or balancing of public policy interests.

But in fact, the history of the relationship between the Fugitive Slave
Clause and the Extradition Clause is a remarkably tangled one that goes beyond
their mere collocation in the Constitution. Precisely because the substantive state
laws were so completely divergent, at least between the two camps of the
slaveholding and non-slaveholding states, the practical application of these two
Clauses as federal norms for enforcing state law would put them at loggerheads.
The very reason Congress saw fit to pass the aforementioned Act implementing
the Fugitive Slave Clause was because of a controversy that had emerged
concerning the proper interpretation of the Extradition Clause.

That controversy involved a slave, John Davis, who had been claimed by
abolitionists in Pennsylvania to have gained his freedom by the operation of law of
the Pennsylvania abolition statute. After Davis had been sent back to Virginia by
his erstwhile master, he fled back to Pennsylvania, but then was abducted by three
Virginians who had been sent to recapture him. A Pennsylvania court indicted the
three Virginians for kidnapping, and the governor of Pennsylvania subsequently
asked the governor of Virginia to extradite them for trial. 91 Attorney General
Innes of Virginia flatly refused to recognize the nature of the Extradition Clause
as a binding vertical norm that did not work on the basis of comity. The three
most striking arguments to that end were Innes' denial that the facts of the case
produced as serious a crime as claimed, even under Pennsylvania law; Innes' claim
that the facts of the case were barely prosecutable under Virginia law; and finally,
that extradition of the suspects would amount to a violation of the “unmolested
enjoyment of his liberty” that every free man in Virginia was entitled to. 92

As a result of the deadlock, Thomas Mifflin, the governor of
Pennsylvania, reached out to President Washington to initiate a legislative process
in Congress to clarify the Extradition Clause. 93 Of course, it was almost
inevitable that Congress would see fit to legislatively implement the Fugitive Slave
Clause at the same time, both because of the historical and systemic relationship
of the two Clauses and because of the nature of the case sparking the legislative

90 Section 1, Fugitive Slave Act of 1793, Annals of Congress, 2nd Congress, 2nd Session
http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=003/llac003.db&recNum=702 (last visited on 11
December 2014). Note, of course, that also the common name for this act was the "Fugitive
Slave Act", it was equally an implementation of the Extradition Clause.
91 Finkelman (1990), p. 400–403.
92 ibid., p. 404.
93 ibid., p. 405.
process. Nevertheless: if the legislative process had been undertaken to resolve a stalemate between the application of the two Clauses, the result was to be severely biased in favor of the Fugitive Slave Clause.

The provision cited above on extradition certainly sounds like a convincing implementation of a vertical cross-border form of equality for all federal citizens, i.e. that no federal citizen can escape prosecution in one state by fleeing to another state, even his or her home state. But the practical problem was that the Act provided for no means of vertical enforcement of the obligation of the state from which extradition was being requested (providing only for a federal penalty of 500 dollars and one year in prison for anyone rescuing a fugitive from justice from custody), even if such a power could have been construed from the Constitution. The Act was toothless in this regard; in practice it relied on voluntary action (essentially sovereign comity) on the part of the state from which the extradition was being requested.

The Act’s implementation of the Fugitive Slave Clause, on the other hand, penalized any person (by means of liability in a federal lawsuit for a fine of 500 dollars) interfering with the process of rendition of a claimed slave, for which all that was required was submission of proof to a local court or magistrate that the claimed slave owed service or labor under the law of the state from which he or she had ostensibly fled. The claimant or his or her agent was then empowered to transport the claimed slave back to the claimed state of origin, with no further action required on the part of the executive of the forum state.

Thus in practice, only the provisions of the Act providing for rendition of fugitive slaves instituted a true cross-border form of equality for federal citizens. What’s more, the Fugitive Slave Clause completely ruled out the application of accepted rules of conflict of laws, specifically the raising of public policy exceptions, on the part of courts in non-slaveholding states. The Fugitive Slave Clause and the Act therefore completely abrogated any remnant of sovereign comity on the part of a non-slaveholding state at the same time as the Act’s implementation rendered the Extradition Clause virtually nugatory and completely subject to sovereign comity.

The cross-border equality for federal citizens introduced by the Act’s implementation of the Fugitive Slave Clause was patently perverse for two reasons. First of all, it really only introduced an equality (as a benefit) for federal citizens resident in slaveholding states; federal citizens resident in non-slaveholding states derived absolutely no practical benefit from this equality that they were theoretically entitled to. Second of all, as noted above, for free black citizens of non-slaveholding states, this federal norm of equality not only granted them a

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94 ibid., p. 408.
95 ibid., p. 419. Sections 1 and 2 of the Act, supra n. 90
96 ibid., p. 419–420. Sections 3 and 4 of the Act, supra n. 90
dormant and irrelevant form of formal equality, but introduced an active and vicious form of substantive inequality between them and white citizens of the same state. Free black citizens in non-slaveholding states, being perpetually subject to the presumption of slavery in slaveholding states, were now practically subject to the same presumption in their home states. Any claimant could present (easily fabricated) proof of service or labor owed in a slaveholding state and could carry the free black citizen off with little more than a pretense of due process of law. The free black citizen was denied the “unmolested enjoyment of his liberty” under state law that was jealously guarded for his potentially illicit captors. And in the years to come, courts in non-slaveholding states would carry out their duty as imposed by federal law faithfully, if regretfully. In practice, for sedentary black citizens, the Fugitive Slave Clause instituted not only a cross-border equality, but a uniform equality all over the territory of the Union, subjecting them all equally to the risk of kidnapping.

The damage to the black citizens of the United States, and to the promise of the citizenship of the United States under the original Constitution embodying anything close to a uniformity of equality, was already largely done and irreversible in 1793. The remaining developments leading up to the Civil War largely deal with how the damage to equality among citizens contributed to the centrifugal forces driving the states apart, and thus can be reviewed fairly cursorily in the rest of this chapter. The final legal development before the Civil War, *Dred Scott v. Sandford*, was merely to deliver the final nail in the coffin of equality.

**The schism widens between the states: Prigg v. Pennsylvania**

The Fugitive Slave Clause, the case of John Davis, and the Fugitive Slave Act were only the beginning of an increasingly yawning abyss between the North and the South. The Northern states had previously been content to (gradually) abolish slavery on their own territories and turn a blind eye to the institution in the South; their gently abolitionist tendencies were not paired with the same intensity of activism that the Southern states could exhibit in favor of slavery. In the House of Representatives, representatives from the North never moved to loosen the existing laws or to introduce anti-kidnapping legislation, even though they had a bare majority. At most, they could occasionally unite to vote down the Southern states’ attempts to tighten the existing legislation, such as an 1801 bill proposed by Maryland Rep. Joseph Nicholson to fine any employer who hired a black person without a certificate of freedom. Only when the Northern states were increasingly confronted with the effects of slavery on their own soils would they increase their resistance, and then from their state legislatures. *Prigg v. Pennsylvania* would be the Supreme Court’s 1842 decision on Northern states’
increasingly resistant laws and their ability to use the Extradition Clause to enforce them through federal law.

The Fugitive Slave Act did prescribe just a hint of legal procedure for claimants of slaves in non-slaveholding jurisdictions. Nonetheless, the widespread belief that the Fugitive Slave Clause, like its inspiration in the Northwest Ordinance, essentially endorsed common-law “recaption” meant that claimants simply skipped the procedure and essentially kidnapped blacks in non-slaveholding jurisdictions. To combat the rising tide of lawlessness that this entailed, and to protect their black citizens, northern states increasingly enacted tougher state legislation. These typically entailed stiff criminal penalties on kidnapping free persons of color, or provided in no uncertain terms that there was no right of extrajudicial recaption. Pennsylvania enacted a more complex and difficult procedure for rendition than the federal Fugitive Slave Act had prescribed. New York, Indiana and Massachusetts made it possible for claimed fugitives to sue and have their claim to freedom tried by jury.99

Courts, unfortunately, including state courts of the northern states themselves, more often than not hewed to the line of federal supremacy and rejected state application of these laws. They would do so out of either a certain formalism or a teleological interpretation of the Constitution, the “historical necessity” doctrine. According to this doctrine, the Fugitive Slave Clause had been necessary to secure the assent of the Southern states to the Constitution.100 One wonders whether any of them were aware that the Clause had slipped into the Constitution almost as an accident of history. Admittedly, in light of the Nullification Crisis of 1830, many judges may have been reluctant to endorse any act on the part of a northern state that even vaguely resembled South Carolina’s anti-unionist defiance.

It was against the background of these proliferating anti-kidnapping laws of northern states that the Supreme Court heard its first case concerning slavery, Prigg v. Pennsylvania.101 This case was essentially a judicial retrial, almost a half century later, of a case identical to the one Congress had tried to settle legislatively with the passage of the Fugitive Slave Act. Pennsylvania had asked Maryland for the extradition of Edward Prigg, the agent of a Maryland claimant. Prigg had violated Pennsylvania law by circumventing the legal procedure and simply carrying off Margaret Morgan, who had been living in Pennsylvania for five years, along with her children. Maryland and Pennsylvania essentially agreed to make a test trial out of the matter: Maryland duly extradited Prigg to Pennsylvania, Prigg was convicted, the Pennsylvania Supreme Court upheld the verdict, and Prigg

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100 ibid., p. 218.
101 Prigg v. Pennsylvania (1842)
appealed the conviction to the United States Supreme Court.\textsuperscript{102} Chief Justice Roger Taney assigned the majority opinion to Justice Joseph Story, the eminent legal scholar of the Constitution and conflict of laws, who himself seems to have been of mildly abolitionist convictions.\textsuperscript{103} Nonetheless, Story chose the perspective of a conservative interpretation of the Constitution, along with “historical necessity” doctrine,\textsuperscript{104} to declare the Pennsylvania statute to be unconstitutional. He based this conclusion on an analysis of the Fugitive Slave Clause that held the “positive unqualified right on the part of the owner of the slave” to recaption to be self-executing, “which no state law or regulation can in any way qualify, regulate, control, or restrain.”\textsuperscript{105} Story confirmed, however, that the Fugitive Slave Clause was not at all based on comity, since

> no nation is bound to recognize the state of slavery as to foreign slaves within its territorial dominions when it is opposed to its own policy and institutions in favor of the subjects of other nations where slavery is recognized. If it does it, it is as a matter of comity, and not as a matter of international right.\textsuperscript{106}

Thus, implicitly, the Fugitive Slave Clause was the expression of a positive, vertical legislation of slavery, “which the Constitution of the United States was designed to justify and uphold”,\textsuperscript{107} whose validity was not up to an application of conflict of laws, including a state’s public policy objections.

However, Story went on to imply that while a state was bound not to interfere with the rendition of a claimed slave, and to protect the rights of a claimant against interference, at the same time it might not be bound to actively assist in rendition if its legislation prohibited it:

> The provisions of the act of 12th February, 1793, relative to fugitive slaves is clearly constitutional in all its leading provisions, and, indeed, with the exception of that part which confers authority on state magistrates, is free from reasonable doubt or difficulty. As to the authority so conferred on state magistrates, while a difference of opinion exists, and may exist on this point in different States, whether state magistrates are bound to act under it, none is entertained by the Court that state magistrates may, if they choose, exercise the authority unless prohibited by state legislation.

On the previous point, Story had carried most of the justices with him. But on this point, which implied that states had no obligation to enforce this provision of federal law, a number of justices dissented, including Taney.\textsuperscript{108}

\textit{Prigg v. Pennsylvania} served only to further deepen the schism between the North and the South. New York insisted on applying a narrow interpretation to \textit{Prigg}, denying its applicability to cases that did not closely resemble it. The New England states chose to take Story up on his implication that they were no longer

\textsuperscript{102} Fehrenbacher (2001), p. 219.
\textsuperscript{103} ibid., p. 220.
\textsuperscript{104} \textit{Prigg v. Pennsylvania}, (1842), 540.
\textsuperscript{105} ibid.
\textsuperscript{106} ibid.
\textsuperscript{107} ibid., 543.
obliged to make their state facilities available for rendition. Pennsylvania enacted
exacting regulations on the right of recaption without prohibiting it, penalizing
violent recaption.\textsuperscript{109}

For their part, southern states felt themselves to be pushed into taking
their own legislative measures to stem the flow of fugitive slaves, which they
believed to be abetted by abolitionist conspirators. Southerners were further
frustrated by the increasing difficulty of recaption and rendition in uncooperative
or resistant northern states.\textsuperscript{110} On the level of state legislation, southern states
increasingly closed all the remaining portals to freedom for slaves, even wholly
within their own jurisdictions, absolutely prohibiting manumission by will or by
deed. Thus an institution that had once been defended as a redoubt of freedom
for white slaveholders was now being enforced against the will of even those white
citizens who freely chose to grant their slaves freedom, in “the interest in securing
the social order in a Federal Union in which one section came to oppose to social
order in the other.”\textsuperscript{111}

In the presence of such clear public policy, the door now slammed shut
on interstate comity in southern courts, which previously had been open to the
\textit{ex \textit{lege}} emancipation of slaves who had been domiciled in non-slaveholding
jurisdictions with the full consent of their masters.\textsuperscript{112} Although the \textit{Dred Scott}
decision of the United States Supreme Court was to turn on issues other than
comity, Judge William Scott of the Missouri Supreme Court had clearly
pronounced a public policy exception in a previous, state phase of Dred Scott’s
case: that “no state is bound to carry into effect enactments conceived in a spirit
hostile to that which pervades her own laws”.\textsuperscript{113}

Faced with northern intransigence, senators and representatives of
slaveholding states now closed ranks in Congress, as well. They introduced a bill
in the Senate to amend the Fugitive Slave Act to make the involvement of state
officials unnecessary in the process of rendition of fugitive slaves. At first, this
only entailed lengthening the list of federal officials from whom certificates of
removal could be obtained, such as postmasters. But then the bill was radically
changed to introduce an entire hierarchy of federal officials in charge of
facilitating rendition; a rather ironic solution coming from southerners who
opposed the expansion of federal power at all costs.

The southern Senators were aided by northern Senators, including
Daniel Webster of Massachusetts, who were all too eager to grant the
slaveholding states anything they wanted in order to ease sectional tension and get
the rest of the Compromise of 1850 passed (which we will return to below). After
a number of amendments, the Senate passed the bill on August 26, 1850; and the

\textsuperscript{109} ibid., p. 222.
\textsuperscript{110} ibid., p. 225.
\textsuperscript{111} Morris (1996), p. 398-399.
\textsuperscript{112} 'American Slavery and the Conflict of Laws', (1971), p. 92-93.
House of Representatives passed it with no debate on September 12, also aided by northern representatives desirous of peace.\textsuperscript{114} The ultimate Fugitive Slave Act of 1850 introduced not only the system of federal commissioners and marshals, but it codified the right of recaption without process and introduced harsh penalties of up to 1000 dollars and six months’ imprisonment for anyone harboring a fugitive or impeding the rendition process.

**Slavery and territorial expansion: *Dred Scott v. Sandford***

I have now extensively analyzed the disastrous legal implications for equality of the Fugitive Slave Clause, along with the ever-increasing political strain that its implementation put on the Union. We can now return to the second seed of constitutional discord planted by the Northwest Ordinance: the federal regulation of slavery in the territories. Our analysis of the problems engendered by the Fugitive Slave Clause in terms of equality in United States citizenship, however, was never quite echoed in the actual legal and political struggle that it set off. Substantive issues of entitlement of black United States citizens to the equality implied by citizenship took a back seat to what was really just a power struggle between the slaveholding and the non-slaveholding states.

The matter of federal regulation of slavery in the territories, on the other hand, would come precisely to bear on the question of whether a black American was entitled to citizenship of the United States, and the equality entailed in that citizenship. It would also determine the extent to which Congress was authorized to ban slavery in federal territories that were not yet states. And it would come to bear on the question of what the relationship of state citizenship to federal citizenship was.

Dred Scott was a slave in Missouri who had been purchased by one Dr. John Emerson of St. Louis around 1833. Emerson, a surgeon in the U.S. Army, took Scott with him to Fort Armstrong, on Rock Island in Illinois. They lived there, and also on some nearby land that Emerson had bought a claim to, for about two years. Emerson was subsequently transferred to Fort Snelling, near the current location of St. Paul, Minnesota in 1836, and he took Dred Scott with him. At the time, this area was part of no state, but the Wisconsin Territory, then the Iowa Territory as of 1838. During their stay there, Dred Scott married Harriet, another slave. In 1840, Dred Scott and Harriet returned with Emerson to St. Louis, and Dred Scott and Harriet remained with Emerson’s wife while Emerson went to Florida on another commission. Emerson returned in 1842, then moved to his land claim in Iowa, but died by the end of that year. He willed almost his entire estate to his wife Irene.\textsuperscript{115}

In 1846, Dred Scott and Harriet sued Irene Emerson for their freedom.

\textsuperscript{115} Fehrenbacher (1981), p. 121-129.
They argued that through having been domiciled with the consent of their master on free soil, they had become emancipated. They probably did not think that they were making a controversial claim: it was well known that Missouri courts accorded comity to the emancipatory laws of other states if a domicile had been established there. The case did not go as easily as Dred Scott and Harriet might have expected. After a number of hitches, possibly due to errors on the part of their counsel, they finally did win their freedom from the court of St. Louis at the beginning of 1850. But Mrs. Emerson filed appeal to the Missouri Supreme Court, shortly before the winds of political change started to blow in her favor.116

It is at this point that Dred Scott’s case, owing nothing to his personal circumstances, became entangled in the national controversy regarding slavery in the Western territories and the increasing animosity between slaveholding states and non-slaveholding states. In September 1850, Congress passed the five bills, including the Fugitive Slave Act of 1850, that became known as the Compromise of 1850. This compromise provided the resolution to a bitter struggle between the slaveholding states and the non-slaveholding states about whether the Western territories newly acquired in the Mexican-American War would be non-slaveholding or slaveholding.

This had been a national debate, roughly, about whether Congress could pre-ordain a given territory to be slaveholding or non-slaveholding, and if so, which territories would be slaveholding or non-slaveholding; or if Congress’ silence on the issue for a given territory meant that it would be decided, based on popular sovereignty, by the first settlers to set up a territorial government there.117 Crucial to the debate with regard to non-state territory was what the default status of slavery was under the Constitution where there was no positive state law on the matter. “Free-soilers” claimed that slavery could only exist under state law, and thus that freedom for all was the default status under the Constitution; while theorists like Calhoun defended the point of view that because the Constitution protected rights of property, nothing about it prohibited slavery from the outset. The more politically intractable the debate became, the more it seemed that the matter would somehow have to be decided by the Supreme Court.118

To return to the effect of the struggle surrounding the Compromise of 1850 on Missouri state politics: it had left Missouri particularly bitter, now that it was surrounded on three sides by free territory. In the August 1850 elections for the Missouri state legislature, forces moderate on slavery, led by Senator Thomas Hart Benton, were the big losers. The judges of the Missouri Supreme Court saw that the time was ripe to maneuver against Benton and curry favor with proslavery interests. Intervening elections for the Missouri Supreme Court swept in the proslavery Democrat William Scott, who joined sitting judge Ryland in a 2-to-1

116 ibid., p. 130–133.
117 ibid., p. 65.
118 ibid., p. 77.
majority against Dred Scott in the nakedly political decision quoted above\textsuperscript{119} on March 22, 1852, denying comity to the effect of Illinois and territorial law.\textsuperscript{120}

Any appeal on the part of Dred Scott to the United States Supreme Court at this stage would have only been asking for a ruling on the Missouri court’s understanding of comity.\textsuperscript{120} Anyhow, the Supreme Court might have declined jurisdiction. But then a number of circumstances changed. Irene Emerson remarried to an abolitionist congressman from Massachusetts, Dr. Calvin C. Chaffee, and Dred Scott and Harriet were sold to Irene Emerson’s brother, John Sanford of New York. Whatever the reasons for this (Kettner claims it was deliberate, in order to concoct a case,\textsuperscript{122} while Fehrenbacher sees the exact motives as shrouded in mystery\textsuperscript{123}), this suddenly gave Dred Scott and Harriet arguable access to the diversity jurisdiction of the federal court system, as Sanford was a citizen of a different state.

The federal circuit court of Missouri ruled that Dred Scott was a citizen of Missouri for purposes of the diversity jurisdiction, using roughly the same criteria that had become established in federal case law;\textsuperscript{124} after all, it reasoned, “citizen” in the sense of the diversity jurisdiction did not necessarily have to mean “citizen” in the sense of the Privileges and Immunities Clause. Nevertheless, on the merits it ruled that Dred Scott was still a slave, apparently ceding the Missouri Supreme Court full sovereignty in its application of comity. (The judge apparently commented afterwards that if Dred Scott had been \textit{declared to be free} while living in Illinois, he would have remained free upon his return to Missouri, an assertion probably based on an understanding of the Full Faith and Credit Clause that only allowed for judicial and administrative acts, but not the mere natural operation of law, to have effect,) The court was probably also influenced by the recent U.S. Supreme Court decision \textit{Strader v. Graham} (1851), which had denied emancipatory effect of the laws of Ohio to a Kentucky slave who had occasionally visited Ohio. The Supreme Court had ruled in favor of Kentucky’s sovereignty “to determine the status, or domestic and social condition of the persons domiciled within its territory.”\textsuperscript{125}

This established the case to be appealed to the Supreme Court of the United States. The first matter to be decided was whether the diversity jurisdiction applied. And the second matter to be decided was whether Dred Scott had become free by virtue of having been domiciled in Illinois or a territory where slavery was prohibited.

\textsuperscript{119} \textit{Supra} at n. 113  
\textsuperscript{120} Fehrenbacher (1981), p. 133-139.  
\textsuperscript{121} ibid., p. 139-140.  
\textsuperscript{122} Kettner (1978), p. 325.  
\textsuperscript{123} Fehrenbacher (1981), p. 140-144.  
\textsuperscript{124} See \textit{supra} at n. 61  
I need only to briefly summarize the notorious majority opinion authored by Chief Justice Roger Taney\textsuperscript{126} to be able to subsequently comment on it as a general conclusion to the “horizontal” phase of United States citizenship, while determining which of my types of equality in duplex citizenships apply:

1. The Constitution categorically excludes persons of African origin, whose ancestors had been imported to the United States as slaves, from United States citizenship. To support this conclusion, Taney cited countless colonial and state statutes, in force at the time of the promulgation of the Constitution, which categorized slaves and persons of African origin as patently inferior to white persons. Citing the Declaration of Independence, Taney noted that

   In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.\textsuperscript{127}

   And as to what the Framers meant the preamble of the Declaration to mean:

   They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them.\textsuperscript{128}

   Taney further cited the recognition of slavery, in the Slave Trade Clause and the Fugitive Slave Clause, in the Constitution as proof for the point of view that blacks were ever intended to have an inferior status to whites and to be excluded from citizenship.

\textsuperscript{126} Dred Scott v. Sandford (1856)
\textsuperscript{127} ibid., p. 407.
\textsuperscript{128} ibid., p. 410.
Furthermore, Taney saw federal naturalization law, which solely admitted “free whites” to the possibility of becoming naturalized United States citizens, as evidence that the Framers never intended for blacks to ever be able to become United States citizens. There were only two possible ways to become a citizen: by being a descendent of the citizens of one of the states that had established the Constitution, or by being naturalized by the federal naturalization law.

States were free to admit blacks to state citizenship, or to any of the rights entailed in it, but this by no means implied that they had also become United States citizens, since only federal law, which had been agreed upon by all the states, could provide that a person was a United States citizen.

After all, if any state was free to make a black person a citizen, that citizen would then be entitled under the Privileges and Immunities Clause to go to a slaveholding state as a free man, and would be exempt from the operation of the special laws and from the police regulations which [the slaveholding states] considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.129

As such, Dred Scott was not a “citizen” in the sense of the diversity jurisdiction, and his case could not be brought in federal court.

2. Nevertheless, Taney went on to issue a statement on the merits of Dred

129 ibid., 417
Scott’s claim. As to Dred Scott’s domicile in federal territory: did Congress have the power to prohibit slavery in that territory, which was acquired in the Louisiana Purchase?

The Constitutional provision granting Congress the power to “to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States” did not apply to territories acquired after the Revolution, but only to the unincorporated territories the United States had at that time (i.e., the Northwest Territory).

Anyhow, even this provision of the Constitution, where applicable, did not grant Congress power to establish legislation over this territory, but only regulate any personal or moveable property it might acquire there. It cannot exercise power over the person or property of a citizen residing in that territory, as that would be tantamount to colonialism. Nor can it limit the rights and freedoms enumerated in the Bill of Rights in that territory.

Therefore it follows, that since the Fifth Amendment provides that no person shall be deprived of life, liberty, and property, without due process of law, and “the right of property in a slave is distinctly and expressly affirmed in the Constitution”, any act of Congress limiting that right is void, and Congress has no power to regulate slavery in the territories. Thus, Dred Scott and his family were not made free by their residence in a territory, and more generally, the Missouri Compromise was invalid.

3. Finally, the question of whether Dred Scott was free by his period of residence in Illinois is purely a matter to be decided by Missouri, and thus Strader v. Graham continues to apply. Since Dred Scott does not have access to the diversity jurisdiction of federal law, a federal court has nothing to say about it.

Conclusion: The failure of horizontal United States citizenship

By this judgment, the Supreme Court sweepingly excluded black Americans from the possibility of ever being entitled to the full equality inherent in United States citizenship. One can certainly point out numerous flaws in Taney’s reasoning,
even working within the limited logical toolbox that the Constitution and the case law of the time provided him.

But the greatest flaw that this judgment reveals may be in the text of the Constitution at the time: its complete failure to provide a clear formal definition of United States citizenship and the equality entailed in it. As Justice McLean wrote in his dissenting opinion in *Dred Scott*, "On the question of citizenship, it must be admitted that we have not been very fastidious." Instead, the Constitution implicitly relied primarily on state citizenship to define who United States citizens were. And while the Framers made absolutely clear that United States citizenship was not merely the legal successor to British subjecthood, but something completely different, they failed to clearly establish compelling legal norms of equality that ensured that not only the descendants of British colonists and naturalized European immigrants could fully enjoy the equality of citizenship.

In terms of equality, the only two reliably uniform forms of equality that were ever established under the Constitution of the time were equal subjection to prosecution for treason and the equal right of slaveholders to recapture slaves (with on the flip side, the equal liability of free black citizens to being "recaptured"). For the rest, the practical equality that white United States citizens enjoyed was based largely on the fact that all of the states had shared cultures of “English liberties”. We already noted that the Declaration of Independence was perhaps implicitly grounded in the “rights of Englishmen”, which meant that it did not provide a strong philosophical basis for extending those rights to any persons other than "Englishmen" and their descendants. And in Taney’s opinion, we see echoes of archaic Cokean reasoning, dividing the world along racial lines into civilized and “conquered”, when he writes that the Constitution had established a line between a “citizen race who formed and held the Government, and the African race, which they held in subjection and slavery and governed at their own pleasure”.

We can certainly disagree with Taney’s assertion that the Constitution was never meant to formally admit blacks to United States citizenship. But as long as the Fugitive Slave Clause and a weak statutory implementation of the Extradition Clause were in effect, we can agree that there was no chance of free black United States citizens ever getting to substantively enjoy any equality inherent in citizenship. The Constitution implicitly instituted slavery as a legal norm, including in the non-slaveholding states. In practice, black Americans were only ever going to be aliens.

United States citizenship, to start with, was almost purely “horizontal” in nature. Aside from a uniform subjection to prosecution for treason (which was not really an equality for equality’s sake, but a function of allegiance), the most prominent equality in United States citizenship was non-discrimination (based on the most

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131 ibid., 533
132 Cf. supra in Ch. 1 before n. 197.
133 *Dred Scott v. Sandford*, (1856), 420
uncontroversial reading of the Privileges and Immunities Clause): citizens of one state were entitled to the equal applicability of the laws of any other state they went to. This meant that citizens were only entitled to treatment that was substantially the same in different states to the extent that those states happened to have the same legal traditions. Mobile white citizens could generally rely on the non-discriminatory application of “rights of Englishmen” that all of the states' legal systems had in common. However, the states diverged sharply from each other on the issue of race and slavery. This meant that a mobile free black citizen of a non-slaveholding state, when in a slaveholding state, could derive no benefit from non-discrimination as a form of equality: she or he would be equally subject to the laws of the host state that presumed her or him to be a slave.

Thus a duplex citizenship that entails largely only horizontal equality is not much of a citizenship (in terms of equality) at all. Only through becoming more “vertical” could United States citizenship come to possibly mean something more. In our reading of the history of United States citizenship, we saw clear evidence that the fact that Congress had the power to set a “uniform rule of naturalization” somehow contributed to an increased “verticalization” of state citizenship; if only for convenience’ sake, state citizenship was increasingly being seen as a function of United States citizenship rather than the other way around. Yet this development was far too implicit and was not directly linked to any concept of inherent equality in United States citizenship, thus rendering it vulnerable to the centrifugal forces in the Union.

Another sign of the increasing primacy of federal citizenship was the ever-increasing implausibility of “domestic citizenship”, i.e. state citizenship without United States citizenship. United States citizenship could, however, exist without state citizenship: this was partly necessitated by Western expansion into territories that had not yet become incorporated states. In Schönberger’s analysis, citizenship in a federal order certainly allows for someone to be a federal citizen without being a state citizen: federal citizenship by its very nature strives toward unity, while state citizenships are plural. But the possibility of state citizenship without federal citizenship, such as what Taney suggested, is alien to federalism, in Schönberger’s view: this is precisely why Dred Scott, in particular this aspect of it, was necessarily a prelude to the Civil War.

We saw that certain kinds of equality established by a duplex citizenship can establish inequality among federal citizens within the territory of a given state. We called these “cross-border equalities”, where only migrating federal citizens benefit from a certain vertical norm of equality, and “portable equalities”, where

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134 See supra in Ch. 2 at n. 115.
135 Schönberger (2005), p. 174-175.
136 ibid., p. 187-188.
migrating federal citizens can take rights with them that they enjoy in their home state. Wherever a cross-border form of equality is established, we claim that it typically is meant to serve a particular policy goal, particularly easing migration between states, and the cost of inequality can be balanced against the benefit it is meant to serve. However, if the federal cross-border form of equality is extremely divergent from the equality available to sedentary citizens, or if mobile federal citizens have extremely divergent rights in their home states that are portable to host states, then migration of federal citizens can have an extremely destabilizing effect on the system as a whole.

We saw that the Fugitive Slave Clause introduced a form of cross-border equality that—in the non-slaveholding states—directly limited the equal right to life, liberty and the pursuit of happiness enjoyed by sedentary (black) citizens and also brought about instability for all through general lawlessness and stress on the federal system. On the flip side of the coin, viewed purely from inside the perspective of the slaveholding states (as represented in Taney’s opinion), the introduction of a cross-border equal right to life, liberty and the pursuit of happiness for all US citizens (regardless of color) would have posed a threat to the political conceptions that those states were founded on. A legal order that is necessarily based on certain sedentary persons being denied the rights of citizenship, indeed human rights, can quite arguably be destabilized by the presence of mobile federal citizens who do have those rights (e.g., by free blacks mixing into a society based on black slavery) or by sedentary citizens fleeing into adjoining states in order to claim equality as mobile citizens (e.g., slaves fleeing into freedom and destabilizing a slavery-dependent economy).

Likewise, portable equalities—guaranteed by comity—also posed a danger of instability for slaveholding states that recognized emancipations in free states, and for free states that recognized the right of slavery in other states. A host state could limit the instability and inequality thereby created, by raising public order exceptions, but if once these became the rule rather than the exception then the portable equalities at stake became nugatory.

I will make the following new claim: the only way to limit the inequality and potential destabilizing effects of mobility-enhancing forms of equality in a federal order is to ensure convergence (if not complete uniformity) in the equality enjoyed by sedentary citizens of different states in the first place, i.e. to minimize and ameliorate the inequalities engendered by mobility. For instance, to apply this claim to the American case: at the very least, the necessary first steps to make a horizontal United States citizenship work would be the abolition of slavery and the imposition or voluntary adoption on the part of all the states of common human rights standards. Otherwise, the mobility entailed in a duplex citizenship would be (and in fact was) too destabilizing for states and the federal system as a whole.

As it happened, however, United States citizenship would increasingly abandon the horizontal paradigm of citizenship. A much more effective solution would be
to make the benefits of citizenship more strongly vertical and to repeal the vertical burdens that existed. In the next chapter, we will explore how United States citizenship would increasingly be vertically defined.
Chapter 4: A new, vertical beginning for United States citizenship

Introduction

In this chapter, we will see how the development of United States citizenship was given a new vertical impetus with the introduction of the Fourteenth Amendment to the US Constitution (in conjunction with the Thirteenth and Fifteenth Amendments). However, the promise of this new, *de jure* United States citizenship was still to fall short for black citizens until well into the twentieth century, as many states still denied them the *de facto* rights of citizenship. This exposed the problem of "second-class citizenship", i.e. where a *de jure* citizenship is a hull devoid of substantive content. However, over the course of over a century, United States citizenship would develop through judgments of the Supreme Court, the civil rights movement, and Congressional legislation into a vertical equality that was not only formally uniform for all federal citizens, but substantially uniform as well.

The Fourteenth and Fifteenth Amendments

As we did with the English Civil War, we have skipped over the American Civil War, since it can be seen, at least with regard to the secessionist states, as a sort of constitutional interregnum (which did not really exist, i.e. viewed retrospectively, there was no interruption of constitutional continuity). Charles II, upon being invited to resume the throne of England, at least implicitly had to accept a new status quo in which Parliament was supreme. Yet the parliamentary forces in England might later have come to regret not setting more limitations on the king and his progeny in constitutional stone; they would be sure not to repeat that mistake after the Glorious Revolution, by passing the Act of Settlement and the Bill of Rights as constitutionally foundational statutes.

As the American Civil War wound down, the elected politicians of the Union were equally mindful of the need to remodel the Constitution prior to the secessionist states’ full return to the fold. President Abraham Lincoln’s 1863 Emancipation Proclamation, an executive order based on military authority over occupied territories in the South, was legally somewhat flimsy and seemed unlikely to hold up after the end of the war. Moreover, prior to becoming President the jurist Lincoln had long been conscious of the fact that the existing text of the Constitution (and the small-c constitution, including the Declaration of Independence) offered only a shaky legal basis for legislating human or civil equality. In his 1857 speech on *Dred Scott*, Lincoln had parried Taney’s assertion
that the authors of the Declaration did not intend to grant equality to black people\(^1\) with the legal argument that the Declaration did not grant equality to all white people either. Rather, Lincoln argued, the preamble’s assertion of all men’s inalienable rights to life, liberty and the pursuit of happiness was declaratory, not constitutive. Lincoln freely admitted that the phrase “all men are created equal” was legally inoperative for the purpose of declaring independence from Britain;\(^2\) but it was placed in the Declaration, not for that, but for future use. Its authors meant it to be, thank God, it is now proving itself, a stumbling block to those who in after times might seek to turn a free people back into the hateful paths of despotism.\(^3\)

Now as President, Lincoln had a chance to help create a basis for constitutively legislating the equality that the Framers had only declared the existence of. Lincoln’s re-election in 1864 on a platform of abolishing slavery by constitutional amendment gave him and the Republican majority in Congress a mandate to push for passage of what would become the Thirteenth Amendment; and they did ultimately achieve the required two-thirds majority vote in Congress. Almost all of the Northern states quickly ratified it; a sufficient number of border states and Southern states with Reconstruction governments (i.e. vertically imposed) went on to ratify it as well, and the Thirteenth Amendment entered into force with Georgia’s ratification at the end of 1865, not long after the formal conclusion of the Civil War.

Yet many in Congress (with all of the formerly secessionist states still excluded from representation) feared that the Southern states would try to circumvent the abolition of slavery by legislating inequality of black Americans by other means; in fact, many Southern states had already begun to do so with the enactment of the so-called “black codes”.\(^4\) As a result, Congress passed the Civil Rights Act of 1866\(^5\) to make clear that race was no reason to deny the rights of citizenship. As Bickel writes, this Act further aimed to “exorcise” \textit{Dred Scott}, which had only used the concept of citizenship “negatively, in exclusionary fashion”.\(^6\) To use our terms, \textit{Dred Scott} had used an \textit{inductive} reading of United States citizenship, finding the ways in which blacks \textit{de facto} did not enjoy the rights of citizenship, to deny it as a status \textit{de jure} to black Americans. Since many states denied them the rights that went along with citizenship, they could not be citizens, in Taney’s reasoning.

Congress countered this by positively legislating a vertical United States citizenship that was no longer dependent on state citizenship, providing

\(^1\) Cf. supra in Ch. 3 at n. 127.
\(^2\) Cf. supra in Ch. 1 before n. 195.
\(^3\) Basler (1946), p. 361.
\(^5\) Civil Rights Act, (United States Congress 1866)
[t]hat all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States;

and providing which rights flowed forth from that status, deductively:

and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.\footnote{7 United States Congress (1866), Sec. I.} 

The subsequent sections went on to establish criminal penalties and civil liability for violation of Section 1, as well as providing for means of executive enforcement. As to the catalogue of rights listed in Section 1, it is clear from their stated beliefs that the Republican majority in Congress considered these to be the same rights as those guaranteed by the Privileges and Immunities clause of Article IV, Section 2 (specifically as catalogued by Justice Washington in \textit{Corfield v. Coryell}\footnote{8 Supra in Ch. 3 at n. 32 et seq.}).\footnote{9 Tribe (2000), p. 1295; Curtis (1986), p. 47-48; Keynes (1996), p. 72.} In fact, Congress’ rationale for the passage of the Act seemed to be that the Privileges and Immunities Clause, on its own, lacked sufficient legal authority to compel the states to respect those rights for all citizens.\footnote{10 Smith (1997), p. 820-821.} 

Yet subsequent to the passage of the Civil Rights Act, a more nettlesome constitutional question arose: even if the Privileges and Immunities Clause did not itself provide any protection, did it provide a sufficient formal basis for Congress to legislate the substantive protection that the Act aimed to provide? Representative John A. Bingham of Ohio, the principal drafter of the Act, feared that it did not (nor, for that matter, did the Thirteenth Amendment\footnote{11 Nelson (1988), p. 48.}): what was to become the Fourteenth Amendment was specifically intended by Congress to provide the necessary constitutional basis for the Civil Rights Act after the fact.\footnote{12 Smith (1997), p. 821.}

The Fourteenth Amendment was adopted by the necessary two-thirds majority of Congress on 13 June 1866, but was only ratified by the necessary number of Southern states after Congress applied some legal arm-twisting, making representation in Congress for any state conditional on that state’s ratification of the Amendment.\footnote{13 McDonald (1991), p. 11. (As one can gather from the title of McDonald’s article, the ratification process would be seized on for over a century to come by those eager to cast doubt on the constitutionality of the Fourteenth Amendment.)}

Section 1 of the Fourteenth Amendment provided:

\footnote{7 United States Congress (1866), Sec. I.}
\footnote{8 Supra in Ch. 3 at n. 32 et seq.}
\footnote{10 Smith (1997), p. 820-821.}
\footnote{11 Nelson (1988), p. 48.}
\footnote{12 Smith (1997), p. 821.}
\footnote{13 McDonald (1991), p. 11. (As one can gather from the title of McDonald’s article, the ratification process would be seized on for over a century to come by those eager to cast doubt on the constitutionality of the Fourteenth Amendment.)}
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The first sentence, the Citizenship Clause, could be seen as making US citizenship even more vertical, not only defining US citizenship without reference to state citizenship, but deriving state citizenship from US citizenship. And the first clause in the second sentence (containing what would become known as the Privileges or Immunities Clause) could be seen as defining the substantial rights attaching to citizenship, being an obvious reference to the Privileges and Immunities Clause in Article IV. (Notably, the subsequent clauses, the Due Process Clause and the Equal Protection Clause, referred not to citizens but to persons. One account for this is that these formulations may have had a historical relationship to the Republicans’—admittedly unorthodox—reading of the due process clause of the Fifth Amendment, which they had already seen as prohibiting slavery in the territories. The Fifth Amendment had referred only to “persons”, but Republicans read it as applying to citizens within states and persons within territories, in order to be able to say that slavery in the territories—regardless of slaves’ citizenship status—was a deprivation of slaves’ liberty without due process of law.\textsuperscript{14})

In terms of legislative chronology, the second sentence preceded the first one: in the original version passed by the House, for which Bingham is given most of the credit, only the second sentence was present. The Citizenship Clause, an even more specific echo of the Civil Rights Act’s \textit{jus soli} definition of citizenship, was inserted by subsequent amendment in the Senate. Bingham, who was apparently very taken with the original promise of the Privileges and Immunities Clause, may have either had a very expansive notion of citizenship that was interchangeable with personhood, or have assumed that birthright US citizenship could be defined by statute. The Senate, on the other hand, may have wished to rein in the privileges and immunities promised to all US citizens (or even all persons) by expressly limiting the grant of US citizenship (excluding, in particular, Native Americans from sovereign tribes and children of foreign diplomats) and at the same time cementing the reversal of \textit{Dred Scott}.\textsuperscript{15}

The enactment of Section 1 of the Fourteenth Amendment marked the first time that the protection of the Constitution had expressly been inserted in between states and their citizens; this was a reversal of constitutional tradition, according to which the states were to be trusted in their exercise of sovereign power with

\textsuperscript{14} Curtis (1986), p. 46.
\textsuperscript{15} Bickel (1973), p. 373-374.
regard to their own citizens, and only the federal government had to be limited.\textsuperscript{16} So at least in theory, some form of uniform equality (in terms of protections, rather than only the burdens of equal prosecutability for treason and across state lines) had now been instituted for all US citizens (as defined by the Citizenship Clause), both as citizens (Privileges or Immunities Clause) and as persons (Due Process Clause and Equal Protection Clause), that could be enforced against the states in federal and state court. US citizenship now clearly existed, at least in theory, as a primary status that equalities could be deduced from.

But what this equality precisely entails for US citizens, and to what extent it is in fact judiciable in federal court against state authorities, would be a question that the Supreme Court was to struggle with answering, as we will see in the remainder of this chapter. We have a fairly good idea, from the legislative history of the Fourteenth Amendment, of what the Republican majority in Congress meant to enact with the Privileges or Immunities Clause: in particular, it seems very likely that Congress understood the Privileges or Immunities Clause also to incorporate the protections of the Bill of Rights, at least the first eight amendments, in the limitations on the states.\textsuperscript{17}

Yet Congress missed the chance to clearly, positively enumerate the privileges and immunities of citizenship in the text of the Privileges and Immunities Clause as it had in the Civil Rights Act, choosing instead for a negative formulation.\textsuperscript{18} Bickel criticizes Bingham for choosing this formulation precisely for its indefiniteness, concluding that Congress wished only to overrule \textit{Dred Scott} without considering the positive consequences it desired for citizenship.\textsuperscript{19} (And indeed, the meaning of the Citizenship Clause, the clause aimed to overrule \textit{Dred Scott}, would crystallize and become settled much sooner in the case law than the other three Clauses, in no small part thanks to its positive definiteness.)

Section 2 of the Fourteenth Amendment aimed to abolish the three-fifths rule of the Apportionment Clause\textsuperscript{20} and ensure the enfranchisement of (male) black citizens. Yet it did not positively enact suffrage for them—continuing the

\begin{flushright}
\textsuperscript{16} Cf. supra Ch. 3 at n. 40.
\textsuperscript{17} Tribe (2000), p. 1301-1302; and see, for how obvious and self-evident an article of faith it was to many Republicans that the Bill of Rights limited state action, prior to the enactment of the Fourteenth Amendment and subsequent to it: Curtis (1986), p. 49-51 and 91 respectively.
\textsuperscript{18} Bell (1980), p. 32 n. 7, referred to by Buckner Immiss (1999), p. 100. Indeed, the relationship between privileges \textit{and} immunities and privileges \textit{or} immunities is one of the logic of negation: if citizens \textit{shall} (positively) \textit{have} rights P \textit{and} Q, then it follows (negatively) that states \textit{shall not abridge} P \textit{or} Q. Unfortunately, taken literally, this leads back to the original problem of definition and judiciability of the Privileges and Immunities Clause, and whether or not it is declaratory or constitutive of the privileges and immunities.
\textsuperscript{19} Bickel (1973), p. 373-374. See also, for other, less personally directed accounts of why this text may ultimately have been chosen by the Joint Committee in Congress, Nelson (1988), p. 51-53.
\textsuperscript{20} Supra Ch. 3 at n. 7 et seq.
\end{flushright}

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Constitutional tradition of not positively enacting suffrage for anyone — instead putting pressure on states not to disenfranchise them (italics added): Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

The Republicans in Congress were hereby attempting to resolve a dilemma of the emancipation of former slaves in the South. As we discussed before, the three-fifths compromise had actually worked to the disadvantage of non-slaveholding states in terms of their representation in Congress (and thus their weight in the Electoral College in Presidential elections) relative to the slaveholding states, meaning that Congress would be more biased toward pro-slavery interests. It would have been more to the political advantage of Northern abolitionists if slaves had been counted for less or not at all.

Now if all persons were to be counted fully, the states with large populations of former slaves were suddenly to get a boost in representation. This was not necessarily a bad thing for the Republicans, if newly enfranchised blacks were to vote for them, as expected. But if white Southerners were to continue to disenfranchise blacks, then the advantage for the Republicans (who saw themselves as no less than the guardians of the reconstituted Union) would evaporate. The apportionment clause of Section 2, penalizing disenfranchisement with reduced representation, was the codification of one solution that was proposed to this problem. (Section 3, which disqualified from elected office politicians previously elected to federal office who had actively collaborated with secession, was the codification of another proposed solution, i.e. to tilt the electoral playing field in the South in the favor of Unionist politicians.)

One advantage of Section 2 was that it finally created more of a link between citizenship (rather than wealth) and democratic representation (at least, to the extent that the percentage of all residents who were male citizens over 21 was roughly the same in every state). But it also could have been read as an implicit authorization to whites in Southern states to go ahead and disenfranchise blacks anyway for what they might consider to be the small price of reduced representation. (It is possible that earlier proposals, which did expressly enfranchise black male citizens, were dropped because of assurances to radical

21 Supra Ch. 3 at n. 9.
22 Supra in Ch. 3 after n. 12
24 Cf. supra in Ch. 3 at n. 8
Republicans that the Privileges or Immunities Clause, directed as it was specifically to citizens, could be read to guarantee the franchise to all citizens.\textsuperscript{26} It is also fairly clear that those proposals that positively enfranchised black citizens had been unpassable.\textsuperscript{27} Section 2 also attracted criticism from the growing women’s movement, which objected to the fact that it exclusively benefited men.\textsuperscript{28}

The most pro-equality forces within the Republican Party feared that the Fourteenth Amendment was not enough to guarantee that the Southern states would not disenfranchise black citizens (and, it must be noted, Northern states were only lukewarm toward the enfranchisement of black citizens; even in 1840, when abolitionist sentiment had reached a fever pitch in the North, most free blacks in the North were still legally or practically disenfranchised\textsuperscript{29}). These radical Republicans wished to take further constitutional measures. But in the run-up to the Presidential election of 1868, the goal of retaking the White House from the Democrat Andrew Johnson (who had succeeded to the Presidency subsequent to the assassination of Lincoln, and had proved more resistant to Reconstruction measures than the Republicans would have liked) was paramount. Moreover, other, less radical Republicans had already sold the Fourteenth Amendment to their white constituents precisely by pointing to the fact that the Fourteenth Amendment did not actually give blacks the right to vote.\textsuperscript{30} (Bell notes that most Republicans were not so much motivated by any ideology of equality as they were by the desire to maintain control of Congress.\textsuperscript{31})

So if the Republicans had plans for any new Constitutional amendment, they certainly kept mum about it in the period before the election, knowing that it was bound to be unpopular. After the Republican candidate Ulysses S. Grant had been elected, and the Republicans had retained a safe Congressional majority, the Radical Republicans enlisted the support of factions of nationalists (supporters of a strong central government) and universal suffragists to pass the Fifteenth Amendment in Congress. It was subsequently ratified in 1870,\textsuperscript{32} but the required three-fourths majority of states could be achieved only with the few states still outside the Union, for which their readmission was made contingent on ratifying the Amendment.\textsuperscript{33} The Fifteenth Amendment provided:

\begin{quote}
Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.
\end{quote}

\begin{flushleft}
\textsuperscript{26} ibid., p. 56.
\textsuperscript{27} Bell (1980), p. 33.
\textsuperscript{29} Bell (1980), p. 129-130.
\textsuperscript{31} Bell (1980), p. 33.
\textsuperscript{32} Jordan (1985), p. 546-548.
\textsuperscript{33} Bell (1980), p. 132.
\end{flushleft}
The formal introduction of a vertical United States citizenship and human rights standard

With the Thirteenth, Fourteenth and Fifteenth Amendments, collectively known as the “Reconstruction Amendments”, the formal Constitutional framework for a United States citizenship with equality as its guiding principle has been put in place, thus finally fulfilling the promise of the preamble of the Declaration of Independence. Their literal provisions can be broken down into three categories: human rights, the definition of citizens, and citizen’s rights.

The text of the Thirteenth Amendment and the portions of the Fourteenth Amendment dealing with the rights of “persons” can be described as establishing in terms of a uniform equality a common standard of human rights (the abolition of slavery, the right to due process, and the right to the equal protection of the laws), not so much citizen’s rights per se, in the United States.

But the mere establishment of a common human rights standard within the existing framework of a formally horizontal United States citizenship was thought to be insufficient in light of Dred Scott, which still made respect for those rights contingent on states’ say-so. Thus the Citizenship Clause of the Fourteenth Amendment clearly defined a vertical United States citizenship, of which state citizenship was henceforth to be a derivative.

Finally, the Fifteenth Amendment and the remaining provisions of the Fourteenth Amendment provided for the uniform equalities that attached specifically to United States citizenship. The exact meaning of the “privileges or immunities” of citizens that states could not abridge was somewhat ambiguous. It was a bit clearer, on the other hand, that for the first time in the Constitution, something approaching electoral rights for citizens was to be attached to United States citizenship, either indirectly (Section 2 of the Fourteenth Amendment, which also hinted at a right to democratic representation) or more directly (the Fifteenth Amendment).

The Fourteenth and Fifteenth Amendments can be seen as pre-emptive moves on the part of the ideological victors of the Civil War to make sure that the former slave states would not legislate racial inequality by other means once slavery had been abolished. But their greatest flaw may be that none of the rights of citizens were positively defined: the Privileges or Immunities were defined negatively, and even the Fifteenth Amendment could be read to at most declaratively to refer to a pre-existing right of United States citizens to vote, rather than to constitutively guarantee it. (Perhaps its framers assumed too facilely, in line with their own thinking, that the right of citizens to vote would be seen one of the Privileges or Immunities.)
This failure to establish clear texts of the provisions would prove to be a sticking point in their interpretation, especially in light of the fact that the Reconstruction Amendments had been adopted without a full democratic consensus on what they meant, or for that matter, a satisfactory contribution to the democratic consensus from those Southern states under vertically imposed Reconstruction administrations. In the remainder of this chapter, we will review how it was to take over a century for the formal framework of the Reconstruction Amendments to be fleshed out in a substantially meaningful citizenship for US citizens of color.

The long road to substantive equality based on US citizenship

Grant’s first term as President marked great strides toward enforcing the promise of US citizenship for black citizens in the South: Grant’s administration deployed federal troops and aggressive prosecution in federal courts to suppress racially motivated violations of civil rights. Congress provided legislative backing for this executive power by enacting, after a lengthy debate, the Enforcement Act of 1871,34 the third in a series, which in its third section authorized the President to use military force to suppress movements that aimed to deprive any class of people in a given state of their civil rights.

The Act additionally established civil liability for such deprivation (Section 1) and criminal liability and federal jurisdiction (Section 2). Congress unmistakably based the Act on the Fifteenth and Fourteenth Amendments, and the Privileges or Immunities Clause in particular: Section 3 referred to the deprivation “of any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by this act”. The Act revealed a fragile consensus on the Reconstruction Amendments that even if they were not self-executing, they justified the active legislative insertion of federal (i.e. vertical) power and jurisdiction in between a state and its citizens whenever that state failed to protect constitutional rights.35

Yet the fact that such legislation was even being considered, i.e. to enforce right by might, shows that the Reconstruction Amendments were far from achieving the status of settled law in the South. The Act was more commonly known as the Ku Klux Klan Act due to the fact that it was specifically drafted to deal with the menace of white supremacist conspiracies; these secret organizations of whites worked tirelessly to terrorize by means of murder, beatings and systematic ostracism any blacks who dared to vote. Their goal was to enable the electoral recovery of the Democratic Party by keeping the black voters that the Republicans needed away from the polls. Thus the legal force that had been employed by Congress to ensure a continued Republican majority (i.e. by

34 Enforcement Act 1871 (third act), (United States Congress 1871)
essentially forcing the Southern states to ratify the Reconstruction Amendments), had now been met by the backlash of violent force from popular white movements.36

The Tilden–Hayes Compromise: the political abrogation of the Reconstruction Amendments

The ultimate result of the presidential election of 1876, after Grant had served out his second term and stepped down in accordance with (informal) constitutional tradition, effectively validated these violent methods:37 Tilden, the Democratic candidate, won the national popular vote, and his victory in the Electoral College hung in the balance, dependent on disputed results from South Carolina, Florida and Louisiana. In these states (at least in South Carolina and Florida, which had black majorities), it appeared that effective disenfranchisement of those states’ black voters might have swung the results in favor of Tilden. With this being the point of contention, the matter could not be objectively resolved by recounts: a special 15-member electoral commission composed of members of the House, the Senate, and the Supreme Court was convened. This commission had a narrow Republican majority by one, and it voted along party lines to give all the disputed electoral votes to Hayes, the Republican candidate.

Nevertheless, the Democrats (and the white population of the Southern states that had backed the Democrats) could not be expected to accept the result of such a partisan process without resistance: it was feared that forcing this decision would result in a second Civil War. Thus a compromise was struck between Democratic and Republican leaders: Hayes would become president, but federal troops would be withdrawn from the South, the election results for governor in the disputed states (in which the Democratic candidate had supposedly won) would stand, and Hayes would include southern Democrats in his cabinet.38

This spelled the end of Reconstruction, whose demise had already begun previously, in the form of increasing hesitation on the part of the Union to intervene in the face of Southern white resistance. Reconstruction had admittedly been realized largely through legal and military pressure from the Union, but it had significantly improved the position of black citizens in the South. Blacks in the South had been elected to public office, not only in state and local elections, but also to the House and even the Senate. They had done increasingly well economically, as well.39 But now their fate had been sealed by a national political compromise that allowed the whites of the Southern states to once more relegate black citizens to what was effectively alienage (not only with disenfranchisement,
but also with so-called Jim Crow laws instituting segregation in all public spaces\(^{40}\), and in some ways, with the sharecropper system, to what was effectively slavery as well. The Thirteenth, Fourteenth and Fifteenth Amendments had been effectively voided with regard to black citizens by virtue of the fact that the Union no longer had the political will to enforce them.\(^{41}\)

**The Slaughterhouse Cases and Plessy v. Ferguson: the judicial abrogation of the Reconstruction Amendments**

The Supreme Court, for its part, had already shown itself unwilling to grant the Fourteenth Amendment effectiveness as against the states in the *Slaughterhouse Cases*.\(^{42}\) The legislature of Louisiana had enacted legislation to allow the city of New Orleans to grant an effective monopoly on slaughtering to one corporation, the Crescent City Company, which other slaughterhouses were then obliged to rent space from. The butchers who had been placed at a competitive disadvantage banded together and sued Crescent City; their counsel spotted an opportunity in the fact that the protection clauses of the Fourteenth Amendment had been formulated in open terms of “citizens” and “people”, rather than in specific terms of granting rights to black citizens and people. The butchers argued that the establishment of a monopoly abridged their right to pursue their livelihoods without restrictions and was therefore a violation of the Privileges or Immunities Clause, the Due Process Clause and the Equal Protection Clause.

Ruling for a narrow majority, Justice Samuel Freeman Miller contradicted the Republican political orthodoxy on the substance of the Privileges or Immunities Clause, denying that those privileges or immunities included the right to engage in a profession.\(^{43}\) Miller went on to deliver a further blow, this time to the judiciability of the Clause in federal court, by ruling that the Fourteenth Amendment was not intended to make the protection of civil rights the responsibility of the federal government; the states were to be trusted to be the proper guardians of those rights. Miller construed the privileges or immunities narrowly in substance and judiciability, limiting them to certain limited rights that could not be abridged by Congress, and then essentially only in situations in which there was a specific federal interest. Miller had thereby given the Privileges or Immunities Clause a narrower scope and less judiciability than Justice Washington had given the Privileges and Immunities Clause (which, incidentally, Miller crucially misquoted\(^{44}\)) in *Corfield v. Coryell*; this despite the fact that Congress had clearly intended to bolster the weak and possibly only declaratory Privileges and Immunities clause by enacting the Fourteenth Amendment.\(^{45}\)

\(^{40}\) Buckner Inniss (1999), p. 104.
\(^{41}\) Bell (1980), p. 33.
\(^{42}\) *The Slaughter-House Cases* (1873)
\(^{43}\) Keynes (1996), p. 95.
Ironically, Miller, a Lincoln Republican, based his decision on a narrowly teleological reading of the Thirteenth, Fourteenth and Fifteenth Amendments together, deeming their only intended purpose to be the prevention of discrimination against blacks. Yet Miller’s evisceration of the protection promised by the Privileges or Immunities Clause would end up doing far more damage to the rights of black citizens. Moreover, Miller had based his conclusion on judiciability, i.e. that the Privileges or Immunities Clause did not intervene between states and their citizens, on an extremely curious reading of the Citizenship Clause. Since it provided, Miller reasoned, that the persons it referred to were “citizens of the United States and of the state where they reside”, the citizenships of the United States and of a state were “distinct from each other, and [...] depend upon different characteristics or circumstances in the individual”. Miller was hereby repeating Taney’s fatal decoupling of state and US citizenship in *Dred Scott*, the undoing of which had been one of the most undisputed purposes of the Fourteenth Amendment.

Justices Field and Bradley wrote passionate and legally well argued dissents to Miller’s opinion, outlining why the Privileges or Immunities Clause was clearly intended to make a catalogue of privileges and immunities, or even the Bill of Rights (which had not been invoked by the plaintiffs) enforceable as against the states. But Miller’s evisceration of the substance of the Fourteenth Amendment (the Privileges or Immunities Clause, at least), as well as its enforceability was to persist and harden into a new orthodoxy. It was to take only three more years before the *Slaughterhouse* doctrine would deal a knockout blow to the Fourteenth Amendment’s initial promise of protection for black citizens.

At issue, in *United States v. Cruikshank*, was the validity of the federal prosecution under the first of the Enforcement Acts of a group of armed whites who had killed over sixty black citizens of Louisiana. The victims, all Republicans, had assembled in front of the courthouse in Colfax, Louisiana in the context of unrest concerning a disputed gubernatorial election in Louisiana, when they were massacred by the white mob. The defendants in the federal prosecution were indicted for conspiring, essentially, to abridge the victims’ Constitutional right to assembly and to bear arms.

The Court, in a majority opinion written by Chief Justice Waite, ruled that the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment only applied to encroachments on the part of states, not to private individuals (a doctrine that would become known as the “state action” doctrine). Waite went on to sharply limit the scope of state actions that the Fourteenth Amendment could limit: the First Amendment only restricted Congress, not the
states, in its ability to legislate restrictions on the right to assembly, and “was not intended to limit the powers of the State governments in respect to their own citizens.”50 Likewise, the Second Amendment did not guarantee the right to bear arms, only restricted Congress in its ability to legislate restrictions on it. Waite had referred expressly to Slaughterhouse and summarized one of its points as follows:

We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other.51

Astonishingly, Waite hereby not only restated Miller’s decoupling of state and federal citizenship (which in turn reprised the Dred Scott doctrine), but went a step further than even Miller or Taney had, expressly grounding the primacy of rights derived from state citizenship in the “allegiance” that state citizens owed their states. Taney’s decoupling of state and federal citizenship in Dred Scott had perhaps only indirectly validated secessionist doctrine in the pre-Civil War South, but this particular consideration of Waite’s directly endorsed an almost Calhounian point of view52 that one might have otherwise expected the defeat of the Confederacy to have laid to rest.

This line of case law could be seen as giving Southern states legal encouragement to substantively secede from the Union in terms of no longer having to accord much significance at all to United States citizenship; and the political development of the Tilden-Hayes Compromise, just under a year later, sealed the fate of black citizens of Southern states. In just ten years the fervor for racial equality, which the radical Republicans who drafted the Fourteenth Amendment had at least claimed to support, had cooled considerably. Republican judges were increasingly retreating from mobilizing the Fourteenth Amendment as a source of rights for blacks, perhaps toeing the line of a new consensus that the only way to hold the Union together was not to provoke Southern whites.53

The Supreme Court continued its line of notorious judgments with the Civil Rights Cases54 of 1883. Congress had passed the Public Accommodations Act55 in

50 ibid., 552.
51 ibid., 549.
52 See section supra in Ch. 3, ”Excursion: federal citizenship and allegiance” on p. 126.
54 Civil Rights Cases (1883)
55 For the legislative history, see Keynes (1996), p. 86–94.
1875, setting criminal and civil penalties under federal law for individuals who
denied access to hotels, transportation and the like on the basis of color. But the
*Slaughterhouse* die, eviscerating the protection of the civil rights of United States
citizens against states, had already been cast. Moreover, it was the *Cruikshank*
finding, that the Fourteenth Amendment could only limit the action of the states
(if at all) and not individuals, that was truly central to the Court’s striking down of
the Public Accommodations Act (in a majority opinion written by Justice
Bradley). Oddly enough, the Court seized on the literal text of the Fourteenth
Amendment—that “no State shall abridge”—to support the view that Congress
could not pass bills forbidding individuals from abridging the rights of others. Yet
it had become painfully clear by this point that private individuals were the
 greatest source of abridgment of the rights of black citizens.

As to the substance of the statute, in something of an *obiter dictum*,
Bradley wrote (once more, teleologically) that the purpose of the Thirteenth and
Fourteenth Amendments was to ban slavery, and that merely being excluded from
certain public accommodations was not a “badge of slavery”. Bradley went on to
espouse a particular view of the equality embodied in citizenship: for a former
slave, he wrote,

> there must be some stage in the progress of his elevation when he takes the
> rank of a mere citizen, and ceases to be the special favorite of the laws, and
> when his rights as a citizen, or a man, are to be protected in the ordinary
> modes by which other men’s rights are protected.  

We can call this view the purely formal view of civil equality: it rejects any notion
that state action is required to improve the position of a citizen in order to allow
him to enjoy substantive equality with his fellow citizens.

The sole dissenter, Justice Harlan, pointed to the abject perversity of the
majority’s logic by comparing and contrasting its opinion to the Court’s most
notorious decisions, *Prigg* and *Dred Scott*.

In response to the now-entrenched case law of the Court that held that
Congress had no power to enforce the Fourteenth Amendment against private
parties, Harlan first cited Justice Story’s majority opinion in *Prigg*. Story had
affirmed that Congress was unrestricted in its power to legislatively implement
the Fugitive Slave Clause of the constitution by means of the Fugitive Slave Acts
of 1793 and 1850, and that these laws could be directly effective against private
parties. “[I]t would be more objectionable,” Harlan quoted Story, “to suppose that
a power which was to be the same throughout the Union should be confided to state
sovereignty, which could not rightfully act beyond its own territorial limits.”

In our terms, the uniform equality (*burdening* black citizens)
implied by the Fugitive Slave Clause was considered to be a great enough good

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57 *Civil Rights Cases*, (1883), p. 25.
58 Supra in Ch. 3 at n. 101.
60 *Prigg v. Pennsylvania*, (1842), 623.
61 Cf. *supra* in Ch. 3 at n. 104.
to warrant the legislation of direct vertical authority; at the time, Pennsylvania’s protest that that constituted an encroachment on state sovereignty had fallen on deaf ears at the Court, Harlan noted. Now, Harlan was clearly implying, the tables were turned; Constitutional provisions and Congressional legislation aiming to implement a uniform equality (benefiting black citizens) were held back by a new legal orthodoxy that held them to be encroachments on state sovereignty.

Harlan went on to review Taney’s arguments in *Dred Scott*, in which Taney had cited the numerous traditions, statutes and customs that justified the point of view that blacks had always been viewed as inferior, thus justifying their enslavement and exclusion from citizenship. Thus, Harlan concluded, the Thirteenth Amendment was not merely intended to abolish slavery *per se*, but to eradicate the very subordination of black Americans of which slavery had only been the most abject conclusion. The Civil Rights Act of 1866 clearly aimed to eradicate the “burdens and disabilities which constitute badges of slavery and servitude”, not just the institution itself.

In *Plessy v. Ferguson*, a case decided under the new Chief Justice Fuller, state action was precisely what was at issue, and so the plaintiff’s case could not be *prima facie* thrown out for claiming federal authority over the actions of private individuals. The state legislature of Louisiana had enacted a statute mandating, in its own words, “equal but separate” facilities for “colored” and white passengers on trains. Homer Plessy, a “colored” citizen of the United States and resident of Louisiana, was arrested in New Orleans for refusing to leave a “white” compartment of a train, and appealed his subsequent conviction all the way to the Supreme Court. The majority opinion first found that the statute did not constitute a violation of the Thirteenth Amendment, since the statute could by no means be construed as re-establishing slavery. The Court went on to find that the Fourteenth Amendment aimed only to enforce equality before the law, and not to abolish the distinctions between the races, or to force a “commingling of the races”. The Court rejected the plaintiff’s argument that the enforced separation of the races was as absurd as separating persons by hair color, “or requiring white men’s houses to be painted white, and colored men’s black”; the Court saw separation of the races, in contrast to those examples, as being patently

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62 *Civil Rights Cases*, (1883), 31-32.
63 ibid.
64 ibid., p. 35.
65 *Plessy v. Ferguson*, (1896)
66 A subsidiary argument of the plaintiff’s case was that as a person of only one-eighth African ancestry, he did not consider himself to be truly “colored” and felt, in fact, that he was being unjustly robbed of his whiteness without due process by not being allowed to sit in the “white” compartment. For further discussion and sources regarding this “racial identity” aspect of the case, see Buckner Inniss (1999), p. 105 in n. 163.
67 ibid., p. 105.
68 ibid., p. 106.
reasonable, an almost natural part of society, one of the “established usages, customs and traditions of the people” that it was impossible to legislate out of existence. 69

What may have only been *obiter dicta* in the *Civil Rights Cases* had now, thirteen years later, been elevated to primary considerations for the Court, giving the Court’s imprimatur to a system of racial segregation in the South that had become the institutional successor to slavery and judicially entrenching it for at least sixty years to come.

The sole dissenting justice, as in the *Civil Rights Cases*, was Justice Harlan. We will focus on two of Harlan’s most memorable considerations. In the very first sentence of his dissent, 70 Harlan described the Louisiana statute as requiring “separate but equal” accommodations, thus subtly and crucially subverting the statute’s own language and that of the majority opinion, and thereby coining the phrase that would forever after be associated with *Plessy*.

Harlan went on to say:

> [In] view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. 71

In order to illustrate an example of a “class”, Harlan once more cited one of Taney’s considerations in *Dred Scott*, that descendants of Africans were considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them. 72

Harlan seized on this notion at the heart of *Dred Scott* of an “inferior class” as something that the Reconstruction Amendments were supposed to have “eradicated”. Yet in some states, he went on, whites still claimed to be a “superior class” in the eyes of the law. 73

With this statement, that the “Constitution ... neither knows nor tolerates classes among citizens”, Harlan expressed an ideal akin to that defended by James Madison during the Constitutional Convention and the first Congress with regard to naturalized citizens: that it was undesirable to create classes or gradations within citizenship. And more importantly, Harlan arguably contributed to the political vocabulary, possibly laying the groundwork for generations of put-upon United States citizens to argue that they would not be made “second-class citizens”.

70 *Plessy v. Ferguson*, (1896), 552.
71 ibid., 559.
72 *Dred Scott v. Sandford*, (1856), 404.
73 *Plessy v. Ferguson*, (1896), 559-560.
We can also compare another aspect of the majority opinion in *Plessy to Dred Scott* (as cited in the *Civil Rights Cases* by Harlan) to make a point about *de facto* and *de jure* citizenship. Taney, working from a largely *de facto* conception of citizenship, had cited all of the myriad extant societal norms (as expressed in laws) that substantively excluded black Americans from the rights and equalities associated with citizenship: for Taney this precluded, by inductive logic, the possibility that black Americans could ever be United States citizens.

Now black Americans had been granted, *a priori*, United States citizenship *de jure* in a move to reverse that logic. Yet as soon as a "colored" citizen of the United States sought to deduce substantive rights and equalities from that status, *a posteriori*, the majority in *Plessy* cited all the extant societal norms that excluded blacks, identified certain state laws as expressions of those norms, and asserted that the rights and equalities thereby denied were by no means a necessary consequence of United States citizenship or of the status of being a freeman.

Of course, courts change over time, and the Supreme Court was no exception: the Fuller Court was of an entirely different composition than the Taney Court and were operating in a markedly different era of the Union. But despite the fact that the Court’s favored bases of formal Constitutional logic could swivel almost 180 degrees over time, the Court’s failure to fulfill the promise of United States citizenship for racial equality remained depressingly the same.

Harlan’s rejection of “classes” within citizenship and our distinction between *de jure* and *de facto* citizenship lead us to Bosniak’s definition of what a critique of “second-class citizenship” entails. Second-class citizenship, put in our terms, is a *de jure* citizenship without the enjoyment of *de facto* citizenship: a purely “formal status of citizenship” that “can mask real oppression and thereby represents a largely empty husk”. Bosniak mentions the status of black Americans after the passage of the Fourteenth Amendment as a textbook example of second-class citizenship. The 1875 Supreme Court decision *Minor v. Happersett* confirmed that women U.S. citizens were effectively also second-class citizens, with the majority’s consideration that voting was not a “privilege or immunity of citizenship” protected by the Fourteenth Amendment.

**Wong Kim Ark:** the cinching of birthright US citizenship

Of the provisions of Section 1 of the Fourteenth Amendment, *Slaughterhouse* had already relegated the Privileges or Immunities Clause to near-irrelevance and sharply limited the judiciability of the Due Process Clause and the Equal

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Protection Clause. But until *Wong Kim Ark*, the Supreme Court had not yet examined the Citizenship Clause, at least not in its function of granting United States citizenship to almost all persons born on United States soil.

The previously reviewed judgments of the Supreme Court only took into account the division of existing American citizens of immigrant origin into two races, white and black, who could be legally segregated by state law. (The only inhabitants of the United States not of recent immigrant origin—the Native Americans—were still largely understood not to be United States citizens, based on being construed as formally sovereign nations not formally subject to the jurisdiction of the United States.) The law rarely accounted for anyone who fell outside of this three-way racial categorization. But if there was one other category of persons who came to mind, it was the Chinese, who had even more recently immigrated to the United States, starting in 1850. That the Chinese were viewed as completely alien to American society is made clear by the dissent in *Plessy* written by Justice Harlan, who otherwise spoke so eloquently of racial equality:

> There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race.

Harlan had gone on to excoriate the Louisiana statute as illogical by pointing out that “a Chinaman” could sit in the “white” passenger coach, clearly implying such a thing to be societally unacceptable.

It had been concern about Chinese immigration that had led Congress, in 1875, to institute the first wave of legislation to actually restrict entry of aliens, specifically Chinese, into the United States. (Previously, as we saw *supra* in Ch. 2, Congress expressed its concerns about immigrants solely by regulating the conditions for access to citizenship. It was then assumed, apparently, that physical entry into the United States could not be controlled, and that lack of political rights and property rights would make long-term residence unattractive for aliens who did not qualify for or apply for citizenship. In 1882, in fact, Congress completely denied Chinese immigrants entry by passing the Chinese Exclusion Act, the statute Harlan refers to.

Considering that persons of Chinese origin were considered by some to be the ultimate aliens (in the substantive sense) to American society, it might

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76 *United States v. Wong Kim Ark* (1898)
78 *Cf.* for the roots of this notion in English constitutional law in England and the colonies, *supra* in Ch. 1 at n. 34 and 171. Note that statutory limits and reporting requirements on real property rights for aliens persist to this very day in various US states (and federal law has reporting requirements for alien ownership of agricultural land), although only very few states completely deny aliens property rights: see National Association of Realtors (2006) for an overview.
seem somewhat surprising that in the 1886 judgment *Yick Wo v. Hopkins*, the Supreme Court had already struck down a San Francisco ordinance based on the fact that it was applied to Chinese in a discriminatory way. The ordinance required laundries in wooden buildings, but not laundries in brick or stone buildings, to obtain a permit. Since all of the Chinese-owned laundries were in wooden buildings, while nearly all the white-owned laundries were in brick or stone buildings, the ordinance permitted city authorities to make arbitrary discriminations based on race. But the mere fact that the ordinance enabled such discrimination was not enough for the Court, ruling unanimously, to strike it down as a violation of the Equal Protection Clause of the Fourteenth Amendment: it was the fact that the city authorities were blatantly discriminatory in the permit approval process, denying every single application from a Chinese owner and approving almost every single application from a white owner. Crucially for the judgment, the Court was of the opinion that such a distinction did not serve a valid public purpose, and thus did not fall within the realm in which a state was entitled to make the legislation that its citizens saw fit to make.\(^8^1\)

Later on in *Plessy*, the Court referred directly to *Yick Wo* to explain why by contrast, the segregation of public transportation in Louisiana could be considered to be reasonable:\(^8^2\) the Court seemed to imply that completely and arbitrarily denying a good to a class of people was unreasonable, but that merely mandating a class of people’s use of an “equal but separate” good was reasonable. If one were to look for possible racial motives in this distinction on the part of the Court, then it may have been the case that the Court did not have much sympathy for the prejudice of white Californians against Chinese immigrants, considering it a more local issue;\(^8^3\) while it considered allowing states to regulate the relationship between whites and former slaves to be of more essential importance to the national constitutional order.

But there is also a more apparent commonality to explain the different results that *Yick Wo* and *Plessy* come to: neither decision of the Court is based on citizenship. The plaintiff in *Yick Wo*, in fact, was not even a United States citizen; the Court’s decision was based on the Due Process and Equal Protection Clauses, which, as the Court noted, mean that “[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens.”\(^8^4\) The plaintiff in *Yick Wo*, the Court held, was being deprived of property (by being restricted in the practice of his calling) without due process of law. In *Plessy*, on the other hand, the Court could find no violation of due process, since there was no deprivation of life, liberty or property at stake; more controversially, of course, and with a more

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\(^{80}\) *Yick Wo v. Hopkins* (1886c)


\(^{82}\) *Plessy v. Ferguson*, (1896), 550.

\(^{83}\) For an exposition of just how virulent anti-Chinese racism was in San Francisco at the time of *Yick Wo*, see, in general, Failinger (2012).

\(^{84}\) *Yick Wo v. Hopkins*, (1886c), 369.
obvious racial motive, the Court held that there was no denial of the equal
protection of the laws either.

More silently and insidiously, *Plessy* followed *Slaughterhouse* and the
*Civil Rights Cases* in simply failing to give much, if any, positive value to United
States citizenship. *Yick Wo*, on the other hand, was in line with the Court’s
increasing mobilization of a very powerful Due Process Clause, in which the
Court would increasingly intervene to protect persons, not citizens, from
interference with their economic interests on the part of states. In fact, as many
critical commentators have noted, post-Reconstruction courts abandoned citizens,
as such, and came down heavily on the side of economic interests.85 Starting with
the 1886 decision *Santa Clara County v. Southern Pacific Railroad*, in fact,
corporations were deemed to be “persons” in the sense of the Fourteenth
Amendment, thus, in Bell’s view, meaning that they derived more protection from
the Amendment than black citizens could.86 This development culminated in the
period of the Supreme Court starting with its *Lochner* decision, when the Court
pursued a line of economically *laissez-faire* constitutionalism based on the Due
Process Clause, striking down states’ attempts to enact legal protections for
workers and regulate other aspects of the market.88

After that long introduction, the Supreme Court decision that this subsection is
devoted to becomes almost a footnote. We have seen that United States
citizenship, at least as a means to get federal courts to block states’ violations of
privileges or immunities or the Bill of Rights, has been hollowed out in terms of
substantive value. This may explain why only two years after *Plessy*, it was easy for
the Court to rule that the Citizenship Clause of Section 1 of the Fourteenth
Amendment meant that everyone born on United States soil, provided that she or
he was not the child of foreign diplomats and not an Indian not subject to federal
taxation, was a United States citizen; even the plaintiff, a member of the “Chinese
race” who had left the United States, then been denied entry under the Chinese
Exclusion Act upon his return.

The Court prefaced this conclusion with an extensive exploration of
many of the theories of allegiance and subjection that we have explored in this
thesis, starting with *Calvin’s Case*. The Court ultimately used three bases for its
ruling: the text of the Citizenship Clause as it stood; the legislative history of that
text, showing the Republican majority in Congress to be very aware that there
would be few limitations on acquisition *jure soli* of United States citizenship; and
existing statutory law and legal doctrine in various states and Britain that generally

86 *Santa Clara County v. Southern Pacific Railroad* (1886b)
88 *Lochner v. New York* (1905)
held a child of alien parents (who were not diplomats) to be born within the “jurisdiction” of the birth country.

Interestingly, the Court briefly cites the then-recent British case law of Isaacson v. Durant and Lord Coleridge’s pronouncement that allegiance is owed to the body politic of the King—i.e., Parliament as embodied in the King—and not the body personal of the king. The context in which the Court cites Isaacson reveals that this Whiggish doctrine—that allegiance is really owed to the lawmaker for a given territory—provides the legal underpinnings for the notion that citizenship is acquired \textit{jure soli}, i.e., by being born in a territorially defined jurisdiction of a lawmaker, rather than \textit{jure sanguinis}, i.e., acquiring personal allegiance to the monarch by descent. Such a notion might once have been anathema to American revolutionary theorists like James Wilson, who wished to base a political autonomy of the American colonies on the colonists’ personal relationship to the king. Thus we see that Wong signals a final rupture with not only doctrines of feudal English constitutional law, but also with another implicitly ethnocentric legal doctrine that the American Revolution was based on, since acquisition of citizenship by descent within personal allegiance indirectly means that that acquisition is racially exclusive.

The contrast with the case law on the \textit{de facto} value of United States citizenship cannot be more stark: why did the Court accord so much importance to the legislative history of the Fourteenth Amendment in this case, when the same analysis in \textit{Slaughterhouse}, the \textit{Civil Rights Cases}, or \textit{Plessy} would have revealed the \textit{de facto} value of citizenship in the Fourteenth Amendment to have been almost as undisputed in the legislative process? The answer would appear to be that the Court did not consider United States citizenship, as a purely formal status, to be worth much, or that it did not fear that guaranteeing an almost unlimited birthright to it would threaten the stability of the Union. (Interestingly, the Court in Wong did specifically refer to \textit{Slaughterhouse}, and in particular to an obiter dictum in Miller’s tortured analysis of the relationship between United States and state citizenship, to show that Miller at least understood birth on United States soil to confer United States citizenship.) Such a point of view on the part of the majority could be highlighted by the fact that Harlan, the sole dissenter in \textit{Plessy}, was the sole justice to concur with the dissenting opinion in Wong, which was written by Chief Justice Fuller. If the majority of the Court believed that the grant of \textit{de jure} United States citizenship was meant to be generous, but that it did not \textit{de facto} entail much in the way of rights, Harlan seems to have had the opposite point of view: the \textit{de facto} rights entailed in United States citizenship should be generous, thus \textit{de jure} United States citizenship should not be granted too easily.

90 United States v. Wong Kim Ark, (1898), 663.
91 See supra in Ch. 1 at n. 156
92 Supra in Ch. 1 at n. 150.
93 United States v. Wong Kim Ark, (1898), 677.
94 Supra at n. 47.
Yet even as a fairly thin formal status, United States citizenship did, without controversy, guarantee one thing: unconditional access to and rights of residence on the territory of the United States. The Court admitted freely that the Constitution granted Congress a nearly unlimited power to exclude or expel (classes of) aliens.\textsuperscript{95} By definition, this power could never apply to citizens.\textsuperscript{96} Thus citizenship, simply through the entitlement that it grants to be on the territory of the United States and enjoy the equalities of due process and equal protection of the law, would gain in significance against the background of ever-heightened immigration control through Congressional legislation.

In the final section of this chapter, we will review how the formal status of United States citizenship developed further, and how ever more rights could be deduced from it, despite the limited significance that the early case law accorded to the substantial citizenship provisions of the Fourteenth Amendment. I can already reveal that the promise of the Privileges or Immunities Clause was not going to be revived anytime soon, possibly not for another century. United States citizenship would develop along two lines. The judicial line would be characterized by an expansion by leaps and bounds of the rights derived from the Due Process and Equal Protection Clauses. In other words, the Supreme Court would expand the human rights standard (i.e. for “persons” as such) that could be enforced against the states. This expansion of uniform equalities would not be for citizens as such; but citizens would be the primary beneficiary of the expansion, being the only persons guaranteed the unconditional right of access to and residence in the territory where that human rights standard would be enforced.\textsuperscript{97} In other words: the substantial citizenship so gained would be found at the intersection of all persons within the jurisdiction of Congress, on the one hand, and the persons admitted to the territory of the United States, on the other. There would also be some development of the rights of persons to movement, and to equal treatment while moving, under the Interstate Commerce and Privileges and Immunities Clauses.

The second line is the legislative line, driven by the people of the United States acting as a constitutional legislator and Congress legislating on its own. While this line (at least in Congress) would deal with equality of persons, it would additionally affect those possessing the formal status of United States citizenship, as it would have everything to do with their right to vote and to be elected. Somewhat curiously, however, these expanded political rights would never be positively defined, but rather would be defined by an ever-more detailed list of Constitutional prohibitions on the states aimed to increase formal equality on the

\textsuperscript{95} United States v. Wong Kim Ark, (1898), 699-700.
\textsuperscript{96} ibid., 653.
\textsuperscript{97} This is the view of Bickel: that the "irreducible legal significance" of United States citizenship is "international more than domestic". Bickel (1973), p. 382.
one hand, and on the other hand by action on the part of Congress to increase substantive equality.

Despite the fact that neither of these lines would positively define rights of the citizen, they would intertwine to become known in the American tradition as civil rights.

The only way is up: toward the full development of civil rights

The first two legislative developments subsequent to the Reconstruction Amendments with regard to the political rights of citizens were the Seventeenth and Nineteenth Amendments. The Seventeenth Amendment, ratified in 1913, implicitly increased the direct representation of United States citizens by taking the election of the Senate out of the hands of state legislatures, and putting it into the hands of the “electors in each State” having “the qualifications requisite for electors of the most numerous branch of the State legislatures”, i.e. the same persons whom Article I, Sec. 2 of the Constitution had identified as the electors of the House of Representatives. However, this Amendment said nothing about the rights of United States citizens as such.

The Nineteenth Amendment, on the other hand, ratified in 1920, was the first Amendment since the Fifteenth to directly address the rights of United States citizens. The Nineteenth Amendment extended the protection promised by the Fifteenth Amendment by repeating its text, this time with regard to sex: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.” Again, this was a negative provision: on the surface of it, if one had used the interpretation that had been widely given to the same text in the Fifteenth Amendment, it did not itself actually grant women the right to vote. But in fact, the Fifteenth Amendment was the culmination of a decades-long struggle on the part of the women’s suffrage movement to enfranchise women, and so it could only be clearly understood as a vertical mandate on the states to positively allow women who were United States citizens to vote. (See, however, the discussion in the conclusion of this chapter on whether United States citizenship positively grants a right of suffrage.)

*Edwards v. California* and *Mitchell v. United States*

The Privileges and Immunities Clause of the Constitution (in Article IV, Sec. 2) had dropped the denial of interstate freedom of movement to “paupers” and “vagabonds” that Article IV of the Articles of Confederation allowed for. In practice, however, states continued to deport migrant United States citizens back

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98 Supra in Ch. 2 at n. 64.
to their home states for making use of public poor relief, relying on a legal tradition going back to before the English Settlement and Removal Act (a statute adopted in 1662) of sending the needy back to the parish that was responsible for them. This practice had been endorsed, moreover, by the Taney Court in the 1837 decision *Mayor of New York v. Miln*, in which the Court had refused to strike down a New York statute requiring ships arriving from outside the state of New York to report the names of passengers. The Court found here that it was within the sovereign police power of states “to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts as it is to guard against the physical pestilence”. The New York statute in question applied not only to non-U.S. citizens, but citizens of other states as well.

It would take over a century before the Constitution would be interpreted to exclude such a power on the part of states. Edwards was a citizen of the United States and a resident of California who had been convicted of a misdemeanor under a state law that penalized knowing bringing “any indigent person who is not a resident of the State” into California. (The statute was a so-called “anti-Okie” law from this period of history, famously fictionalized in John Steinbeck’s 1939 novel *The Grapes of Wrath*, when migrants from the drought- and Depression-stricken “Dust Bowl” in Oklahoma and Texas moved to the “Golden State” in search of opportunity.) The facts leading to Edwards’ indictment were: Edwards had driven to Texas to pick up his brother-in-law Duncan there, whom he knew to be on hard times, and had brought him back to California.

The Court unanimously ruled that the California statute violated the federal Constitution, thereby reversing *Miln*, but with three opinions contending different legal bases. The majority, in the opinion written by Chief Justice Byrnes, did not base the decision on United States citizenship, but on the Commerce Clause, which granted Congress the power to regulate interstate commerce. In this case, by contrast to *Gibbons v. Ogden*, Congress had not made any law that conflicted with the California statute. But the majority opinion was based on the so-called “dormant” Commerce Clause, a reading of the Commerce Clause in the case law of the Supreme Court, starting in 1852, that holds that the Constitution’s grant of this power to Congress implicitly excludes any state regulation that imposes an “intended and immediate” burden on interstate commerce.

The two concurrences by Justices Douglas and Jackson insisted that the California statute was unconstitutional based on its infringement of the rights of United States citizenship: specifically, as guaranteed by the Privileges or

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99 *Mayor of New York v. Miln* (1837)
100 ibid., p. 142.
101 Schönberger (2005), p. 75-76.
103 *Supra* in Ch. 3 at n. 48 et seq.
Immunities Clause of the Fourteenth Amendment, which had suffered so much neglect in the case law of the Court. Douglas, in his opinion, forcefully disputes that the proper basis was to be found in the Commerce Clause, contending that the rights at stake were of a higher order than “the movement of cattle, fruit, steel and coal across state lines”.\(^{105}\) Jackson, for his part, invokes the promise of United States citizenship “as a shield against oppression” by analogy to that of Roman citizenship; Jackson cites\(^{106}\) the Biblical story of Paul that has been reproduced in the introduction to this book.

Douglas and Jackson’s points were eminently valid. But the majority opinion had, without a doubt, consciously drawn on a historical reading of the Commerce Clause that did not view the importance of interstate commerce merely in terms of goods and livestock. Indeed, as Tribe notes, the Commerce Clause can be placed in the context of its origins in Article IV of the Articles of Confederation: together with the Privileges and Immunities clause, it was expressly conceived “to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union”.\(^{107}\)

The majority opinion can be analyzed from a critical legal perspective, against the background of the political developments that had preceded this decision, as an expression of the economic necessity of the use of vertical power to block a state’s political goals. The course of *laissez-faire* constitutionalism that had been pursued by the Court starting with *Lochner* had increasingly become a hindrance to the administration of President Franklin D. Roosevelt; much of Roosevelt’s New Deal legislation to intervene in the market violated the *Lochner* Court’s notions of property rights and liberty of contract.\(^{108}\)

Roosevelt put political pressure on those members of the Court who continued to rigidly adhere to the *Lochner* line by in 1937 proposing a bill to increase the number of Supreme Court justices from nine to fifteen, thus enabling him to pack the Court with New Deal supporters. Justice Owen Roberts abruptly abandoned the *Lochner* line in a decision of the Court shortly thereafter, creating a majority of justices with favorable inclinations toward New Deal legislation and rendering Roosevelt’s “court-packing” bill unnecessary. Tribe notes, however, that there were many more factors in play, beyond mere brute political pressure, that probably contributed to Roberts’ “switch in time that saved nine”. The Court’s shift can also be quite simply accounted for by saying that the Court realized it could no longer work in a complete vacuum, with the justices ruling along lines of strict legal doctrines and personal political preferences; the Court very likely realized that it could no longer ignore the immense political popularity of

\(^{105}\) *Edwards v. California*, (1941a), 177.

\(^{106}\) ibid. 182


Roosevelt and his relief measures and the accompanying shift in public opinion that made the _Lochner_ line increasingly untenable.\(^{109}\) _Edwards_ partly reflects this new orthodoxy on the part of the Court (which Schütze calls the “new nationalism”\(^ {110}\)), as the Court contextualizes its decision in the necessity for vertical intervention to derogate parochial interests that stand in its way. The majority opinion notes that Duncan, when in Texas, had been receiving assistance from the Works Progress Administration, a New Deal program; in California, he was aided by the Farm Security Administration, another federal program. If considerations of sparing the purse of the local community had once provided the rationale for denying assistance to migrant citizens, the Court reasoned, then those considerations no longer had any basis, now that caring for the needy had become a national expense.\(^ {111}\)

But on other points, the majority decision in _Edwards_ transcends purely economic interests, speaking directly to the Constitution’s goal of creating a national political community. Famously, the majority decision quotes Justice Cardozo:

> The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that, in the long run, prosperity and salvation are in union, and not division.

But then it goes on to give that assertion a spin that relates it not only to the American people as a whole, but the position of the individuals who constitute it: “Moreover, the indigent nonresidents who are the real victims of the statute are deprived of the opportunity to exert political pressure upon the California legislature in order to obtain a change in policy.”\(^ {112}\) This statement illuminates, quite strikingly, that the majority opinion is in fact based on United States citizenship. Only rather than drawing an equal right to movement and residence directly from the Privileges or Immunities Clause in the Fourteenth Amendment, the Court implicitly draws it from the right of United States citizens to be part of the political process.

In other words, denial of freedom of movement to a state for United States citizens constitutes a denial of their right to become citizens of that state and be politically represented there. The route chosen by the Court’s majority to a freedom of interstate movement for United States citizens is certainly circuitous, but it does appear have some basis in United States citizenship. Can we say that this freedom of movement is therefore an equality deduced from the _de jure_ status of United States citizenship? It is admittedly difficult to find anything in the text of the Constitution positively guaranteeing United States citizens the right to vote and be represented.\(^ {113}\) The Fifteenth and Nineteenth Amendments only ban states from abridging the electoral rights of United States citizens. However, the


\(^{110}\) Schütze (2009), p. 83.

\(^{111}\) _Edwards v. California_, (1941a), 175.

\(^{112}\) ibid., 173-174.

\(^{113}\) _Cf. supra_ in Ch. 3 at n. 9.
Citizenship Clause of the Fourteenth Amendment, that derives state citizenship from residence, does offer us a bit more of a positive basis: after all, a United States citizen becomes a citizen of the state where he resides, and any restriction on him residing there would constitute a barrier to his becoming a citizen of that state, *ergo* being able to participate in the political process there. We will revisit the basis of electoral rights for citizens, and the role of freedom of movement as an accessory to those rights, in the conclusion of this chapter.

If we put the equality that *Edwards* established for United States citizens in the terms of our four forms of equality, do we qualify it as an equality that is uniform for all United States citizens, or a “cross-border” equality that is only for migrating United States citizens? In theory, of course, it counts uniformly for all United States citizens wherever they are, and does not solely benefit migrating citizens: the *Edwards* reading of the Commerce Clause makes clear that if a state had enacted a statute prohibiting all of its citizens (or a class of its citizens with no reasonable basis) from *leaving* the state, the contemporary Court would have declared that statute to be a violation of the Commerce Clause. But formally, of course, a citizen of a state would have to at least attempt to make use of her freedom of interstate movement first, or have a plan to travel interstate that was thwarted by the statute, in order to be able to bring a claim in federal court against her home state. Viewed purely formally, then, a truly sedentary citizen with no need to move out of his home state would therefore not be in a cross-border situation that would warrant a claim against his home state in federal court; the freedom of movement is thus really a cross-border equality.

Just a few months prior to *Edwards*, the Court had handed down another decision based on the Commerce Clause that made it rather clearer that any equality derived from the Commerce Clause was necessarily a cross-border equality and not one that was uniform for all U.S. citizens. Arthur W. Mitchell, a black U.S. Representative from Chicago, was forced to move from a “white” Pullman car to a “colored” second-class car when the train he was on, traveling south, crossed into Arkansas, where a segregation statute was in effect. Mitchell filed a complaint with the Interstate Commerce Commission (ICC), a federal commission that had been set up to enforce the Interstate Commerce Act of 1887, a federal statute that aimed to regulate all common carriers (primarily railroads and ships) carrying passengers between states, U.S. territories, and the District of Columbia. The Act did not specifically ban discrimination on the basis of race (Congress in 1887 would almost certainly have had little political appetite for such a provision), but it did provide in fairly strict terms that all common carriers had to charge all passengers equal rates for equal services over equal distances traveled.

This provision provided the perfect legal basis for Mitchell to expose the hypocrisy of “equal but separate” segregated accommodations, which generally were anything but equal. In his complaint to the ICC, Mitchell detailed how the Pullman car that he had sat in, up to the Arkansas line, had air conditioning, hot and cold running water, separate flushing toilets for men and women, and access to the dining car and observation car. The “colored” car that he was forced to
move to, on the other hand, was not air-conditioned, did not provide men with a flushing toilet or a sink with running water, was “filthy and foul smelling” and did not provide access to the dining car and observation car.\footnote{114}{\textit{Mitchell v. United States} (1941b), 90-91.}

The ICC dismissed Mitchell’s complaint, siding with the railroad in its claim that it had improved the accommodations for “colored” passengers and that the only reason it was not always able to accommodate “colored” passengers in first class was that there was not much demand for such accommodations. The ICC found that the discrimination in question, based on state law, was “plainly not unjust or undue”, and further observed that the ICC only had the power to set aside state law where the differences in treatment were “unjust” or “undue”.\footnote{115}{ibid., 91-92.} When Mitchell sued in federal district court to void the ICC’s ruling, the district court declined to void it, ruling that the ICC’s evaluation of the facts had not been unreasonable, and anyhow that the district court did not have jurisdiction.\footnote{116}{ibid., 88-89.}

The Supreme Court made short shrift of both the district court’s rulings (ruling that a federal district court did in fact have jurisdiction to review a ruling of the ICC) and the merits of the ICC’s ruling. The fact that the railroad had made some amends in the meantime (by improving the second-class “colored” car) did not mean that Mitchell no longer had a complaint, the Court ruled. Anyhow, that change was far from resolving the root of the problem, which was that black passengers who bought a first-class ticket were only guaranteed first-class accommodations if a drawing room (i.e. a separate compartment) was available on the Pullman car; if these drawing rooms were already filled with white passengers, though, then they were unavailable to black passengers. For that matter, the lack of access to the dining car and observation car patently constituted discrimination, as even the ICC had observed.\footnote{117}{ibid., 93-97.}

In \textit{Mitchell}, the Court did in fact base its decision on the Fourteenth Amendment, but not on the Privileges or Immunities Clause (i.e. a right for all citizens), but the Equal Protection Clause (i.e. a right to all persons to enjoy the equal protection of the law).\footnote{118}{ibid., 94.} The Court’s judgment was not based in any way on citizenship; the Court was quite simply able to find a basis for federal law to derogate the state segregation statute in the Interstate Commerce Act. And in fact, \textit{Mitchell} was the first of a series of judgments of the Court\footnote{119}{Bell (1980), p. 98 in n. 9.} that would increasingly drive segregation out of all forms of transport that fell under the purview of the Act.
Even though Mitchell was not formally based on citizenship, we can see that it did de facto create a new equality for United States citizens. There were only two flaws in the equality that this line of rulings helped to create. One was that this equality was clearly exclusively a cross-border equality, as it could only be enforced against carriers with interstate routes. The sedentary citizen, or at least the citizen who took a carrier that had routes exclusively within one state, could not benefit from this equality. The next case in this line, Morgan v. Virginia,\textsuperscript{120} made that painfully clear: the Court ruled that provisions of the Virginia code providing for segregation on carriers could not apply to vehicles moving interstate. The implication, of course, was that vehicles moving purely internally were not subject to the non-discrimination provisions of federal law. The second flaw was that this line of rulings did not directly challenge Plessy’s principle of “equal but separate”: if a railroad were to segregate passengers by race, but have two sets of identical cars attached to each train, one set for black passengers, and one for white passengers, then the Court would have found this to be in compliance with federal law.

\textit{Brown v. Board of Education: effectively instituting a uniform equality}

It is clear that the Supreme Court, from the moment of the demise of Lochner, had become more open to allowing changing public norms and opinions to influence its decision-making. It is telling that in the filings for Mitchell, the Roosevelt administration (the “United States” in the name of the case) had sided with Mitchell and against the ICC; while it may not have been this very fact that encouraged the Court to break through the previously sacred sovereignty of states on the issue of racial segregation, this stand on the part of an elected (and notably, Democratic) politician was emblematic of a break with the old fear that enforcing the Reconstruction Amendments too strictly would alienate Southern whites and drive the Union apart. The Union was now much more strongly cemented together in its national identity by a number of other factors, including the expanded economic role of the federal government, the growth of public education, in which the values and history of the United States as a whole were taught, and two world wars.\textsuperscript{121} Brown\textsuperscript{122} can be at least partly viewed in the context of the political and societal developments, including the development of a national identity, that helped make it possible.

I can be brief in summarizing this groundbreaking decision, as the Court’s unanimous decision, authored by Chief Justice Warren (who had been appointed to the Court by President Eisenhower only just over half a year prior), was itself brief. In all but one of the four cases that were consolidated into Brown, the

\textsuperscript{120} Morgan v. Virginia (1946)
\textsuperscript{121} Kramer (1994), p. 1557-1558.
\textsuperscript{122} Brown v. Board of Education of Topeka (1954a)
federal district court had denied the plaintiffs’ claim that segregated public schools, by definition, could not be “equal” in the sense of \textit{Plessy}. Significantly, in the first place, the Court had accepted that it had jurisdiction in this matter “[b]ecause of the obvious importance of the question presented”.\textsuperscript{123} The Court went on to discuss the background of the Fourteenth Amendment, finding it to be inconclusive as to what it could have been meant to say about segregation in public education, since public education was not widely established at the time of the Amendment’s passage.\textsuperscript{124} Then the Court went on to assess public education “and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.”

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.\textsuperscript{125}

Separating black children from white children, even where the facilities are equal, the Court went on, “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”\textsuperscript{126} As such, the Court concluded, “[s]eparate educational facilities are inherently unequal”, and school segregation constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{127}

It does not take a deep analysis to see that this decision of the Court was based much more on evolving social norms than on changing legal insights. The Court itself identified insights of psychology, but other commentators identify other underlying factors, including the need for the United States to compete with the Soviet Union in the struggle to win world opinion, in which segregation was an embarrassment; the victory in World War II over powers espousing overtly racist ideologies; and the fact that black soldiers had fought valiantly overseas (in a military that, at least since 1948, was now integrated), performing one of the equal duties of (male) United States citizens, only to return home to be denied the equal privileges of United States citizenship.\textsuperscript{128} The Court’s basing its decision on

\textsuperscript{123} ibid., 488.
\textsuperscript{124} ibid., 489-490.
\textsuperscript{125} ibid., 492-493.
\textsuperscript{126} ibid., 494.
\textsuperscript{127} ibid., 495.
\textsuperscript{128} Bell (1980), p. 93; Sunstein (2009), p. 41.
changing social norms provided the *Plessy* Court, as well as all of the Union's politicians who had failed to adequately enforce the Reconstruction Amendments, with a convenient fig leaf of “not having known any better at the time”. As well, *Brown* continued the line of not mobilizing United States citizenship as a formal status, and with it the Privileges or Immunities Clause of the Fourteenth Amendment, to abolish racial discrimination. Rather, if the Court used citizenship at all, it seized on substantive citizenship (in the Platonic, republican sense) as an area that justified vertical intervention between states and their citizens.

And at last, at least as to the right not to be forced to attend racially segregated schools, the Court had pronounced that there was an equality that all residents of the United States were uniformly entitled to. All the same, it was clear that *Brown* contained the seeds of destruction for all forms of segregation in public facilities and accommodations. Even though the Court had not formally overturned *Plessy* (although it did say “Any language in *Plessy v. Ferguson* contrary to the finding [that segregation creates a feeling of inferiority] is rejected“129), it is telling that the *Plessy* Court had justified the Louisiana statute providing for segregated transportation by pointing to the fact that segregation in schools was a widely accepted phenomenon, thus implying that segregation on transportation had to be even more acceptable.130

Our judicial history of the creation of a uniformly equal entitlement not to be forced to attend segregated schools ends here; although there would be numerous subsequent Supreme Court decisions on the matter, all of them built on *Brown* and its establishment of federal jurisdiction against states for sedentary citizens (as residents) who had been denied the equal protection of the law.

**Legislating uniform electoral equality and cross-border equality**

The implementation of *Brown* would not go easily, of course. Southern white politicians announced plans to massively resist the integration of schools, and state legislatures began busily passing laws to circumvent *Brown*, in an echo of the Southern backlash to the Reconstruction Amendments. Congress, on the other hand, continued the vertical push toward racial equality, passing the Civil Rights Act of 1957 as an endorsement of *Brown*. The 1957 Act had everything to do with United States citizenship as a formal status, as it was meant to really begin enforcing the Fifteenth Amendment. The Act established federal jurisdiction and penalties against actions meant to deprive United States citizens of their voting rights, as well as establishing a Civil Rights Commission to investigate the practical disenfranchisement of citizens. When the 1957 Act turned out to be less

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130 *Plessy v. Ferguson*, (1896), 544.
than effective, Congress passed the Civil Rights Act of 1960 to give it some more teeth.

Around the same time as the 1960 Act, probably not entirely coincidentally, Congress proposed the first Constitutional amendment dealing with electoral rights of United States citizens since the Nineteenth Amendment. The Twenty-third Amendment, ultimately ratified in 1961, allowed for the first time the District of Columbia, a non-state territory, to choose electors to the Electoral College in Presidential elections in a number equivalent to the number of electors chosen by the least populous state. Since the District had a black majority, this Amendment can be regarded as a civil rights measure, contributing to the further enfranchisement of black United States citizens.

In 1962, Congress proposed yet another Amendment that even more directly addressed concerns of civil rights. The Twenty-fourth Amendment, ratified in 1964, banned the United States or any state from abridging the right of citizens of the United States to vote in federal elections based on not having paid a poll tax or any other tax. The imposition of a poll tax had been one of the means that Southern states had used to circumvent the Fifteenth Amendment by indirectly denying black voters the right to vote in other ways. (Although the Twenty-fourth Amendment only directly addressed the right to vote in federal elections, the Supreme Court went on to read the Equal Protection Clause of the Fourteenth Amendment as also banning poll taxes in state and local elections.)

Congress was also to follow the Commerce Clause track for creating cross-border equalities, which the Supreme Court had last followed in Morgan v. Virginia and now continued on with Boynton v. Virginia. Boynton, a black passenger on an interstate bus, was fined for sitting in the “white” section of the restaurant in a Richmond bus terminal. When asked to move by a waitress, he had responded that as an interstate bus passenger, he did not have to move. The Court went rather farther than Boynton’s assertion, ruling that due to its location (in a Trailways bus terminal) the restaurant was integrally involved in interstate commerce and thus was every bit as subject to the Interstate Commerce Act as the bus company was. Boynton inspired civil rights activists, known as the “Freedom Riders”, to ride interstate buses through the South in mixed racial groups in order to challenge bus companies and stations. The resulting arrests and violent attacks by white mobs attracted national attention to the cause of civil rights and helped to provide Congress with the necessary impetus to enact further legislation.

With the Civil Rights Act of 1964, Congress aimed to close all of the remaining escape hatches that Southern segregationists could use to eviscerate the

132 Boynton v. Virginia (1960)
133 ibid., 455.
134 ibid., 460-464.
equalities that United States citizens could enjoy. Most of the Act dealt with banishing racial discrimination in all interactions between citizens and government: of course, it was undisputed that Congress had the power to establish uniform equalities in the area of electoral rights, the subject of Title I of the Act. (Congress would also go on in 1965 to pass the Voting Rights Act, further strengthening electoral rights for United States citizens by, most notably, banning the literacy tests that had been used to indirectly disqualify black citizens from voting as well as establishing a federal pre-clearance requirement for state electoral laws to make sure that they would not be used to disadvantage minority voters.) However, the Civil Rights Act also provided (in Title III) that any State or local government that still segregated public facilities could be the subject of a lawsuit brought by the Attorney General in federal court. Title IV provided more or less the same as to the desegregation of educational institutions, and also provided for the Commissioner of Education to survey and report on equal educational opportunities. Title VI did not need to claim or imply any direct jurisdiction of federal law; it simply provided that any federally funded program that was found to discriminate would be denied federal funding.

But it was the provisions of the Civil Rights Act that aimed to banish racial discrimination at the hands of private individuals and companies that were the most innovative. Title II prohibited segregation in all public facilities engaged in interstate commerce, based on the Commerce Clause and Sec. 5 of the Fourteenth Amendment. If Boynton had interpreted the Interstate Commerce Act to prohibit segregation in public facilities that were integrally involved in interstate transportation of passengers, Title II expanded on the Interstate Commerce Act by stretching the definition of “interstate commerce” to apply to more than just the interstate transportation of passengers. Any inn, hotel or motel with more than five rooms was considered to be engaged in interstate commerce. A restaurant or gas station was not solely considered to be engaged in interstate commerce if it predominantly served interstate travelers, but also if a substantial portion of the food it served or gasoline it sold had moved in interstate commerce. A movie theater, concert hall or stadium was considered to be engaged in interstate commerce if most of the films it showed, or live acts or sports teams it presented, had moved in interstate commerce. Title VII, banning discrimination in private employment, stretched interstate commerce even further: any employer with more than 25 employees was implicitly considered to be involved in interstate commerce. All of the equalities established by Title II and Title VII were therefore still technically cross-border equalities; but crucially, a citizen of a state no longer had herself to cross a border to profit from these equalities, as long as an establishment she was patronizing, or an employer she was working for, could be considered to be involved in cross-border activities.

To a person used to an interpretation of the Constitution that held that the federal government was to involve itself as little as possible in the close-to-

the-ground activities that states were expected to regulate, such an expansion of vertical power might have been shocking. And indeed, the constitutionality of Title II was immediately challenged by the owner of an Atlanta motel who continued to refuse to rent rooms to blacks. But in *Heart of Atlanta Motel, Inc. v. United States*, the Supreme Court upheld the constitutionality of Title II. The Supreme Court held that Congress’ interstate commerce power was sufficient to bring the activities of private individuals involved in interstate commerce within the ambit of the Fourteenth Amendment and its goals of protecting blacks from discrimination. The Court rejected the plaintiff’s invocation of the Civil Rights Cases by noting that the Civil Rights Act of 1875 had not claimed to regulate interstate commerce; moreover, “Our populace had not reached its present mobility, nor were facilities, goods and services circulating as readily in interstate commerce as they are today.”137

With *Heart of Atlanta*, and its companion case *Katzenbach v. McClung*, the Court did not formally overturn the Civil Rights Cases, but merely asserted that society had changed. However, this tactic would also prove somewhat legally problematic to future cases, in which it would find itself “straining … to find the necessary impact on commerce.”139 But as in previous cases, the Court obviously felt reinforced in asserting the establishment of a new set of vertically enforced norms of equality for the republic by the political developments that had led to the enactment of the Civil Rights Act of 1964. The Court cited the legislative developments that started with the Civil Rights Acts of 1957 and 1960, culminating in President Kennedy’s message to Congress accompanying the bill that would become the 1964 Act:

> to promote the general welfare by eliminating discrimination based on race, color, religion, or national origin in . . . public accommodations through the exercise by Congress of the powers conferred upon it . . . to enforce the provisions of the fourteenth and fifteenth amendments to regulate commerce among the several States, and to make laws necessary and proper to execute the powers conferred upon it by the Constitution.140

And just over two months later, the March on Washington for Jobs and Freedom, most prominently remembered for Dr. Martin Luther King, Jr.’s “I Have a Dream” speech, had taken place, commanding national attention for the civil rights movement.

Of course, Kennedy had been assassinated before the bill had even made it out of the Rules Committee of the House, which seemed disinclined to pass it on. But President Lyndon Johnson, Kennedy’s successor, set his mind on getting the bill passed, telling the Congress five days after the assassination, “No memorial oration or eulogy could more eloquently honor President Kennedy’s

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136 *Heart of Atlanta Motel, Inc. v. United States* (1964a)
137 ibid., 250-251.
138 *Katzenbach v. McClung* (1964b)
140 *Heart of Atlanta Motel, Inc. v. United States*, (1964a)
memory than the earliest possible passage of the civil rights bill for which he fought so long."  

Having thereby enlisted the public opinion of a grieving nation, Johnson went on to engage a legendary amount of arm-twisting and horse-trading with recalcitrant members of Congress until the bill was passed. The greatest opponent of the bill, Senator Strom Thurmond of South Carolina, said that the bill reminded him of the Reconstruction legislation of the radical Republicans. But where the Reconstruction legislation and Amendments could be said to have come from a small, ideologically motivated faction in Congress, which had not always been entirely above-board to the public about the consequences of the legislation and which had also profited from the fact that the Southern states were still largely excluded from Congressional representation, the Civil Rights Act of 1964 was clearly different. Not only did the Act have national opinion on its side, but its goals were crystal-clear. Moreover, even if Johnson had had to use horse-trading and arm-twisting to get the necessary number of Southern members of Congress to vote for the bill, they did still vote for it, as fully entitled representatives of their districts and states, meaning that the Act had been passed in a fully democratic process. Without a doubt, the political background of the Act gave the Court the confidence that it needed to continue to steer the course.

The struggle for substantive equality for black United States citizens would continue, of course; and not insignificantly, the legal battles to come would largely center around questions of the extent to which federal law could prescribe specific measures to ameliorate the substantive inequality of black citizens that had been entrenched by over a century of segregation, rather than just strike down and penalize statutes and practices that failed to take heed of the formal equality of citizens. School busing, a remedy aimed to introduce a substantial balance of white and black pupils in public schools, was to be a particular flashpoint.

At the time of writing of this thesis, in fact, the Supreme Court has very recently struck down a provision of the 1965 Voting Rights Act that provided that all states with a history of disenfranchising practices at the time of enactment (nine in total) were required to “preclear” any changes to their electoral laws with the federal government. The majority opinion, written by Chief Justice Roberts, was based on what it saw as changed social circumstances. “Nearly 50 years later,” Roberts wrote, “things have changed dramatically.” Roberts claimed, essentially, that the goals of the Voting Rights Act had had now been achieved, that black voters could no longer be said to be disenfranchised and that

142 ibid., p. 560-569.  
143 ‘1963 Year in Review: The Civil Rights Bill’, (1963a)  
144 See generally, for a review of judicial remedies applied to integrate educational facilities, Bell (1980), p. 364-473.  
145 Shelby County v. Holder (2013b)  
146 Cf. supra before n. 135.
disenfranchising practices had been successfully wiped out. Thus a continued vertical derogation from the states’ sovereignty to manage their own affairs, as guaranteed by the Tenth Amendment, was unconstitutional, and could not be justified by the practices of a half-century prior. This decision could be seen as a blow to the notion that active vertical intervention is sometimes required to safeguard substantive equality, and that judicial review of violations of individuals’ formal equality is not always sufficient.

Such a reading would be underscored by the fact that on the very next day, the Court handed down two more landmark decisions concerning the right of same-sex couples to have their marriage, legally concluded under state law, recognized under federal law and not to have their right to marry legislatively taken away by a state that had previously allowed for same-sex marriage (although this latter ruling technically denied standing to the petitioner and allowed the district court ruling to stand). These two decisions (at least, if one takes the Supreme Court’s decision in the former together with the district court’s ruling in the latter) are both grounded in a notion of formal equality and substantive due process (in the former, based on the Fifth Amendment, since it had to do with an act of Congress; in the latter, based on the Fourteenth Amendment).

Perhaps somewhat ironically, the doctrine of substantive due process had been largely developed by the *Lochner* Court, the demise of which had led to a Court that was more receptive to vertical intervention to reduce racial discrimination. The demise of the *Lochner* Court and its vigorous application of due process to freedom of contract and property, actually led to the Court shifting the application of that doctrine to rights of family, reproductive rights and privacy.

A revival of the Privileges or Immunities Clause?
We have seen how the development of “civil” rights in the United States, subsequent to the Fourteenth Amendment, has actually had only partly to do with the rights of citizens as such (and then specifically, in the area of electoral rights, which was further entrenched by the ratification of the Twenty-sixth Amendment in 1971, banning the abridgement of the right to vote for United States citizens eighteen years of age and over), and for the rest was based on the rights to due process and equal protection of the laws enjoyed by all persons on the territory of the United States. (Although it must be noted that access to these particular equalities, according to the case law of the Supreme Court, can be limited for non-United States citizens, considering that Congress has the power to deny entry to or expel aliens.)

147 United States v. Windsor (2013c)
148 Hollingsworth v. Perry (2013a)
In *Edwards*, however, we did see that while the Court grounded the right to freedom of interstate movement in the Commerce Clause, thus making it a right that theoretically applied to all persons, this right was colored by citizenship and the right to move to a state to be politically represented there. The Court would make this much more explicit, and identify an additional basis for the freedom of movement, in its 1999 decision *Saenz v. Roe*, with the majority opinion written by Justice Stevens. The state of California changed its public assistance program, in 1992, to limit the benefits that new residents could receive within the first year that they lived in California to the level of the benefits that they had received in their state of prior residence. The plaintiffs had put forth that this regulation inhibited their right to freely move to California.

The Court first explained that the right to travel has three components, each protected by a different provision of the Constitution: the first is the right of ingress and egress, which had been infringed by California in *Edwards v. California* (so protected by the Commerce Clause), but not in this case, since the California public assistance rules did not directly inhibit entry into the state. The second is the right as the citizen of one state to travel through other states, without taking up residence there, and be entitled to equality (in the sense of non-discrimination) with the residents of that state (protected by the Privileges and Immunities Clause in Article IV of the Constitution). The third component is the right of a newly arrived citizen to enjoy equality in the sense of non-discrimination with the existing citizens of that state: this is protected by the Privileges or Immunities Clause of the Fourteenth Amendment, the only one of the three provisions just identified that specifically protects United States citizens.

Strikingly, the Court cited *Slaughterhouse*, the decision widely blamed for essentially burying the Fourteenth Amendment, to support this reading of the Privileges or Immunities Clause: both Miller’s majority opinion (although Miller’s language here seems to somewhat conflate the Privileges or Immunities Clause with the Citizenship Clause, since he refers to the right of the United States citizen to “become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State” [underlining added]) and Bradley’s dissent (which likewise, actually appears to be referring to the Citizenship Clause and its derivation of state citizenship from United States citizenship).

The Court ruled that California had violated the Citizenship Clause by creating varying classes of California citizens: first two classes based on length of residence (those who had lived for longer than one year in California, and those who had not). Then, California had subdivided the citizens in the latter class into, essentially, a class of those who had come from states or countries with benefits higher than or equal to California’s, and then a number of classes equivalent to

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151 *Saenz v. Roe* (1999)
152 ibid., 500-503.
153 *The Slaughterhouse Cases*, (1873), 80.
154 ibid., 112-113.
the number of all of the previous states of residence that had benefits lower than California’s. The Citizenship Clause, the Court ruled, did not tolerate the creation of even two classes of citizens.\(^{155}\)

The Court did, however, uphold its previous rulings that it was constitutional for a state to impose durational residency requirements for getting a divorce\(^ {156}\) or being entitled to a lower, “in-state” tuition at a state-run higher educational institution.\(^ {157}\) It justified these differences by asserting that such benefits were “readily portable” benefits that, were there no residency requirement, would encourage United States citizens from other states to move to a state, acquire the benefit, and leave to enjoy it in their home states; while social assistance, on the other hand, could only be enjoyed in the state in which it was received.\(^ {158}\)

Tribe’s contemporary comment predicts (correctly, as it would turn out) that \textit{Saenz} did not portend a real revival of the Privileges or Immunities Clause (in place of, or complementing the Due Process Clause and the Equal Protection Clause) as a source of equality for United States citizens. In fact, in this case, the Court was not even really mobilizing United States citizenship for the cause of personal autonomy of United States citizens.\(^ {159}\) Rather, the Court was explaining its view of federalism: that the freedom of movement of citizens, and the freedom of citizens to choose their states, is a necessary counterpoint to the extensive sovereignty of states relative to the federal government in the American system.\(^ {160}\) As the Court itself said in \textit{Saenz}: ‘Citizens of the United States, whether rich or poor, have the right to choose to be citizens ‘of the State wherein they reside.’ … The States, however, do not have any right to select their citizens.’\(^ {161}\)


\(^{156}\) \textit{Sosna v. Iowa} (1975)

\(^{157}\) \textit{Vlandis v. Kline} (1973)

\(^{158}\) \textit{Saenz v. Roe}, (1999), 505.

\(^{159}\) Tribe (1999), p. 179, 198.

\(^{160}\) ibid., p. 111.

Conclusion: United States citizenship as a vertical norm

Saenz provides a fitting conclusion to our exploration of the “vertically defined” relationship between United States citizenship and the citizenship of the states. But it also provides an opportunity to revisit the question that arose with our review of Edwards: where, if anywhere in the Constitution, are the electoral rights of US citizens in their respective states positively guaranteed? The answer is: nowhere, not in so many words. Article IV, Section 4 of the Constitution does provide that the “United States shall guarantee to every State in this Union a Republican Form of Government” -- but the Supreme Court did establish in Luther v. Borden, in refusing to pass judgment on Rhode Island’s electoral process, that this clause was non-judiciable, a line from which it has never since departed.

We must look beyond the Constitution itself, in the texts that make up the “small-c” constitution of the United States. The Preamble of the Declaration of Independence notably holds that “Governments are instituted among Men, deriving their just powers from the consent of the governed”. We explored supra how Lincoln recognized that the Preamble was not judicially operative, but argued, at least as to the Preamble’s assertion that “all men are created equal”, that it was declaratory of a pre-existing reality. The Reconstruction Amendments were born of the desire to ensure that that reality was positively legislated.

But we have not yet traced the source of the citizen’s right to participate in the political process, beyond abstract nods to the ideals of republican and democratic government. To that end, we can identify another document as belonging to the “small-c” constitution of the United States: Lincoln’s Gettysburg Address. At the beginning of the Address, Lincoln (now speaking as a President with a popular mandate, not merely as a public speaker) even more firmly elevates the Preamble’s “proposition that all men are created equal” to one of the founding ideals of the United States. At the end of the Address, Lincoln identifies the United States with “government of the people, by the people, for the people”. By resolving that “this nation” would have a “new birth of freedom”, Wills writes, “Abraham Lincoln changed the way people thought about the Constitution.”

It is from these constitutional premises of equality and “government of the people, by the people” that both the right of political participation and the inability of a state to select its citizens follow as necessary corollaries. Before the Civil War, the exclusion of slaves and former slaves from the “people” had been accepted as the sovereign right of states; from here on

162 Supra on p. 149
163 Supra Ch. 3, n. 71
165 After n. 1
out, however, the “people” would increasingly be seen as a precursor to state
government, not something determined by it. In fact, any ideal of government by
the people and of the people invokes a human right for all inhabitants of the
territory covered by that government, not one necessarily limited to holders of an
abstract status of citizen. The Constitution arguably does not restrain states from
allowing non-US citizens to participate in the political process (one only has to be
a US citizen to be elected to the House, the Senate, or the Presidency): indeed,
until the First World War, numerous states allowed aliens to vote (although
usually only after they had declared their intent to become US citizens), and even
the United States Congress had at various times enfranchised aliens living in

In any case, we can say that this (by now) deeply ingrained
constitutional norm of government by the people and of the people fills in what
were the originally fatal omissions of the Fourteenth and Fifteenth
Amendments\footnote{Supra, section beginning after n. 33} by providing, to start with, that all of the inhabitants of a state
ought to be enfranchised; positive provisions of the Constitution then potentially
circumscribe this franchise by only prohibiting states from denying it to US
citizens of varying stripes. By now, we can read the prohibitions of the Fourteenth,
Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments against
this constitutional background to construe them as in fact largely guaranteeing
equal electoral rights to any US citizen over eighteen\footnote{And, it should be added: “who is not a convicted felon”, according to a not
a given state, without a condition of payment of poll tax. (Again, we see a civil
right emerging at the intersection of a human right and a prohibition of state action
to the disadvantage of US citizens, as we did at the intersection of the Equal
Protection and Due Process Clauses of the Fourteenth Amendments and the
prohibition on deporting US citizens from the territory where those
Constitutional protections pertain.\footnote{Supra on p. 149.}) Of course, to the extent that this can be
read as a guarantee, it is still only a formal one prohibiting directly discriminatory
state laws; states can still try to abridge the substantive electoral rights of citizens
with statutes that may constitute indirect discrimination against certain classes,
such as voter ID laws.

But that gap in protection can be filled when disadvantaged citizens seek judicial
relief, as it is not solely through participation in the political process that US
citizens are guaranteed representation to protect their interests. There is also a
vigorous constitutional doctrine that plays a role in protecting, for one, the

169 Supra, section beginning after n. 33
170 And, it should be added: “who is not a convicted felon”, according to a not
uncontroversial interpretation of §2 of the Fourteenth Amendment by the Supreme Court in
171 Supra on p. 149.
freedom of movement of US citizens. I will give this doctrine an admittedly very
cursory review.

The American constitutional theorist John Hart Ely elaborated the
doctrine of “representation reinforcement” by drawing on, ironically enough, the
theory of “virtual representation” that had once been used by the British
parliament to justify the lack of actual parliamentary representation for British
subjects in the North American colonies. According to this doctrine, the
interests of those who are not politically represented in the political process of a
state must be tied to the interests of those who are, to ensure that those in power
will not disadvantage those who are not in power. Ely identifies the Privileges and
Immunities Clause of Article IV of the Constitution, ensuring that state
legislatures cannot treat out-of-staters less advantageously than their own citizens,
as an early manifestation of this doctrine.

Ely also identifies this notion as lying at the heart of a consideration of
Chief Justice Marshall in *McCulloch v. Maryland* as to why it was unacceptable
for the state of Maryland to single out banks not chartered by the state legislator
(which in this case, affected the Baltimore branch of the Bank of the United
States) for payment of a tax to the state: if the state legislature had taxed all banks
in Maryland in the same way, then such a tax might have been acceptable, because
then the owners and officers of Maryland-chartered banks (i.e., who had
representation in the legislature) would have been equally burdened. The Bank
was thus a disempowered minority in the state of Maryland whose interests had to
be tied to those of the voters of Maryland. (For that matter, the Bank was
chartered by the Congress, i.e. by the people of the United States as a whole, and
thus arguably, all of the people of the United States other than Maryland were
being denied representation of their interests in this action of the Maryland
legislature.)

In the twentieth century, Ely identifies this doctrine as most
explicitly emerging in the Supreme Court’s case law in its 1938 decision *Carolene
Products*. In Footnote 4 to that decision, as an *obiter dictum*, the Court holds that
any

legislation which restricts those political processes which can ordinarily be
expected to bring about repeal of undesirable legislation, is to be subjected
to more exacting judicial scrutiny under the general prohibitions of the
Fourteenth Amendment than are most other types of legislation.

The Court goes on to hold that legislation directed against particular religious,
national, or racial minorities should likewise be subject to strict scrutiny in order
to protect the interests of members of those minorities, whom the political
majority might otherwise neglect.

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172 Supra in Ch. 1, n. 195.
174 Supra in Ch. 2, n. 126: 436
176 ibid., p. 75-76.
177 United States v. Carolene Products Co. (25 April 1938)
We see here that the Court calls for strict scrutiny of two kinds of legislation. One kind denies access to the procedural machinery of representation, thereby making it impossible at the outset for those disadvantaged by a law to get it changed. The other kind substantively, and without a rational basis, disadvantages members of minorities, who even if they did have access to the political process might never, by virtue of their smallness of number, be able to get enough representation to overturn that legislation.

State legislation that effectively restricts the freedom to move to that state and participate in its political process is a textbook example of the first type of legislation that should be subject to strict scrutiny, as mobile citizens are being denied at the very outset the opportunity to participate in the political process to repeal the legislation that keeps them out. To quote Ely on the case *Carrington v. Rash*,\(^{178}\) in which a Texas law denying the franchise to citizens who had moved to the state for military service was struck down, “We cannot trust the ins to decide who stays out”\(^{179}\).

The consideration of the majority opinion in *Edwards* to that end\(^{180}\) can be placed squarely within this doctrine; as can *Saenz*.\(^{181}\)

We can also identify Congressional legislation such as the Voting and Civil Rights Acts as being in line with the spirit of representation reinforcement: it aims to implement the Fourteenth Amendment by keeping the machinery of democracy accessible to all on a state level and banning state laws that directly or indirectly aim to disadvantage minorities. (As to judicial scrutiny of the second type named in *Carolene*, I will again admit that I am skipping over a legion amount of American scholarship and case law on the matter, in which the concept of “suspect classification” plays a key role, and in which the position of the Supreme Court has remained far from constant.\(^{182}\))

We thus see that where United States citizens are able to obtain judicial protection for their freedom to take up residence in another state, this is more often than not rooted in the notion of government by the people and of the people, and the vertically guaranteed equal entitlement to participate in the political process that United States citizens ought to enjoy. Moreover, sedentary state citizens are able to invoke the Fourteenth Amendment against their own states, thus meaning that United States citizenship sets certain minimum parameters for the equality enjoyed by state citizens relative to each other.

Where United States citizens cannot or do not participate in the political process (for instance, for citizens of another state who are merely temporarily sojourning in a state) their interests can be protected by tying up their interests with those of the voters of that state. One “horizontal” manifestation of

\(^{178}\) *Carrington v. Rash* (1 March 1965)

\(^{179}\) Ely (1980), p. 120.

\(^{180}\) *Supra* n. 112.

\(^{181}\) Tribe (1999), p. 120 et seq.

this ideal is the completely non-discriminatory application of state laws: voters of
a state, in order to pass legislation to disadvantage visiting citizens of other states,
would have to pass legislation by which they would disadvantage themselves in the
same way.

In the next chapter, I will go on to apply our findings concerning equality,
mobility, and political representation to an exploration of the historical
relationship between EU citizenship, including in its early guises in the European
Economic Community, and member state citizenship.
Chapter 5: European integration as a project of the member states

Introduction

In the previous chapters, we witnessed the rise to prominence of equality as a defining aspect of citizenship. Citizenship of the United States had initially taken the place of subjecthood to the British monarch, which was defined in terms of allegiance. Indeed, the most incipient form of citizenship of the United States as a whole, due to the fact that the citizens of the united States severally could all be prosecuted for treason, was derived from the same obligation as subjecthood: an allegiance owed in return for protection.

Indeed, equal liability for treason was the only form of equality to be found in the United States citizenship avant la lettre that was born on 24 June 1776. The values of equality as expressed ten days later in the Declaration of Independence were really values of general human rights, not so much civil rights (i.e., restricted to citizens). The Articles of Confederation and the Constitution, moreover, were rather stingy with their endowments of equality specifically for citizens of the united States severally or of the United States as a whole. If anything, the equalities granted continued to be more prominently in the form of burdens or derogations from rights (equal subjection to criminal prosecution in all states—at least in theory—and equal subjection to claims of being a runaway slave—in practice only for black citizens) rather than in the form of advantages. Moreover, where equality came in the form of an advantage, it was largely in the form of non-discrimination, or equal application of a given state’s laws within the territory of that state. All of these forms of equality, including the last one, did not have a very strong basis in equality itself as a core value of citizenship. Indeed, all of them could be analyzed as simply resulting from the common allegiance that all citizens of the united States had, meaning that citizenship had not yet come much farther than the allegiance common to English and Scottish subjects of the King that had been established in Calvin’s Case.

Finally, the relationship of citizenship to the equalities enjoyed by citizens was something of a chicken-or-the-egg debate. Was a given person entitled to certain equalities because he or she was a citizen; in other words, is equality a function of citizenship? Or was it the enjoyment of certain equalities that made that person a citizen; in other words, does equality constitute citizenship? The first model deduces equality from citizenship; the second model inductively derives citizenship from equality. In fact, both can be useful models, and it can be said that they stand in a dialogue to each other.

When we speak of the “incipient United States citizenship” of 24 June 1776, we are of course using the inductive model. The Congressional debate on the introduction of a uniform rule of naturalization, on the other hand, clearly
presupposed a deductive model: that an a priori grant of citizenship of the United States as a whole resulted in entitlement to certain forms of equality. Chief Justice Taney, in the Dred Scott decision, conveniently muddled the two models: asserting federal authority over the grant of citizenship (the deductive model) to deny equality to black Americans, then using the de facto denial of various forms of equality to black Americans, including the citizenship of individual states, as evidence for their lack of citizenship (the inductive model, a contrario).

Only with the passage of the 14th Amendment was equality truly elevated to a central value of United States citizenship. Citizenship of the United States as a whole became the primary status, rather than citizenship of one of the united States, thus clearly establishing the deductive model as legally dominant. The guarantees and freedoms of the Constitution for US citizens became—ultimately—enforceable against individual states. As the civil rights substance of the Constitution was further developed by amendment, an equal right to political participation became one of the central features of US citizenship. Constitutional bans on state interference with US citizens' political rights based on race and sex (in other words, the negative legal norms accompanying US citizenship) became so conclusive as to be analyzable as positive equality for US citizens.

For European citizenship, on the other hand, we can largely only apply the inductive, de facto model to the first 35 years of its incipient existence in the law of the European Coal and Steel Community, then the European Economic Community, during which it never even had a name as such in positive legal norms. One could only point to a bundle of various forms of equality enjoyed by citizens of member states and call this a kind of citizenship avant la lettre of the Community as a whole. It was only with the Treaty of Maastricht of 1992 that, together with the foundation of the European Union, the de jure status (indeed, the “letter”) of Union citizenship was introduced. This was the first moment that a deductive analysis of Union citizenship even became possible. However, it would take almost a decade before truly new forms of equality could be reliably derived from this new status.

As we will go on to explore in Chapters 7 and 8, since 1992 it can be said that the legal development of Union citizenship proceeds from a dialogue between the deductive and inductive models, much as the legal development of the citizenship of the United States had up until the ratification of the 14th Amendment. However, in the scholarship of Community law, in particular since the accession of the United Kingdom and Ireland to the EEC in 1972, it could be said that a “pragmatic”, inductive model of citizenship, stemming from the British constitutional tradition had already entered into an implicit dialogue with the more “formalistic”, deductive continental approaches to citizenship. In exploring this dialogue, I am taking my cue from Schönberger’s suggestion that the contribution of “pragmatic British jurists” to the scholarship of Community law marked something of a milestone in the development of European citizenship. Schönberger (2005), p. 4.
this dialogue, we will take a brief excursion into the development of Commonwealth citizenship from subjecthood in the British Empire, and thereby return to the place where, together with the American revolutionaries, we diverged from the path of British constitutional law. We will also see how, if the British accession introduced some pragmatism to the scholarship of Community citizenship, Community law likely necessitated actual changes to and a greater formalism in British nationality law.

I will explore these topics, as well as apply my analytical framework of the four forms of equality inherent in a duplex citizenship—uniform equality over the federal territory, non-discrimination in a guest state, equality for migrating federal citizens, and equal portability of rights from a state of origin—while proceeding chronologically through the constitutional history of the European Coal and Steel Community, the European Economic Community and the European Union. Every milestone in this development will be the result of a concrete dialogue between two or more of the actors in European constitutional law: the member states, the political institutions of the European Union and the European Court of Justice.
The postwar European idea, leading up to the European Coal and Steel Community

The European integration project has its genesis in the immediate aftermath of the Second World War. Some describe this point in time as the end of the “European Civil War”—at least in Western Europe—a war consisting not only of the Second World War, but also of the Great War before it. To be sure, it can be useful to view all three of those wars as segments of one long, drawn-out conflict between the powers—France and Germany in particular—but the use of the word “Civil” to describe it exposes an obvious bias.

The very notion of a “European Civil War” implies, perhaps, that all Europeans were once bound by a (proto-)citizenship, and that the walls of state borders that had arisen to separate Europeans were merely a historical aberration, an interruption. From this perspective, European citizenship is a pre-existing fact, and the establishment of equality based on that citizenship (indeed, equality to be derived from that citizenship as an inductive model) is to be attained by chipping away at all of the state-imposed restrictions that had accumulated on it over the years.

An opposite historical perspective does not posit the pre-existence, ever, of any kind of European citizenship; but it does see the unification of Europe as essential to preventing future wars. This tone was struck by the Hague Conference in 1948, attended by 600 delegates from the sixteen countries involved in the Marshall Plan, which in its political resolution called for “the nations of Europe to create an economic and political union in order to assure security and social progress”; specifically, “the European nations must transfer and merge some portion of their sovereign rights”. A European Assembly was to be instituted, “chosen by the Parliaments of the participating nations, from among their members and others”. Finally, a “Charter of Human Rights” was to be drafted, and a “Court of Justice” was to be instituted as the final arbiter of the Charter. The direct result of the Hague Conference was the foundation of the Council of Europe on 5 May 1949.

Less than two weeks prior to that, on 20-25 April 1949, the European Economic Conference at Westminster in 1949 struck a related tone, albeit with differences. Its resolutions called for a specifically economic union, “to constitute within Europe an area in which men, goods and capital may move with no more difficulty than is experienced to-day within the frontiers of any single country” and recognized that this was “a complex undertaking which can only be completed by gradual stages”. If the resolutions of the Hague Congress had

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2 For instance, Donnelly (1965), p. 10 and 331. Winston Churchill referred to the two World Wars together as 'a thirty years' war'. Van Middelaar (2013), p. 3 n. 2.
4 The Hague–May, 1948: Resolutions. (Congress of Europe 1948)
5 European Movement (1949)
assumed that the establishment of a common legal standard of human rights, a legislature, and a court was the proper first step in European union, then the form of sovereignty-pooling that the Westminster Conference looked more like an actual supranational government:

The union can only be achieved if the necessary powers are granted as soon as possible to a European authority. The functions and the powers of this authority should be determined by a European Charter which should be agreed by all the countries concerned acting in unison.

It could be said that the Hague Congress, on the one hand, and the Westminster Conference, on the other, represent the respective geneses of the two dominant models of European integration, one based on human rights, and one based on economic freedoms. The former model, moreover, favored intergovernmental action as a means of limiting sovereignty, i.e. states signing treaties in a classical, horizontal mode of international law; the latter model favored the creation of a supranational authority that could vertically impose legal norms.6

Neither of them explicitly called for instituting a European citizenship. However, the Westminster resolutions on displaced persons do make use of a rhetorical flourish that at least implicitly posits some kind of common European “civic” identity, if only for ease of reference to displaced Europeans’ common plight:

The Conference views with deep concern the present plight of the hundreds of thousands of displaced persons of European nationality. [...] The Conference considers that these homeless Europeans, who are unable to return to their own countries, should cease to be treated as stateless refugees and should, instead, as European citizens, be afforded rights and opportunities comparable to those of the citizens of the countries in which they reside.

Perhaps less accidentally, another of the resolutions of the Westminster Conference does seem to presuppose the existence of a European freedom of movement that had only been limited by artificial, state-imposed restraints, in calling for the removal of “all those international obstacles which to-day restrict [the freedom of the peoples of Europe] to seek work, to undertake business, to travel and to live where they will”. This perspective, setting a goal of chipping away obstacles to reveal an underlying freedom, did in fact have some basis in a more than purely idealistic reality: indeed, the phenomenon of state regulation of

6 In introducing the terms, common to the discourse of European law, of “supranational” vs. “intergovernmental”, I am at the same time clearly describing them as “vertical” and “horizontal”, respectively, in order to facilitate a comparison with US constitutional law. The two discourses simply do not otherwise share terminology in this area: in US constitutional discourse the corresponding distinction might be “federal” (as in the constitutional order introduced by the US Constitution, i.e. with a central government that could vertically determine legal norms) vs. “confederal” (as in the preceding order under the Articles of Confederation, in which much was left up to the states in their horizontal relationship to each other).
human movement, using the instruments of passports and visas, was a relatively young one in the Europe of the modern era, having only gained currency after the French Revolution and having only really become all-encompassing around the time of the First World War.7 (For that matter, until the First World War, the right of foreigners to work as laborers, i.e., in employment was virtually never limited or restricted in any country in the world.8)

If we can describe the “Westminster” line of European integration as more “vertical” in its prescriptions for a new relationship among the states, then the logical conclusion for citizenship in such a line would be the establishment of a common and primary European nationality, analogous to the unambiguous US citizenship established by the 14th Amendment. The last time such a thing had really existed with such a wide reach in Europe was with Roman citizenship under the Empire, which entitled the bearer to the equal applicability (at least in theory) of the Roman ius civitatis wherever he went.9 The Westminster resolutions never went quite so far as to suggest such a thing, though.

A more “horizontal” approach to European citizenship, on the other hand, would work on the basis of reciprocity: Europeans would maintain their respective nationalities and would gain equality with other European citizens in terms of non-discrimination when living in other European states. This form of citizenship (which does not necessarily have to be given a name as such) would be analogous to what was arguably the weakest, least vertically determined form of equality engendered by citizenship of a US state from the Articles of Confederation up until the enactment of the 14th Amendment. Ancient European history also offered an example of this. During the Hellenistic period, forms of proto-federal citizenships had developed such as isopoliteia, by which citizens of one polis could be granted the rights of citizenship in another as a sign of friendship and alliance between the two poleis: a citizen of the one, upon migrating to the other, would have access to most of the legal facilities that native citizens could take advantage of.10

Such a thing had also existed in more recent European history: the Indigenat of the North German Confederation of 1867. Schönberger revives this term for describing horizontal forms of citizenship based on reciprocal rights of freedom of movement and residence and the right to treatment as a non-alien.11 For a canonical definition of Indigenat, he cites Article 3(1) of the North German Constitution, which stipulates:

In the entire extent of the federal area there exists a common Indigenat with the effect that the national (subject, state-citizen) of any constituent state must be treated as a non-alien in any other constituent state, and accordingly must be admitted under the same conditions as an indigenous

7 See, in general, Torpey (2000); also Picard (1948), p. 46-47.
8 Lewin (1965), p. 301.
9 Riesenberg (1992), p. 82-84.
10 ibid., p. 52-54.
11 Schönberger (2005), p. 100 et seq.
person for the purposes of settled residence, economic activity, public offices, acquisition of land, acquisition of the right of state-citizenship and the enjoyment of all other civil rights, also that he or she is to be treated equally with regard to prosecution and legal protection.\(^{12}\)

Contemporary to the deliberations in The Hague and in Westminster, Roger Picard\(^{13}\) proposed a very similar form of citizenship for all of Europe: intercitoyenneté. This “intercitizenship”\(^{14}\) would entail completely reciprocal rights of citizenship for the nationals of all the states signing the “pacte d’intercitoyenneté”: the national of one state, resident in another, would retain his or her own nationality, but would be “virtually and temporarily” naturalized, gaining absolutely all of the rights and duties (including obligations of military service) of the nationals of the host state. Europeans would circulate freely without authorization, passports, visas, or quotas.\(^{15}\) The final stage of the introduction of intercitizenship would grant migrating Europeans full political rights in a host state, subject only to the same requirements for active and passive suffrage (length of residence, etc.) that the nationals of the host state are subjected to.\(^{16}\) Picard had already sketched his proposal in an opinion piece in the American Commonweal a year earlier: he believes in the maintenance of national democracies, and expressly proposes intercitizenship as an alternative to uniting states by “federalism” or “world government”.\(^{17}\)

We will start by comparing the early developments in the “Hague” or more horizontal, intergovernmental line of European integration with those in the “Westminster”, or more vertical, supranational line. It will be illustrative to do so through the eyes of the contemporary commentator Suzanne Bastid, who uses Picard’s ideal of intercitoyenneté as something of a standard by which one can evaluate the equalities in terms of non-discrimination actually granted to Europeans in the integration process. Throughout this chapter, I will also use Picard’s intercitoyenneté and the North German Confederation’s Indigenat as pure

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\(^{13}\) Picard (1948), also commented on by Schönberger (2005) on p. 227-229.

\(^{14}\) Cf. the use of that very term by Franklin in 1906 to describe a nearly identical aspect of early United States citizenship, supra in Ch. 2 at n. 46.

\(^{15}\) Picard’s proposal also strikingly echoes the proposals of the British negotiators in 1780 and 1794 to grant British subjects and American citizens reciprocal rights of citizenship in each other’s territories (Ch. 2, at n. 31). That, in turn, would ultimately be the way British subjecthood in the Empire, and later Commonwealth citizenship would work, albeit imperfectly and asymmetrically; Bastid (1953) notes the resemblance of Picard’s intercitizenship to Commonwealth citizenship, p. 470.


\(^{17}\) Picard (1947).
ideal types for a “horizontal” European citizenship. For a pure ideal type of a “vertical” European citizenship, on the other hand, we need only refer to the post-14th Amendment American model: federal citizenship of an overarching state.

The “Hague” line

In the “Hague” line of integration, i.e. under the aegis of the Council of Europe, one of the first accomplishments was the drafting and entry into force (on 3 September 1953) of the Convention for Protection of Human Rights and Fundamental Freedoms, more commonly known as the European Convention on Human Rights (ECHR), to be enforced by a European Court of Human Rights (ECtHR).

Bastid notes the universal character of the Convention, as it granted rights not solely to the citizens of a State party, but to all those persons subject to the authority of the state, including aliens. Thus, aliens who had already been admitted were equally entitled to the Convention guarantees of liberty, safety, and procedural rights to a fair trial. Perhaps significantly to States parties that might have previously restricted property rights to their own citizens, aliens were also to enjoy the protection of their right to property, which at the time had yet to be introduced by a Protocol to the Convention. The enjoyment of these and other rights was not an expression of belonging to any kind of European union, since it applied equally to aliens from non-States parties. For all aliens resident on the territory of a State party, however, the Convention did mark the first time that they gained an undeniable right of individual legal recourse to infringements of their rights on the part of that state; they were no longer restricted to being a third party in a legal dispute that could previously only be entered into in the sphere of international law, i.e. by means of diplomatic contact between their home state and the state of residence.18

The ECHR could not in any way be read to guarantee freedom of movement to Europeans into any of the states parties. Bastid admits that immigration law, i.e. the question of when a state shall admit aliens, is not so much about adopting a “minimum standard of civilization” as it is about setting the conditions for participation in economic life. She notes the extreme inconsistency in laws and administrative practices in Europe (together with a handful of bilateral conventions) with regard to allowing aliens to work.19 However, Bastid notes, European states would choose ultimately not to follow this path of creating the whole new legal system for the citizens of Europe implied by an intercitoyenneté, opting instead for more conventional instruments of

19 ibid., p. 474.
intergovernmental agreements that would only indirectly affect the citizens of Europe.20

Bastid subsequently goes into detail on a Council of Europe initiative toward adopting a “Multilateral Convention on the reciprocal treatment of nationals” which had been proposed by the Italian delegation under the leadership of Count Carlo Sforza. The Italian proposal discarded any notion of intercitizenship, but at the same time insisted that the foundation of the Council of Europe meant that there should be some practical reduction of the disabilities of alienage for the citizens of one member state when on the territory of another member state. This would mean the introduction of reciprocal treatment in certain, initially very limited areas, notably excluding social security. The Parliamentary Assembly of the Council of Europe voted on 25 August 195021 to have the International Institute for the Unification of Private Law (UNIDROIT) in Rome and a working group of the Committee on Legal and Administrative Questions (henceforth the “Legal Committee”, whose four members included Bastid) draft a first version; on 12 May 1951 the Parliamentary Assembly approved22 the draft, with some changes, for further elaboration by a committee of experts.23

The draft provided for equal rights to entry and temporary residence (Article 1), equal rights to property (Article 2), equal rights to access to courts of law (Article 3), equal rights, subject to a host state authorizing a member state citizen to do so, to engage in “any activity of a commercial nature” (Article 4), equal rights to engage in self-employed activities, arts or trades (Article 5), equal rights to medical and hospital assistance and to education (Article 7) and a tax burden equal to or less than nationals of the host state (Article 9). All of these areas of equality were, however, subject to any number of exceptions that could be raised by a host state: notably, the rights to entry and temporary residence were subject to exceptions for threats “to public order, public health, security or morals” and the right to equal exercise of economic activities, which of course was subject to authorization by the host state in the first place, excluded activities relating to national security, public services, natural resources and shipping, and was subject to exceptions “based on economic and social necessity”. Only a very limited form of an equal right to political participation was introduced (Article 6), specifically the right to elect and stand for “bodies or organisations of an economic or professional nature”, and that only after a period of residence of five years.

A right of unrestricted access to the labor market, which in the original proposal24 would also have been gained after five years of residence, apparently

20 ibid., p. 469–470.
21 Draft Multilateral Convention on the reciprocal treatment of nationals, (Parliamentary Assembly of the Council of Europe 24 August 1950)
22 Recommendation 1 relating to the Draft European Convention for Reciprocal Treatment of Nationals, (Parliamentary Assembly of the Council of Europe 12 May 1951)
24 Parliamentary Assembly of the Council of Europe (24 August 1950)
failed to make the first cut; as did the abolition of visa requirements. Much was still left up to the discretion of member states: in particular, Bastid notes, the admissibility of restrictions “based on economic and social necessity” essentially left national admission policies for labor-related migration intact. The Convention was furthermore “equivocal” about the admissibility of one member state excluding or subjecting to a visa requirement an entire category of another member state’s nationals based on their region of origin, e.g., French nationals from Algeria. Conversely, a member state was expressly free (Article 11) to limit the applicability of the Convention with regard to its colonies.

The entry into force of the Convention was to be subject to eight ratifications. Bastid expects this to happen relatively quickly, with the notable exception of the United Kingdom, “which considers the treatments it grants aliens to be liberal, [but] has showed hostility to precise commitments”. The only remaining question for Bastid is whether the Convention was to be seen as a conventional multilateral treaty of establishment, whereby nationals of third countries with most-favored-nation status in one of the member states could also benefit from its provisions; or whether the Convention could be seen as a “sort of pact of intercitizenship” with effects limited to the member states and their citizens, thus establishing a “veritable regional collective”.

Bastid implicitly makes a very important point here, which Schönberger, on the other hand, makes very explicit: a legally compelling citizenship is not on the same level as, and cannot be established by a traditional multilateral reciprocal establishment treaty. If the terms of “intercitizenship” were to be governed largely by the relationship under international law between two or more states parties, the citizen would be little more than a third party to it, and would have a rather precarious legal position at that, subject to the ups and downs of international relations. Bastid had already correctly recognized that the establishment of intercitoyenneté would have to mean constituting a legal system in which the citizen herself is a legal actor, bypassing the relationship between her home state and her host state.

Additionally, there would appear to be something about intercitizenship that means it has to be exclusive in nature: the citizens who enjoy the rights of it will, by virtue of that, be in a more advantageous position relative to the beneficiaries of traditional establishment treaties, thus giving intercitizenship its “hard outside”. Picard, in his enthusiasm for his “horizontal” solution to

26 ibid. p. 484-485.
27 ibid., p. 485-486.
28 Schönberger (2005), p. 214-216. Schönberger is using the term Indigenat here, but on p. 227 et seq. he analyzes Indigenat as a species of Picard’s intercitoyenneté, so I will take the liberty of using the terms roughly interchangeably.
29 Supra at n. 20
30 Cf. Bosniak, supra Ch. 1 at n. 3.
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European citizenship, does seem to somewhat gloss over the necessity of establishing a single legal system for that citizenship to thrive within; although he admits that problems of conflicts of laws might arise from the portability of varying rights, and proposes precluding such conflicts by passing "truly international legislation" or by concluding treaties "on the greatest possible number of matters".  

As it happened, in the end, the Convention was renamed the European Convention on Establishment and was revised to 34 articles from the original fourteen, although the substance remained largely the same; the new Convention (together with a Protocol that—notably—expressly confirmed the right of member states to maintain restrictions on migration) was signed and opened to ratification on 13 December 1955, and did not enter into force until 23 February 1965, having ultimately only required (and obtained) a total of five ratifications (Denmark, Belgium, Italy, Norway and West Germany). At the time of writing of this thesis, the Convention has been ratified by only twelve of the currently 47 member states of the Council of Europe, of which the last to ratify it was Turkey in 1990.

To be fair to the Council of Europe process, however, it did manage to institute a greater freedom of movement at the most directly perceptible formal bottleneck: the point of actually crossing a border from one member state to another. Already in 1949, the Legal Committee had recommended studying the introduction of a European passport, and the Parliamentary Assembly endorsed this view on 1 September 1949. The proposal was to centralize the production of passports for all nationals of member states in a European passport office. If all Europeans’ passports were identical, the reasoning went, then the holder of one would be freed from the requirement of obtaining a visa to cross a border into a member state, and would be additionally exempted from entry and exit controls. However, member states proved to be resistant to this idea, and favored instead an agreement to have member states standardize the appearance of their passports.

It is important to note that the proposal was not to introduce a European nationality, but merely a European passport (i.e., the travel document proving one’s identity and nationality). The European passport would still identify the holder’s nationality as being specifically of a member state. Yet the concepts of “nationality” and “passport” are, in fact, cognitively quite intertwined. Barring certain exceptional circumstances made possible by national law, one can only hold a passport from a given country if one has the nationality of that country. The pars pro toto relationship of passport to nationality is so reliable, in fact, that it

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31 Picard (1948), p. 86–89.
33 European Passport, (Parliamentary Assembly of the Council of Europe 1949)
is now common everyday usage to speak of “having an X passport” to mean “having X nationality” or “being an X citizen”. 35 If the introduction of a European passport was not admittedly meant to be a first step toward introducing a European nationality, then the skeptical member states could call the Legal Committee’s bluff. If all it was about was making a passport with an identical appearance across all member states, then there was no reason to introduce any supranational European passport office at all: the member states could simply harmonize the external appearance of their passports by intergovernmental accord.

In the end, however, the member states never even reached an agreement on creating this “horizontal” European passport, but this was mainly because the focus of negotiations had shifted to the very root of the problem that the uniform European passport had been intended to ameliorate: arduous border formalities. The complete abolition of any requirement to carry a passport to cross borders for citizens of participating states had already been achieved on two smaller scales in 1952: both between the United Kingdom and the Republic of Ireland (for whom, actually, the very existence of border controls in the first place had only been a relatively brief historical anomaly), and in the Scandinavian Passport Union comprising Sweden, Denmark, Finland and Norway. Continued pressure from the Legal Committee on the Committee of Ministers (i.e. the member states) to come to a Europe-wide agreement was bolstered by the fact that a number of member states had already unilaterally and bilaterally gone ahead with relaxation of their border controls.

Finally, on 5 December 1956, the Committee of Ministers announced its willingness to come to an agreement to allow identity cards or other official documents to be used for crossing borders, and possibly to reduce systematic controls to spot checks. The result of this was the European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe of 13 December 1957, which already entered into force on 1 January 1958. 36 By 1961 most of the member states had signed on, with the notable exceptions of the Scandinavians, the British and the Irish with their own passport-free zones. Henceforth, passports and visas were no longer required of nationals of the contracting states for a visit of up to three months (barring the usual exceptions of public policy, security and public health), as long as they could show an identity card.

Notably, a proposal to extend the applicability of the Agreement to all Council of Europe member state nationals resident on the territory of a signatory state, not solely “signatory nationals”, was rejected by the Committee of Ministers later in 1958. It was argued that this not only would lead to treatment

35 It must be noted, however, that this usage often tends to imply that the holder of the passport, who may be an immigrant or a person perceived to have only a weak cultural link to the country of nationality, is only “formally" a national or citizen of that country. We will return to this point later in the discussion of the perception of EU citizenship from the perspective of national political discourses.
discriminating between CoE nationals resident in a signatory state and CoE nationals not resident in a signatory state, but that in general it was undesirable to benefit nationals of member states that had not signed the Agreement. 37

Thus we can see that by this exclusion on the basis of nationality, as far as relaxed border controls for short visits, the Agreement introduced something approaching a limited intercitoyenneté for nationals of the signatory states. It only approaches it, of course, to the extent that relaxation of border controls for entering a destination state for certain aliens can be considered to be introducing a form of equality with nationals of the destination state. The Agreement was not, in any case, phrased in the language of non-discrimination.

However, the possibility of traveling with an identity card rather than a passport does at least formally reveal that something of a direct legal link had been created between nationals of the signatory states and the “foreign” signatory states to which they traveled. A passport, after all, is an expression of a diplomatic relationship between the issuing state and the host state: it almost invariably contains a text written on behalf of the head of state of the issuing state, requesting that the host state allow the bearer to pass. The bearer is therefore a third party in a transaction of international law, a guest being introduced by her or his head of state. An identity card, on the other hand, simply identifies the bearer as a national of a signatory state; he or she can pass without introduction.

The “Westminster” line

To return to Bastid, she goes on to discuss the treaties concluded in the more reduced framework of the “Europe of the six” (Belgium, France, West Germany, Italy, Luxembourg and the Netherlands), even though they “only deal with the problem of the human community in a limited fashion”. 38 These are the Treaty Establishing the European Coal and Steel Community and the Convention Regarding the Status of European Forces (in the context of the European Defense Community). Both treaties, however, markedly differed from the initiatives taken under the aegis of the Council of Europe in that they both contained a supranational element. In other words, both aimed to transfer sovereignty from the member states to a European authority: in the case of the ECSC, a “High Authority”; in the case of the EDC, a “Commissariat”. I will not go into detail on the EDC status of forces treaty here, as the EDC was very quickly consigned to the dustbin of history; but it did have an intriguing provision implying that members of the military, upon completing their tour of duty in another member state, would be allowed to settle in that state under the same conditions as the nationals of that state.

37 ibid., p. 75.
38 Bastid (1953), p. 486.
Bastid finds only one aspect of the ECSC Treaty to be interesting in the context of European citizenship: the fact that its Article 69(1) provides that Member States undertake to remove any restriction based on nationality upon the employment in the coal and steel industries of workers who are nationals of Member States and have recognised qualifications in a coaling or steelmaking occupation, subject to the limitations imposed by the basic requirements of health and public policy.

Furthermore, according to Article 69(2):

For the purpose of applying this provision, Member States shall draw up common definitions of skilled trades and qualifications therefor, shall determine by common accord the limitations provided for in paragraph 1, and shall endeavour to work out arrangements on a Community-wide basis for bringing offers of employment into touch with applications for employment.

Bastid notes skeptically that the first paragraph will only be effective in combination with the “complementary accords” as provided for in the second paragraph. After all, it can’t be effective unless the rules of national immigration law are changed. Moreover, it does not affect the position of member state nationals who are already present in another member state, but seems only to point to a complementary accord on admission and establishment.

Article 69(3), finally, provides:

In addition, with regard to workers not covered by paragraph 2, [the Member States] shall, should growth of coal or steel production be hampered by a shortage of suitable labour, adjust their immigration rules to the extent needed to remedy this state of affairs; in particular, they shall facilitate the re-employment of workers from the coal and steel industries of other Member States.

Thus, Bastid concludes,

any rights for unskilled workers are conditioned by circumstances, and can be provisional. The High Authority must orient and facilitate the action of the Member States for the application of the foreseen measures. Thus, the decision remains to the States. So this treaty sketches the system of intercitizenship for specialists, but the rights created for the benefit of the citizens of the Member States, […] cannot, in fact, be of more than a limited scope.39 [emphasis added]

Bastid’s skepticism is understandable. First of all, she is, after all, coming from the perspective of a jurist: thus she is probably concerned with whether or not a treaty creates enforceable rights for individuals. The provisions of the ECSC Treaty are

39 ibid., p. 486–487.
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little more than programmatic: in other words, they only serve as a political program, a statement of commitments for the signatories, which no individual can force them to move on.

Furthermore, from Bastid’s experience working on what was to become the Convention on Establishment, she apparently was all too familiar with the “weasel words” that characterized states’ empty treaty commitments to liberalize immigration: “subject to limitations posed by health and public policy” (which would no doubt be interpreted broadly), “common definitions of skilled trades” (which would no doubt be drafted very narrowly), “shortages of suitable labor” (which would no doubt be subject to creative interpretation).

Crucially, however, Bastid fails to recognize the potential of the High Authority, indeed of the Community as something more than a mere puppet of the member states. And while she may be right to doubt the efficacy of programmatic, political treaty provisions, which no judge can force compliance with, she overlooks the boldness of the central commitment in Article 65 of the ECSC Treaty: “Member States undertake to remove any restriction based on nationality…” This text echoes the resolution of the Westminster Conference, which aims to take a decisive chisel blow to the walls of state restrictions to expose an underlying freedom of movement. Nowhere does the Convention on Establishment, on the other hand, speak in such terms of repealing, breaking down, or dissolving existing state laws; it merely introduces myriad equalities in terms of non-discrimination for migrant member state citizens, but then only once they have already jumped the hurdle of national immigration law on their own.

From here on out, we will exclusively focus on the “Community” line of development, as it has now become.

The first Community: the ECSC

The negotiation and conclusion of the ECSC Treaty could not have been more different from the negotiation of the Convention on Establishment. The latter was to contain more or less static, concrete provisions that would be binding on the signatories according to the rules of international law; these provisions had to be agreed on unanimously. And so it should be unsurprising that the fifteen member states of the Council of Europe would spend over five years grinding down the bold resolution of the Parliamentary Assembly for reciprocal treatment of citizens, an automatic right of full admission to the labor market for long-term residents and abolition of passports and visas into a bland paste of barely-committal provisions.

The negotiations of “the Six” for the establishment of the ECSC were certainly no less contentious. But the prestige of the project, which was most consciously a first step to the “federation of Europe” called for by Robert
Schuman in his Declaration of 9 May 1950,\textsuperscript{40} may have put the negotiators under pressure not to waste time getting lost in the details. On 18 April 1951, the representatives of the Six, after several days of tough negotiations and last-minute changes, did not even have a final text to sign—so they signed a blank piece of paper and declared the ECSC Treaty to be concluded. In Van Middelaar's retelling, this signature represented a leap of faith, an expression of willingness on the part of the new member states to be bound by the will of the majority. For in the Community, certain binding decisions (such as setting the price of coal or closing a mine) could be made by a qualified majority of the member states.\textsuperscript{41} By unanimous decision, the member states agreed to drop the requirement of unanimity, thus forming what could truly be called a political community, where the majority rules.\textsuperscript{42}

Jean Monnet's original vision had called for all authority in the Community to be vested in the High Authority, which would make decisions on the price of coal and steel and mine closures without heed to the individual interests of the member states, non-ideologically and technocratically. At most, the High Authority would be counterbalanced by some sort of Court that would hold the High Authority to the letter of the Treaty.\textsuperscript{43} This was the vision of what Van Middelaar calls the "Europe of Offices":\textsuperscript{44} the impartial civil servants of efficacy who would tirelessly thrust the integration project forward, if needs be against the will of the member states that didn't know what was good for Europe. This narrative placed itself in opposition to the "Europe of States" that had historically been dominant, in which European agreements could only be reached by diplomacy, by states signing treaties from the perspective of their separate interests and reaching unanimous agreements.\textsuperscript{45} From the European civil servants' perspective, the sad state of affairs that the European Convention on Establishment became could be viewed as a typical example of what would happen if European integration were to left up to the states: no progress would ever be made.

As it happened, however, the Community was not to become the civil servants' paradise that Schuman and Monnet envisaged. During the negotiations, the Dutch negotiator, Dirk Spierenburg, insisted that the governments of the member states have a role in the decision-making process, since they would, after all, be responsible to their parliaments for decisions that could have consequences for their economies. Monnet conceded this point, "on the condition that they would act jointly". This secured the assent of the Netherlands to the Treaty. The Special Council of Ministers would now be an institution on the same level as the

\textsuperscript{40} 'The Schuman Declaration', (d)
\textsuperscript{42} ibid., p. 38.
\textsuperscript{43} ibid., p. 43.
\textsuperscript{44} ibid., p. 3-5.
\textsuperscript{45} ibid., p. 2-3 and 5-6...
High Authority, which could advise the High Authority and would approve its
decisions.46

Yet the Council would come to be something more than just the
“Europe of States” counterbalancing the civil servants of the High Authority. In
between the “outer”, intergovernmental sphere of the states and the “inner”,
supranational sphere of the Community and its institutions, an “intermediate”
sphere was to emerge: the Council of Ministers, in its meetings, would come to
take on more than solely the tasks it had as a Community institution. Indeed, the
heads of government discovered that they could make use of their table to come to
agreements outside of the boundaries of the Treaty, yet in a more informal way
than the old intergovernmental method required. This unforeseen (and in the
view of some legal commentators, improper) use of the Council’s table was to
become a fruitful institution in its own right for the further development of the
Community.47

Van Middelaar identifies a third narrative on European integration: the
“Europe of Citizens”. This was present in an only very embryonic form in the
ECSC, with its provisions on the free movement of specialists and, much less so,
unskilled labor. If, for Van Middelaar, the “Europe of States” belongs to the
princes, or their democratically elected successors, and the “Europe of Offices”
belongs to the civil servants, then this last Europe belongs to the lawyers.48 We
can already see the interests represented by this narrative reflected in Bastid’s
analyses of the treaties of European integration of her time: her “Europe of
Citizens” is opposed to the “Europe of States”, and she is encouraged every time
she can note a treaty provision that a citizen can directly rely upon; discouraged
when a treaty provision on immigration is left up to the discretion of a state.

As it happened, however, the provision on freedom of movement for
specialists was inserted into the Treaty at the behest of a state, acting in a most
classically Machiavellian of ways in the intergovernmental process to further its
own interest. Italy had a vital interest in liberalizing migration in Europe, as it had
a high unemployment rate and a large number of its citizens were already working
abroad in Europe; in fact, from the outset, Italy was more interested in enabling
its citizens to work abroad than it was in the common market in coal and steel.49
Italy already had a number of bilateral establishment treaties with immigration
countries.50 Italy also had an ideological inclination toward federalism in Europe
that stemmed from the resistance movement during the war; the activists that in
1943 had founded the Movimento Federalista Europeo, an organization that had

46 ibid., p. 43-44.
48 ibid. p. 6.
long demanded the introduction of a European citizenship, were led by Altiero Spinelli, a prominent name in the later history of the Community.

In any case, we would do well to assume that Italy’s economic, rather than idealistic, interests in the introduction of greater freedom and equality for Italian emigrants were the truly decisive factors for Italy. We should recall that it was Italy, likewise, that proposed the Convention on Establishment; and among the signers of the treaty for the ECSC, we see a familiar player, Count Carlo Sforza. Italy successfully played off its interests against those of the other states to secure the provision on labor migration. The Netherlands and Germany were already at least lukewarm to the idea, since they were also labor-importing countries in Europe. But it was the high-stakes proposal of Italy’s negotiator, Paolo Taviani, that the High Authority should have the power to set and enforce wage levels that spooked the Dutch and German negotiators, wary of granting more power to the civil servants, into committing to a (limited) provision of freedom of movement. Belgium, for its part, had some interest in securing a flow of foreign workers to its coalmines, and France accepted the Italian proposal as a small price to pay for the rest of the Community package, which it fiercely desired.

Of course, the provision (that would become Art. 69(1) of the Treaty, cited supra) could not be accepted without the now familiar conditions of “health and public order” (which left some room to the states to restrict immigration), the reliance on the states to draft and implement the conditions for labor migration, and the definitions of the skilled trades. As it happened, Bastid’s fears of the states’ lack of commitment to rights of movement for citizens largely came true. The Social Affairs Commission of the High Authority did at least serve to provide the impetus for the drafting of the accord, which was approved by the Council in December 1954. But the way the relevant Treaty provision was phrased meant that a decision on this issue by the members of the Council was not binding on the states: the accord still had to be ratified by the parliaments of all of the member states. Ratification was not completed until June 1957, when Luxembourg ratified it.

Although little freedom of movement had been realized in this first Community initiative, there had at least been some discernable activity in the political life of the Community outside the old closed club of the states. The Italian members of the Common Assembly, representing the concerned citizens, had been especially irritated by the glacial pace of implementation, and repeatedly made speeches about the issue. And the High Authority, the office representing the lofty ideals of European integration, for its part had always continued to push for freedom of movement.

54 ibid. p. 16-17.
As something of a footnote to the (lack of) development in substantial freedom of movement in the Community, it can be noted that the High Authority also tried to initiate some development in the administrative aspect of border-crossing formalities. A *laissez-passer* document, removing the necessity of visas for border crossings between the member states, had already been made available to members and staff of the High Authority in 1953. When Jean Monnet, as the president of the High Authority, was ceremonially issued the very first one, he notably asked an assistant to hand him his French diplomatic passport and said: “We’re going to burn this now.” His possession of the Authority document implied that he had become a European now.\(^{55}\)

Without a doubt in that same spirit, the High Authority suggested the introduction of a “freedom of movement card” that could be issued to qualifying specialists as a travel document. This card ended up being dubbed the Community Labor Card in the administrative arrangement ratified on 12 August 1957, and it was to be issued to a qualifying specialist accepting an offer of work in another member state. However, the symbolic importance of the Card was rather attenuated by the fact that in the final accord as approved by the states, it was only valid for crossing borders in combination with a national travel document. If the Card had been meant to ease the movement of workers for whom applying for a national passport or identity card would have been too much of a barrier, it failed on that count.\(^{56}\) Thus the states had once more curtailed the “vertical” component of freedom of movement, in this case for qualified citizens under the Community. Only the civil servants of the High Authority had managed to obtain a purely supranational “documentary citizenship”.

Where the “offices” and the “citizens” had tried and failed, it would take movement in the sphere of the states to truly advance the issue of freedom of movement. During negotiations for the new, broader Community that was to be founded, Italy played hardball. The interest of the capital-rich Netherlands and Germany was in securing the freedom of movement of capital that had already been called for, next to the free movement of “men” and “goods”, in the resolution of the Westminster Conference. Italy threatened to block this provision if it was not to finally get its freedom of movement of workers. And so, it finally got its wish.\(^{57}\)

\(^{55}\) Van Middelaar (2013), p. 27.


The European Economic Community: the early years leading up to the emergence of the citizen

The next stop on the train of European integration had originally been meant to be the European Defense Community, which had been designed along the same lines as the ECSC, but the French parliament’s rejection of ratification on 30 August 1954 threw a switch on that track. In 1955, the Six sat down once more as states to design a new pact, one exclusively economic in focus. The affected field—all economic activity—was much broader than solely coal and steel; but the stated objectives were more modest. The lofty aspirations of the preamble of the ECSC Treaty, announcing the Treaty as a “creative effort” to safeguard “world peace” by creating “real solidarity” to lay the basis for a “broader and deeper community” were turned down a notch in the preamble to the Treaty of Rome founding the European Economic Community (the EEC Treaty), which was signed on 25 March 1957 and entered into force on 1 January 1958. The new Treaty did, however, strike a single loud, resonant note with its commitment to lay “the foundations of an ever closer union among the European peoples”.58

A parallel with the US Constitution’s “in order to form a more perfect Union” should be obvious, although it might be going a bit too far to say that the drafters were consciously foreshadowing a European union (or Union) with their choice of words. While today’s Union is referred to as such using a cognate of that word in all four of the founding languages,59 only two of them used the U-word in the EEC Treaty: the French text speaks of “une union sans cesse plus étroite”, as does the Italian “unione sempre più stretta”, while the Dutch text speaks of a “steeds hechter verbond” (“alliance” or “confederation”), and the German text, finally, possibly expresses the least passionate embrace of all: “einen immer engeren Zusammenschluß” (which can be read as simply “association”). This difference does not necessarily say anything about a cultural difference between the speakers of English and the Romance languages, on the one hand, and the speakers of the continental Germanic languages, on the other; rather, the word “union” and its cognates are simply more polysemous in the former set of languages.

First, however, I will briefly summarize Van Middelaar’s review of the early constitutional setup of and political developments in the new Community. The new Community was designed from the outset to further curtail the supranational ambitions of the civil servants: the place of the High Authority in the Coal and Steel Community was to be occupied by an innocent-sounding “Commission” in the Economic Community. The Commission’s job was merely to propose legal instruments and then to supervise their execution, while the real decision-making

59 Europese Unie; Union européenne; Europäische Union; Unione europea
power lay with the Council. But the new Community also had a much wider scope of action than the old Community, which had been largely confined to the specific substantive provisions of its treaty.

The new Treaty created an entire framework for the member states to enter into a more or less permanent state of negotiation with each other. In particular, the phased introduction of voting by qualified majority in a number of substantive areas was a portentous development. First of all, because it meant that more than ever, the Community was its own political community, one in which the majority made decisions for the whole. In and of itself, that already implied that the rules of the Community would be potentially supranational in nature, a fact that none of the states had fully caught on to as they drafted the treaty in their comfortable intergovernmental configuration.

But second of all, with the so-called “Community method”, the Commission had the sole right of initiative. The Council adopted legislative instruments by qualified majority, but only if the text of its decision was identical to the Commission’s proposal. If the Council wanted to ignore a Commission proposal, it could only do so by unanimity. The smaller states accepted qualified majority voting, which was otherwise to their disadvantage, precisely because the Community method allowed them to punch above their weight in the Council in matters where the European spirit—as represented by the civil servants—was also aligned with their state interest. Thus the supranational beast that the states had so feared was to be found not in the Commission that they had caged, but in the interplay between the states among themselves and the states and the Commission.60

How did this play out in the case of freedom of movement? The Treaty provided for the hard-won freedom of movement as follows:

**Article 48** *(cf. today's Art. 45 TFEU)*
1. The free movement of workers shall be ensured within the Community not later than at the date of the expiry of the transitional period.
2. This shall involve the abolition of any discrimination based on nationality between workers of the Member States, as regards employment, remuneration and other working conditions.
3. It shall include the right, subject to limitations justified by reasons of public order, public safety and public health:
   (a) to accept offers of employment actually made;
   (b) to move about freely for this purpose within the territory of Member States;
   (c) to stay in any Member State in order to carry on an employment in conformity with the legislative and administrative provisions governing the employment of the workers of that State; and
   (d) to live, on conditions which shall be the subject of implementing regulations to be laid down by the Commission, in the territory of a Member State after having been employed there.

The provisions of this Article shall not apply to employment in the public administration.

Articles 49 [cf. Art. 46 TFEU] worked out in further detail the “the measures necessary to effect progressively the free movement of workers”, and Article 51 [cf. Art. 48 TFEU] dealt with the right of workers to access to the social security systems of member states. The treaty goes on to provide for freedom of movement of self-employed persons, as well:

Article 52 [cf. Art. 49 TFEU]
Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be progressively abolished in the course of the transitional period. Such progressive abolition shall also extend to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to engage in and carry on non-wage-earning activities, and also to set up and manage enterprises and, in particular, companies within the meaning of Article 58 [Art. 54 TFEU], second paragraph, under the conditions laid down by the law of the country of establishment for its own nationals, subject to the provisions of the Chapter relating to capital.

The “transitional period” referred to had been set to be twelve years by Article 8(1) of the Treaty, thus lasting until 31 December 1969. As it happened, as of 15 October 1968, freedom of movement of individuals in Europe, for the purpose of employment or self-employment, was at last a legal fact. Of course, these Treaty provisions were still, ultimately, semi-programmatic and it took the drafting and adoption of legal instruments to implement them. But yet another Treaty provision, complementing the provisions on freedom of movement, clearly established an equality for migrating citizens, although it was somewhat dependent on regulatory action on the part of the Council:

Article 7 [Art. 18 TFEU]
Within the field of application of this Treaty and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality shall hereby be prohibited.

The Council may, acting by means of a qualified majority vote on a proposal of the Commission and after the Assembly has been consulted, lay down rules in regard to the prohibition of any such discrimination.

The freedom-of-movement provisions and the general non-discrimination provision can be formally contrasted to each other as follows. The former

61. For a review of the timeline of the gradual introduction of freedom of movement by legislative instruments passed by the Council, see Maas (2007), p. 17-22.
provisions provide for the states to take steps to establish legal norms abolishing restrictions on freedom of movement and discrimination based on nationality. Thus the Treaty does not establish freedom of movement entirely on its own; rather, the states take the initiative (acting unanimously as the Council). The first sentence of the non-discrimination provision, on the other hand, itself lays down a legal norm. Strikingly, however, the second sentence of the non-discrimination provision allows the Council (voting by qualified majority) to establish further legal norms, which implies that practically, instituting non-discrimination may require the setting of additional norms.

Thus we see three modalities of norm-setting on the part of the Treaty: a semi-programmatic norm that requires further action to institute, both formally and practically; an independent norm that requires no further action to formally institute; and an independent norm that may require further action to practically institute. These modalities will have some relevance to the types of equalities the Community was to introduce for the citizens of the member states.

Somewhat curiously, to this very day (in Art. 45(1) TFEU), the Treaty literally provides for “freedom of movement for workers” [italics added] within the Union/Community without reference to those workers’ nationality; while at the same time the Treaty (now Art. 49 TFEU) provides that “restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State” [italics added] shall be prohibited. Taken literally, this would mean that anyone working as an employee in a member state, regardless of nationality, would enjoy freedom of movement; while the same freedom of movement would be denied to a non-national of a Community member state who was established in a member state as a self-employed person.

Plender notes that this reading of (now) Art. 45(1) TFEU is supported by the obvious contrast with Art. 69(1) ECSC Treaty, which spoke of “workers who are nationals of member states”.62 One might speculate, as Plender does, that this could have even been the intention of the drafters of the Treaty: allowing mobility to act as a safety valve to release unemployed third-country nationals from one member state to another, while the privileges of self-employed member state nationals, particularly professionals with special qualifications, were to be protected.63

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63 Plender (1976), p. 43. (Plender later gives a slightly different account: of the drafters’ possible ideal of a free market in labor corresponding to the common market in goods, Plender (1988), p. 197.) Such a reading, contrasting the respective interests involved with employees and self-employed persons, would, strikingly, dovetail with what Grabitz (1970) describes as the traditional attitude of European nation-states in the 19th century and in the 20th century up to the Great Depression: they did not restrict, and in fact often actively encouraged, the immigration of aliens for employment as laborers, while at the same time the practice of any professions monopolized by guilds and inns was highly restricted for aliens and generally reserved to a nation-state’s own nationals. P. 54-56.
However, the Council swiftly clarified this issue with the passage of Regulation 15/61 and its successor Regulations 38/64 and 1612/68 (the digits after the slash in a Regulation number represent the year of passage), which elaborated on the details of freedom of movement of workers while expressly limiting it to nationals of member states. Durand, writing in 1979, saw this as practically inevitable: if third-country nationals, having been admitted under the immigration law of one member state for the purpose of employment, were allowed to circulate freely in the Community, then it would become “necessary” to harmonize the immigration laws of the member states.

To clarify what Durand meant by his use of quotation marks around the word “necessary”: this was not just a political or pragmatic analysis of what would actually be necessary if third-country employees could circulate freely, comparable to James Madison’s teleological problematization of divergent US state rules of naturalization in *Federalist* 42. What is meant here is: the Treaty expressly said nothing about such a competence for the Community, i.e. a competence to mandate the harmonization of member states’ immigration laws with regard to third-country nationals. But if Article 48 of the EEC Treaty [Art. 45 TFEU] could indeed be understood so expansively as to cover third-country national workers, then one could have read an implied competence into the treaty (and the European Court of Justice would back that reading up) on the basis of art. 235 EEC [cf. Art. 352 TFEU], which granted the Council the competence to go ahead and enact legislation “necessary to achieve” an aim of the Community. (This could be seen as a parallel to the US “textual” constitutional doctrine of “implied powers”, developed in *McCulloch v. Maryland*.)

There is, however, a much more likely explanation for the Regulation’s express restriction to member state nationals of the freedom of movement of workers: again, state interests. Dahlberg, writing in 1967, does not provide an account for the provision in the 1961 Regulation expressly defining “workers” as workers having the nationality of a member state. But he does note that Italy was constantly pressing for strong provisions on the freedom of movement of labor to relieve its high unemployment rate; this interest was complemented by Germany’s interest in relieving its shortage of labor.

In the negotiations for the 1961 Regulation, the Commission, backed by Italy, insisted that one of the necessary implications of the freedom of movement of workers should be that Community workers should receive priority in employment over third-country nationals. The 1961 Regulation, after all, did not provide for Community workers to automatically have the right to work in a host member state. Rather, the Regulation instituted a system of work permits,

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64 Plender (1976), p. 42.
65 Durand (1979), p. 4.
66 Cf. supra in Ch. 2, at n. 48
67 Supra in Ch. 2 at n. 126.
69 Ibid., p. 313.

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where an employer first had to prove that “no suitable worker” was “available among the workers belonging to the normal labor market of the [guest] Member State”\textsuperscript{70}, this lack of availability was considered to have been demonstrated if no suitable candidate applied for a job vacancy that had stood open at a public job agency for at most three weeks.\textsuperscript{71}

The ensuing whiff of competition with “workers belonging to the normal labor market” of a host member state was apparently anathema to Italy, especially in light of the existence of bilateral establishment treaties between other member states and third countries that might have meant that nationals of those third countries were “workers belonging to the normal labor market”. Italy and the Commission had been unable to get the other member states to agree on granting priority to Community nationals (which the other member states may have perceived as “throwing a wall around the Community”, entirely taking away member states’ freedom to admit third-country national workers\textsuperscript{72}), securing instead only a vague, programmatic commitment to priority in Article 43 of the Regulation.\textsuperscript{73}

It is clear to see that at this stage, the realization of freedom of movement of workers was seen as being not so much about realizing directly effective rights for Community nationals as it was about prodding member states into political action to facilitate cross-border employment for Community nationals. A great deal of the obligations that the member states took on with the 1961 Regulation (all of Part 2 of the Regulation, Art. 16 through Art. 30), in fact, had to do with establishing a system for bringing demand for labor into contact with the supply of labor. Workers were seen not so much as free agents as they were seen as commodities for host state employers.\textsuperscript{74}

Even after the initial admission, their mobility was curtailed: they first had to prove themselves on the labor market of the host member state before they could gain more equality to nationals of the host member state in a graduated scale provided for by Article 6 of the Regulation. After one year of regular work in a host member state, a migrant Community national had a right to have her or his work permit renewed for the same type of work (par. 1); after three years of regular work, he or she received a permit to engage in any kind of work for which he or she possessed the necessary skills (par. 2); after four years of regular work, she or he received a permit to engage in any kind of work whatsoever under the

\textsuperscript{70} Verordening No. 15 met betrekking tot de eerste maatregelen ter verwezenlijking van het vrije verkeer van werknemers binnen de Gemeenschap [Regulation 15/61], (Council of the European Economic Community 1961), Art. 1(1). My translation from Dutch.

\textsuperscript{71} ibid., Art. 1(2).

\textsuperscript{72} Lewin (1965), p. 312.

\textsuperscript{73} Dahlberg (1967), p. 313.

\textsuperscript{74} De Lange writes about the way in which labor migration from Italy was provided for in the Netherlands from the end of the Second World War until the gradual introduction of freedom of movement of workers in 1960s: Italian coal miners and metal workers were more or less ‘imported’ in blocks by Dutch employers’ organizations, based on recruitment agreements between the Netherlands and Italy. De Lange (2007), p. 67-81.
same conditions as for nationals of the host member state (par. 3);75 and finally, a provision was made for more irregularly working migrants: after five years in a row, in each of which the migrant had held a work permit for at least eight months, the migrant also got permission to work wherever he or she liked (par. 4). It is important to note that none of these provisions were phrased in terms of the migrant member state national automatically gaining rights to equality; each graduated step in equality was formally granted in the form of a permit by the host member state, even though it not really have much discretion in the matter.

Host member states were clearly not so eager to make any kind of further effort to give Community workers priority within their national labor markets (by changing their laws, abrogating bilateral treaties, etc.), and so the Regulation did not yet require the member states to give Community workers priority. Article 48 of the Regulation did, however, clearly provide for a “standstill” on new discriminatory measures or the escalation of existing discriminatory measures with regard to workers who were nationals of member states: this provision had retroactive effect to the date of entry into force of the Treaty, so any new or escalated measures since then had to be repealed within six months of the entry into force of the Regulation.76

Having reviewed the background of the institution of freedom of movement of workers by the 1961 Regulation, as well as its limited content, we can now return to the question of how it came to be that freedom of movement was restricted to the nationals of the member states. It was clear that Italy wished not only to secure the access of its nationals to the labor markets of the other member states, but it also wished to make sure that they could not be out-competed by third-country nationals.77 Italy was clearly unable to prod other member states into action to expand equality by instituting priority for Community workers; yet even though it initially settled for less, Italy’s tactic of aiming high was to pay off in the long term.

If, at the same time as arguing for priority, Italy had simultaneously expressed a wish to specifically restrict access to freedom of movement in the Community (which at the time, of course, might not have seemed like such a prize) to member state nationals and prevent bilaterally-favored third-country national workers from being able to compete across borders, the other member states would have conceded this without an argument. After all, simply defining a right (or an incipient right) in Community law in a more restrictive way required

75 By this provision, the Community had already more than surpassed at least one of the grand ideals of the Council of Europe process which had failed to make it into the provisions of the European Convention on Establishment (which, in turn, was still four years away from entering into force)—the Parliamentary Assembly’s expressed desire to grant European migrant workers equality on the labor market to nationals of the host state after five years of working in a host state. Cf. supra at n. 25
76 Lewin (1965)
no effort on the part of the member states, and it had no impact on the national labor markets to the extent that they were already dependent on the presence of the aforementioned third-country nationals. Thus the restriction of freedom of movement to Community nationals (although the notion of “national” was far from uniform among the member states, a point we will return to) was a concession to an Italian interest, as well as, possibly, a prescient “European” interest on the part of the Commission, the consequences of which will soon be revealed.

From the worker to the citizen: political developments

As it happened, Italy’s concern about a formal lack of priority for Community workers turned out to be largely unfounded in practice: Italian workers had few problems being put to work in labor-hungry member states. In the negotiations for what would become Regulation 38/64, however, Italy pressed on for the abolition of national priorities, which would enable Community workers to compete directly with a member state’s own nationals and bilaterally favored third-country nationals.

This was an extremely hot-button issue and the subject of many tough rounds of negotiations that went back and forth between the Commission, the Council, and the so-called Consultative Committee, the last of which had been instituted by Articles 28 through 35 of the 1961 Regulation. The Consultative Committee was composed of, from each member state, two representatives of the government, two representatives of trade unions, and two representatives of employers’ organizations. The German and French delegations to the Committee had been adamantly opposed to the abolition of national priorities. But the Dutch and Belgian delegations suggested merely suppressing national priorities with the possibility of reintroducing them if serious economic circumstances required. This compromise proposal ultimately passed the Committee.

The way that this compromise was ultimately formulated in Regulation 38/64, however, might have come as something of a shock to those members of the Committee who had grudgingly allowed themselves to be swayed to vote for it. The previous Regulation, after all, had allowed for priority for national workers with the instrument of time: if a job vacancy had been open for three weeks and no one with an automatic right to work at the job (i.e. a citizen of the member state or a bilaterally favored third-country national) had been hired for it, then a work permit could be granted to the migrating member state national. The protectionist-minded members of the Committee might have thought that the suppression of national priority would still involve a procedure of admission for each migrating member state national, albeit a more facilitated one. But the

79 ibid., p. 319.
opening provision of the Regulation took the suppression of national priorities to its logical conclusion [emphasis added]:

**Article 1**

Every national of a Member State has the right to engage in salaried employment on the territory of another Member State, and under the conditions set in this Regulation, in a position for which the vacancy has been placed at the authorized employment agency.

This represented a sea change in the position of migrant workers who were nationals of a Community member state. Admittedly, there was still an administrative hint of some sort of admission procedure under national immigration law, but it no longer constituted much of a hurdle: Article 22(1) provided that ‘[Each Community worker] having the right to engage in salaried employment on the territory of another Member State shall receive a work permit to that effect issued by the country of employment, which shall reveal that right.’

Article 2 was an elaboration of the protectionist part of the compromise, according to which a host member state could suspend the automatic right to work of migrant Community nationals if there was an imbalance in the labor market. However, this could only happen on the condition of satisfying procedural requirements, such as that such a suspension could only be introduced at the beginning of a quarter unless there was a serious threat to the equilibrium of the labor market (par. 1); and of course any suspension had to be reported to the Commission (par. 2). In any case, a suspension of the automatic right to work only meant that the admission of migrant Community nationals was subject to a job vacancy being open for two weeks (par. 3), so even this worst-case scenario for freedom of movement still offered an incremental improvement over the 1961 Regulation.

Moreover, frontier workers (migrant workers who lived in their home member state and worked over the border in a host member state) were exempted from any suspension of the automatic right to work in the host state (Art. 3). Perhaps most interestingly, migrant workers with a history of work in the host member state, who under the 1961 Regulation could be somewhat grudgingly granted ever greater degrees of equality, now, in an inversion of the norm, automatically gained ever greater degrees of immunity to any suspension of their equal right to work (Art. 6 and 7).

All in all, the entry into force of, in particular, this first chapter (Art. 1 through 7) of the 1964 Regulation could be said to most powerfully represent the moment that migrant Community national workers had both formally and substantively entered into a legal relationship with respective host member states: for the first time, they were spoken of as automatically enjoying equality with host member state nationals. This equality was not granted, but instead ensued directly from being a migrant Community national engaged in work-related activities. Before, the burden of proof had been on the migrant Community worker (or her or his employer) to first prove that she or he should be permitted to work in a host
member state. Now the burden of proof was on the host member state to prove
why a migrant Community worker should not have the right to work there.

Of course, the 1961 and 1964 Regulations, as well as Regulation No. 3
(passed in 1958), ensuring social security rights for migrating workers, introduced
numerous other forms of equality with nationals of host member states. But we
will not go into detail on them here, because all of these equalities were merely
accessory to the equal right to work and to reside in a host member state for the
purpose of work.

It is, however, important to focus on Directive 64/221, adopted around the same
time as the new Regulation, which clearly expressed the seriousness of freedom of
movement and the firm placement of a burden of proof on a host member state
seeking to deny it in an individual case. The Directive restrictively outlined the
conditions under which a migrant Community worker and his or her family
members could be expelled for the reasons of “public order, public security and
public health” mentioned in Article 48 of the Treaty [Art. 45 TFEU].

Article 2(2) of the Directive provided in no uncertain terms that these
reasons for denying a Community worker residence, refusing to renew her or his
residence permit, or expelling him or her could not be cited out of economic
interest. As to public order and public security, Article 3, paragraphs 1 and 2
provided that any measures based on those interests had to be exclusively based on
the behavior of the individual concerned: the existence of a criminal record, in and
of itself, was not a valid justification. The provision that the “behavior of the
individual concerned” had to be the justifying factor was a strikingly vague and
somewhat circular prescription, especially considering that this was supposed to
remove any member state discretion in determining what a threat to public order
or public security was. However, it was the very vagueness of this provision that
was an asset to migrant Community nationals: it meant in any case that this
would always have to be evaluated on a case-by-case basis and there could be no
general rules about it. A migrant Community national therefore always had a
right to a substantive evaluation of her or his case if she or he was being denied
legal residence; furthermore, Article 8 of the Directive guaranteed the right to a
formal procedure.

This was all a quite astonishing development. Exceptions based on
reasons of public order, public security and public health had always been
necessary in treaties affecting immigration—including the EEC Treaty—in order
to assure wavering states that their interests would be protected and get them to
agree unanimously. Traditionally, states knew (as Bastid had sighed) that they
could use such provisions as a loosely interpretable escape hatch to go ahead and
use national immigration law to maintain restrictions on treaty-based rights of
residence. But any such loophole in the legislation, that would allow states their

own wiggle room in interpreting these rights of residence, was effectively closed using the Community method. Dahlberg reveals\textsuperscript{82} that agreement on this particular matter had already been reached at the time of the preparatory agreements that had been made at the level of the Permanent Representatives or below: thus unlike (say) the issue of abolishing national priorities, this matter was formally uncontroversial by the time it reached the Council.

Van Middelaar identifies this unofficial council of ambassadors from the member states to Brussels (and effectively, of “Brussels” to the member states) as a “crucial point of connectivity” in the constitutional life of the Community, and another part of what he previously identified as the “intermediate” sphere, neither entirely of the Community itself, nor of the states. The Permanent Representatives had no formal status in the Treaty at this time (they were to get it, as the Committee of Permanent Representatives or Coreper, in 1965), but they were indispensable to the Community process. They were never of one mind, and debated furiously, but they all shared a common mission of getting things done. They used their weekly meetings to iron out a great deal of smaller matters so that the monthly Council meetings of foreign ministers could be more effective. But they were neither purely concerned with technocratic efficacy, as the civil servants were, nor did they purely represent the interests of the states. “This was the place,” Van Middelaar writes, “where trust between the members slowly grew” into a spirit of joint action.\textsuperscript{83}

Incidentally, in the area of “documentary” freedom of movement, the Council Directive of 16 August 1961 had already abolished the requirement of having a passport and a visa for Community nationals going to another member state to accept an actual offer of work; an identity card or a passport without a visa was sufficient. While the civil servants’ erstwhile dream of the Community Labor Card had died, the idealistic significance of being able to “vertically” be granted permission to travel by a central agency somewhat paled in comparison to the practical benefit of simply being able to get up and go with nothing more than a member state-issued identity card and possibly, at most, an offer letter from an employer or national employment agency. (In theory, the Directive would add the right to move to another member state to the right to visit another member state that had already been introduced in the Council of Europe process, \textit{supra} at n. 36.)

According to Dahlberg, however, the 1961 Directive had unfortunately been rather unevenly enforced.\textsuperscript{84} Directive 64/240 made this obligation for the member states (formulated by Article 3(2) of the previous Directive as “[the requirement of an] entry visa is to be abolished”) much clearer with its own

\textsuperscript{82} Dahlberg (1967), p. 323.
\textsuperscript{83} Van Middelaar (2013), p. 46–47.
\textsuperscript{84} Dahlberg (1967), p. 315.
Article 3(2), which provided that “No [requirement of an] entry visa or comparable obligation may be imposed”.

Thus we see that with the passage of Regulation 38/64 and the associated legislative instruments, a number of equalities and rights had been established for migrant Community workers that, taken as a whole, could be seen to constitute something more than just an international agreement between the member states, but rather something approaching a true, vertically defined citizenship. Although there were still some restrictions on full equality and minor bureaucratic hoops (which were almost all to be repealed with the full realization of freedom of movement, marked by the entry into force of Regulation 1612/68 on 15 October 1968), all of the pieces were now in place. Migrant Community workers had rights as against host member states that did not depend on diplomatic interaction between their home states and the host states. Lewin notes in 1965, as to the use some Community workers had been observed actually making of their rights, that the number of Italians who migrated independently already outstrips the number that is attracted through official recruitment; and this despite the fact that the [1964] Regulation does not give anyone the right to enter another member State in order to seek work there, unless this right has already been acquired by previous regular employment in that member State. [Lewin’s emphasis]

This should not be surprising. For although there was still the formal requirement of only having the right to accept a job vacancy that had been advertised by a state employment agency, the truth was that migrant nationals of member states by now enjoyed a practical presumption of having a right to be in a host member state as workers. And in fact, by 1968 the Council had come to an agreement, “albeit,” as Evans writes, “in a non-binding form, that member states would admit persons seeking work for three months, provided that they did not become a charge on public funds.”

Moreover, the legislative development of the freedom of movement, and the rights and equalities it entailed, only went in one direction: forward, never back. Its bedrock had already been established, retroactively to the entry into force of the Treaty, by the “standstill” provisions that the 1961 Regulation had provided for. This not only tracked the direction of development into an “ever closer union” that the Treaty had proclaimed, but invested migrant Community workers with ever greater legal certainty, the knowledge that the rights they enjoyed could only increase, and would not arbitrarily be rolled back.

85 One of the most significant restrictions was that migrant workers could not immediately be elected to workers’ councils: they had to first establish a history of working for three years at the same enterprise in a member state (Article 9(2)). This matter had been equally contentious as the abolition of national priorities in the debates of the Consultative Council: the German representatives of both workers and employers feared, in particular, that restive Italian Communist unions would establish a foothold in workers’ councils and take over.


An additional piece of the puzzle constituting a citizenship was to be found in the fact that the set of persons enjoying these equalities and rights was closed: it was limited to the nationals of the member states to the exclusion of nationals of all other States. Thus there was something exclusive to the freedom of movement of workers that made it more than just another multilateral establishment treaty, and also gave its beneficiaries priority over beneficiaries of any other establishment treaty.

At least one bilateral treaty concluded by a member state with a third country reveals, as well, that that member state was already aware that this was a necessary consequence; in fact, that consequence might have been already discussed in the negotiations for the EEC Treaty. The Treaty of Friendship, Commerce and Navigation between the Kingdom of the Netherlands and the United States of America\(^8\) (known for short as the Dutch-American Friendship Treaty), by which the signatories granted each other most favored nation status and also granted each other's nationals and companies certain equalities and rights of establishment for purposes of commerce, was signed on 27 March 1956. On the very same day, there was an exchange of letters between the two foreign ministers of the Netherlands (owing to an unusual political configuration of the government at the time), J.W. Beyen and Joseph Luns, and the American ambassador to the Netherlands, H. Freeman Matthews.

In their letter to the ambassador,\(^9\) the ministers referred to the “extensive conversations” their representatives had had “concerning the most-favored-nation aspects of the Treaty in relation to forward-looking regional arrangements designed to bring closer cooperation, or integration, among European nations.” “The common view,” they went on, “[…] is that European regional arrangements […] are mutually advantageous.”

Accordingly, it is recognized in principle that the Netherlands should continue to be able to participate in European regional arrangements which serve these aims and the broad interests of both Parties, even though the Netherlands may thereunder be obliged to grant some reciprocal advantages to other participating countries which it is unable to grant to non-participating countries.

The American ambassador responded\(^9\) that the derogations to the Friendship Treaty implied by the Netherlands’ participation in the European integration project were acceptable to his government, and that this exchange of letters would be considered to be an integral part of the Friendship Treaty. This exchange reveals that the Netherlands knew that European integration would

\(^{8}\) Verdrag van vriendschap, handel en scheepvaart tussen het Koninkrijk der Nederlanden en de Verenigde Staten van Amerika, met bijbehorend Protocol en notawisseling, (1956)

\(^{9}\) ibid., p. 46-48

\(^{9}\) ibid., p. 50-53
mean that it would grant nationals and companies from other participating states a "more than most-favored-nation" status, indeed, a status approaching that of its own nationals.

**European citizenship via freedom of movement: racial criteria?**

We can explore one final, but not insignificant aspect of the exclusiveness of citizenship and freedom of movement from the negotiations for the 1964 Regulation. Germany and Italy were apparently not satisfied that the term “national” was clear enough to exclude persons falling under the (post-)colonial authority of France and the Netherlands. Indeed, I should note at first that there was no off-the-shelf concept of “nationality” that the legal systems of all of the member states had in common for the persons each member state considered to be its primary bearers of rights and privileges. Thus, the designation of the “nationals of the member states” as the beneficiaries of freedom of movement of workers itself would not immediately have been self-explanatory at the time.

To start with, we can briefly review and contrast the historical development of French nationality, on the one hand, and German nationality, on the other, in order to see how various member states’ definitions of nationality could diverge. The development of French nationality was primarily bound up with territorial concerns, i.e. the establishment of republican government on the territory of what had been the Kingdom of France. German nationality, on the other hand, ultimately coalesced around a largely ethnic conception that was suited toward the establishment of a German nation-state.

In France after the revolution, cultural or ethnic Frenchness, whatever that might have been, was still not formally a strong criterion for any *a priori* determination of the set of citizens. In fact, an opposite dynamic was more evident: it was the state that was ever more strongly determining the cultural content of Frenchness. In the *République une et indivisible*, a program to root out all of the myriad and ancient influences of the nobility and the clergy went hand-in-hand with a movement to standardize dialects and stamp out the use of minority languages like Breton, Basque, Flemish and German. This policy was justified not in terms of imposing control, but in terms of enlightening the population. In any case, however, in French discourse the word “nation” remained one whose primary association was with political organization. After 1830, the word “nationalité” came into use as an ethnocultural designation.

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91 See * supra* at n. 64 et seq.
93 In this, a parallel can be seen in language usage to this very day in the sister republic of France, the United States: in American political discourse, the term “nation” is used not so much as an ethnocultural designation, but as an equivalent to the term of international law “state”, although this may also have something with the necessity to avoid confusion with the (subnational) US states.
Elsewhere in Europe, the term “nationality”, as in the “principle of nationality”, was being used to connect ethnocultural communities with (their wish for) states; if necessary, redrawing state boundaries to make the two converge.94 The French project had been rather the opposite: ironing out ethnocultural differences (or at least rendering them subservient to a common language, history and ideology) to make them conform to the outer boundaries of the state. Yet the effect was the same, and by the end of the 19th century French law was using the word “nationalité” in the modern sense of the word in international law.95

Crucially, the development of French nationality had as much as, or even more to do with migration than any of the previous archetypes of citizenship in the French republic had. The 1889 law that first used the term “nationalité française” was promulgated in light of public debate about immigrants to France, in which the most common grievance was that foreigners did not have any military obligations. As such, by the new law children of immigrants born on French soil automatically became French nationals upon reaching the age of majority, with no possibility to renounce it in order to escape conscription. This expansion of citizenship was paired with an increase in surveillance over and documentary identification requirements for aliens in the twenty years to come.96

In the German legal tradition, on the other hand, the infusion of national identity into legal categories of state citizenship occurred precisely in the opposite direction. In France, the a priori existence of the republic was essential to the development of a French citizenship bound up with French national identity. The German nationalist tradition, on the other hand, was a movement that arose throughout an archipelago of states in the (fading) Holy Roman Empire, one that posited the a priori existence of a German nation as necessitating a single state. We already explored the formal concept of Indigenat as a form of horizontal citizenship unique to the (federal) German tradition97—but in this section we can very briefly review the vertical correspondent to “nationality” in the German tradition in the sense of a substantively ethnic citizenship.

In 1913, the German Empire adopted a law (Reichs- und Staatsangehörigkeitsgesetz [RuStAG])98 setting the criteria for the acquisition of citizenship in any of the federal states within it, or for unmediated imperial citizenship for certain persons who did not fall under a state. Again, without getting into the dynamics of federalism that were involved, this law meant the substantive “nationalization” of the previous law governing federal citizenship that had been in force up till then, which dealt purely with formal categories without

96 Torpey (2000), p. 106-108. And see, at least with regard to the rise of nationality as states gained interest in controlling the movements of ‘nationals’, ibid., p. 7 and p. 72-73.
97 Supra at n. 11 et seq.
98 <http://www.documentarchiv.de/ksr/1913/reichs-staatsangehoerigkeitsgesetz.html> (last visited on 25 May 2013)
reference to national identity. The new law described all citizens of states within the empire simply as “Germans”; however, the set of “Germans” was not merely the same as the union of all of the sets of state citizens, but was clearly meant to be a larger set, thus declaring the existence of a legal category of “Germans” outside the Empire, who were referred to (in Article 1) as possessing “immediate (or ‘unmediated’) Imperial citizenship” (unmittelbare Reichsangehörigkeit).

These, writes Brubaker, were the so-called Auslandsdeutsche who had been the subject of a “demand for … civic inclusion” in political discourse.99 These persons hereby gained a more or less unconditional right of return and right of political participation in the territory of the Reich. This “outer” dimension of the new law, thus, had everything to do with emigration.

The law also had an “inner” dimension in that it determined the conditions for acquisition of citizenship of the states. As a rule, citizenship was acquired by bloodline descent (jus sanguinis), i.e., from birth as the child of a German father or an unmarried German mother (Art. 4). There was no acquisition jure soli. These provisions had everything to do with a desire to restrict immigration and homogenize the nation to the exclusion of, in particular, Poles and Jews.100 Naturalization was provided for in Art. 8: a foreigner (i.e. ethnic non-German) could file a naturalization petition in a state, provided he was legally capable, honest, had a home in the state, and could provide for himself and his family.

Nationalist principles in German citizenship law, identified by words such as völkisch and Volkszugehörigkeit, became paramount after the rise to power of the Nazi dictatorship. In 1934, the component states of the Reich were abolished and with them their respective citizenships.101 For the first time, there was formally a unified German citizenship; and the Reichsbürgergesetz of 1935 positively established Reichsbürgerchaft, or Reich citizenship, as a status exclusive to those of “German or related blood” (Art. 2(1)). The formal, residual status of Staatsangehörigkeit remaining to Jews and others excluded from the Volk who had been naturalized during the Wilhelmine era was ultimately redefined by law in order to strip it of any substantial rights of protection.102

During the drafting of the Basic Law of the Federal Republic of Germany after the war, it was taken into consideration to re-establish citizenship of component states as the primary status, to the detriment of the status of “German”. However, the new Bundesländer largely lacked historical continuity with any of the old member states, not to mention congruent populations, since the war and its end had brought massive population shifts with it. But perhaps most decisively, since a German nationality had already been established as a unitary status, the re-federalization of Germany required that the established set

100 See generally, ibid., p. 119-137.
of all German nationals be taken as the starting point. The 1913 RuStAG remained in effect, largely unchanged.

Once more, ironically, considerations of protecting Germans who lived outside the state fold of the Federal Republic, be they in the German Democratic Republic, in formerly German territories, or farther afield (e.g., in the Soviet Union) as ethnic German settlers and their descendants, may have played a role. Thus the Basic Law of the Federal Republic never defined citizenship of the Federal Republic as such, but referred solely to “Germans” as an *a priori* status.

Let us then return to nationality of the member states and the role it played in the freedom of movement of workers in the Community. The German conception of nationality, which implied that the Federal Republic of Germany had millions of nationals outside of the territory where it actually exercised state control, rather clashed with the French and Dutch conceptions. In the post-colonial era of France and the Netherlands, these countries largely strove to create a unified, territorial citizenship for all those residing in both their European territories and the non-European territories remaining after decolonization. Both had previously had inferior legal statuses for their non-European colonial subjects (*sujet* under the *code de l’indigénat*, and *Nederlands onderdaan-niet-Nederlander* [lit. Dutch subject-non-national], respectively), excluding political rights and rights of settlement in the European metropoles, that might have been somewhat embarrassing for any post-war democracy, and which were gradually abolished in favor of granting actual citizenship to the residents of the remaining overseas territories.

Clearly, these issues of post-colonial belonging had already been a sensitive issue during the drafting of the EEC Treaty, as the Treaty provided for the position of “overseas countries and territories” (OCT) in its Article 227(3), implicitly excluding them from the direct applicability of the Treaty by placing them within the bounds of a “special system of association” established by Art. 131 through 136 (cf. Art. 198 through 204 TFEU). These OCT, as listed in the original Annex IV to the Treaty (cf. Annex II TFEU), at first consisted largely of the Dutch, French, Italian and Belgian territories that were not considered to be integral parts of the member states, were soon to become independent or be transferred and whose populations were not, as a rule, nationals of the respective controlling member state (Netherlands New Guinea, whose inhabitants were the

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103 Schönberger (2005), p. 119-120.
105 It must be said that the matter of what the state territory of the FRG actually was was still something of a touchy issue in the 1950s and ’60s, as the FRG was still claiming the right to represent “Germany”, including the territory controlled by the GDR, on the international stage.
last Nederlandse onderdanen-niet-Nederlanders,\textsuperscript{107} Belgian Congo, the trust territory of Italian Somaliland and the territories of sub-Saharan French Africa). The French territoires d'outre-mer such as Saint Pierre and Miquelon and New Caledonia were also on the list, yet they were the exceptions to this rule, as they were not bound for independence and their inhabitants were full-fledged French nationals.

The positions of the non-European countries and territories that were considered to be more integral parts of the member states and/or whose inhabitants were nationals of their respective member states, on the other hand, were a bit more varied. Paragraph 2 of Article 227 specifically addressed the position of Algeria and the French départements d'outre-mer, pointedly excluding those areas (by means of an exhaustive enumeration of the applicable Treaty provisions) from the applicability of the Treaty with regard to freedom of movement of persons. Any decision to apply the excluded Community provisions to those territories would have to be made unanimously by the Council.

The position of the Dutch Antilles and Suriname was somewhat different than that of the French départements d'outre-mer, whose citizens vote directly for and are represented in the French parliament. Under the 1954 Charter for the Kingdom of the Netherlands, essentially the constitution for the post-colonial order between the Netherlands and its associated non-European territories,\textsuperscript{108} the (European) Netherlands, the Dutch Antilles and Suriname were each autonomous "countries" (landen) with their own parliaments and governments under a common monarch. Thus while the Kingdom as a whole was a State on the international scene, the Dutch Antilles and Suriname had their own governments, separate from that of the Netherlands, and their territories were implicitly excluded from the applicability of the EEC Treaty, which had been signed, after all, by the foreign minister of the (European) Netherlands. At the same time, however, the citizens of all of these countries shared a common nationality (in Dutch, simply referred to as the status of Nederlander), and there were no restrictions on Dutch nationals from Suriname or the Antilles settling in or participating in the political process in the Netherlands.

It was clear, in both the cases of these more closely-associated territories or countries for France and the Netherlands, that the freedom of movement of workers would not have territorial applicability there: nationals of other member states did not enjoy freedom of movement to work there. But the subject of the personal applicability of the Treaty was still left open: to name a specifically contentious issue, would Algerians living in France be allowed to make use of the freedom of movement of workers? The Italian delegation, during the negotiations for the Treaty in 1954, had already foreseen that the Algerians would compete with Italians on the labor market, and had sought to have Algerians excluded from freedom of movement of workers. However, in light of their own unitary

\textsuperscript{107} Mannoury (1954), p. 72.

\textsuperscript{108} Statuut voor het Koninkrijk der Nederlanden, (1954b)
conception of French citizenship, and in an effort to appease the Algerians, who had just begun an armed struggle for independence, the French resisted the Italians' efforts.\footnote{Goedings (2005), p. 172-173.}

When it came time to negotiate the specifics of freedom of movement of workers, the issue of non-European citizens of member states came up once more. However, this ultimately only crystallized in the Directive\footnote{Council Directive of 16 August 1961} associated with the 1961 Regulation, of which Article 1 essentially reiterated what Article 227 of the Treaty had already provided as to restricting to the European territories of the member states the legal effect of freedom of movement of workers. Thus nationals of member states inhabiting the more closely-associated overseas countries and territories were excluded (somewhat obviously) while they were still inhabiting those areas; but there was no apparent exclusion of them from the freedom of movement of workers once they had moved to the metropolitan area of their respective member states.\footnote{Goedings (2005), p. 173-174.} It can be surmised that if Italy had been pushing for their exclusion at this stage, it had to settle for the time being for its victory of obtaining the restriction of freedom of movement to the nationals of the member states.

In the negotiations for the 1964 Regulation, however, Italy and the European Commission renewed their efforts to exclude non-European nationals of member states from entitlement to the freedom of movement. As we have seen before, any proposal to limit personal entitlement to freedom of movement generally went hand-in-hand with a proposal to introduce priority for Community workers in a host member state. The smaller the group of entitled persons, the more effectively they would be able to make use of their priority. Third-country nationals who benefited from bilateral establishment agreements were already excluded from cross-border competition with Community nationals; it seems that Italy may have viewed member state nationals from former colonies as yet another kind of bilaterally favored third-country nationals who unfairly competed with Community workers.

However, the fact of the matter was that non-European member state nationals were not at all third-country nationals, but simply nationals of member states. Although Germany and Belgium backed the Commission’s proposal, they each pointed to some uncomfortable truths in terms of consistency and practicality. Germany, possibly recalling an original notion that freedom of movement was meant to be more open to “workers” (and not solely to nationals), noted that the Commission still supported granting entitlement to freedom of movement of workers to officially registered refugees. How could granting certain
third-country nationals the right to free movement chime with denying certain nationals the right? In any case, as Goedings notes, this point was dropped as it became clear that support for granting refugees the right to free movement had evaporated across the board. 112 (However, it may also be the case that Germany, acting in its own interest, had primarily been thinking of ethnic German refugees from Eastern Europe; Germany’s enthusiasm for refugees as such may have declined as the other member states increasingly accepted [the Federal Republic of] Germany’s expansive definition of its base of nationals. This ethnic definition, by contrast to France’s and the Netherlands’ expansive territorial definitions, had not been perceived as a threat by Italy, since the “extraterritorial” German nationals were for the most part quite literally locked away in the GDR and other Eastern European states, unable to make any practical use of the freedom of movement of workers. 113)

Belgium pointed to the more uncomfortable truth regarding the practical enforcement of any distinction between European and non-European member state nationals. Non-European member state nationals usually had passports and identifying documents similar to, if not identical to, those held by European member state nationals. Even if these were in any way distinguishable, or if the place of issuance of a passport was to be used as a criterion, then for instance a Dutch citizen from Suriname whose passport was issued in Paramaribo could move to the European Netherlands and have a new passport issued in Amsterdam. The birthplace shown in a passport could possibly be used as a criterion; but how, then, could a consistent distinction be made between non-European member state nationals, who had acquired their nationality by birth, and member state nationals who had been born in a third country and had immigrated or been a refugee in a member state, then become a naturalized national of that member state? 114

The elephant in the room, of course, was that any discussion of non-European member state nationals was implicitly one about race or superficially perceptible characteristics: non-European member state nationals were predominantly Arab or non-white. Yet it would not do to deny rights of freedom of movement purely based on appearance; one would have to be able to make some sort of legal distinction. All the same, the Community could not force member states to make a distinction among their own nationals, as nationality is purely a matter of national law. Nevertheless, the Dutch and the French acquiesced to the inclusion of a provision in the 1964 Regulation, Article 53(3), that was understood to formally exclude non-European member state nationals:

This Regulation shall not affect the obligations of Member States arising out of special relations with certain non-European countries or territories, based on current or future institutional ties.

Workers from such countries or territories who, in accordance with this

112 ibid., p. 207–208.
113 ibid., p. 170.
114 ibid., p. 208–209.
For France’s part, now that it had signed the Evian Accords in 1962, recognizing Algeria’s independence, it had no need to curry favor with its Algerian former citizens, and indeed wished to discourage Algerian immigration to metropolitan France. The “countries or territories” in the aforementioned provision, on the surface of it, might be read as only applying to truly “third” countries (i.e. independent former colonies with a continuing special relationship) or otherwise less closely associated territories populated by non-nationals. And in fact, such a limited reading of this provision would perfectly suit the eventual accession of the United Kingdom,115 which had both types of relationships to fully independent countries (e.g., India) and territories (e.g., Basutoland) that were part of its (former) Empire. (We will go on to explore, in an excursion in Chapter 6 infra, British notions of nationality with regard to the former British Empire, and how they interfaced with the freedom of movement of workers in the Community.) But France had actively agreed with the Commission’s reading of this provision as going farther than that, applying to member state nationals from overseas countries and territories, as if they were third-country nationals.116

The position of the Netherlands on this provision was much more ambiguous. On the one hand, the Netherlands did not offer much resistance to this provision, probably because, as Goedings writes, it anticipated that Suriname and the Dutch Antilles would soon become independent, and because it did not wish to encourage immigration from these areas, which anyhow had been minimal until that point.117 Lewin, a senior official118 in the Dutch Ministry of Social Affairs and Public Health writing in 1965 (although on behalf only of himself), publicly toes the Commission’s line, asserting that

Citizens of Surinam (Dutch Guiana) and other Dutch overseas territories are […] entitled to unrestricted entry to Dutch territory in Europe and to take up employment there. But they have no similar rights in the other member States.119

Yet behind the scenes, it appears that the Dutch government simply assumed that the provision was effectively a dead letter with regard to non-European Dutch

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115 At least Dahlberg (1967), p. 333, notes the suitability of this provision to British accession, although he reads the provision rather more expansively.
117 ibid., p. 209.
118 That Lewin was a senior official, and thus possibly privy to the government’s opinion on the matter, or was even advising the government on the matter, was revealed in a 1966 report on housing for migrant workers that he helped to author, Commissie Buitenlandse Arbeiders (1966), p. 2.
nationals, since there was no practical way of distinguishing between non-European and European Dutch nationals on the basis of legal documents. The Dutch government was forced to reveal this hand when, during the negotiations for what would become Regulation 1612/68, the final piece in the establishment of freedom of movement of workers, the Commission proposed boosting priority for Community workers at the expense of citizens of the aforementioned overseas countries and territories. Existing migration benefits for citizens of overseas countries and territories to their respective European metropoles could continue to exist, but new benefits could not be introduced. If the expansive reading of the 1964 provision, which included citizens of overseas countries and territories who shared the nationality of the member state, were to prevail in this new Community legislation, then the new Community legislation would violate member states’ national sovereignty over their ability to regulate their own nationals’ rights of settlement and work in their own European territories, not just in other member states.

The Netherlands protested against the Commission’s plans. France, for its part, had already secured a special textual position for its overseas departments in Art. 227(2) of the Treaty; thus its overseas departments could not be read into the contentious provision of the 1964 Regulation. And in fact, France now aimed to strong-arm the other member states into unanimously deciding, in accordance with the Treaty, to apply freedom of movement of workers to its overseas departments, both personally, to the French citizens in those departments (to the extent that they did not already unofficially have it under the 1964 provision of questionable enforceability) and territorially. This would have meant that French citizens living in French Guiana had freedom of movement (and that, say, Dutch citizens from Europe had the freedom to move to French Guiana), while the Dutch citizens from neighboring Suriname had no freedom of movement, neither to French Guiana nor to metropolitan France or any of the European territories of member states other than the Netherlands.

Ultimately, the Dutch negotiated for and got a statement of intent from the Council that made clear that the Dutch overseas countries had more or less the same special status as the French overseas departments, including that their territories could be included in the freedom of movement of workers by a unanimous Council decision. (Interestingly, when the option of introducing freedom of movement of workers on the territories of Suriname and the Dutch Antilles was presented to the governments of those countries, they ultimately declined, fearing an influx of French citizens from the poorer départements d’outre-mer in the Caribbean and French Guiana.)

The final provision agreed on in Regulation 1612/68, Art. 42(3), sharpened the 1964 provision slightly, both limiting the introduction of migration benefits for citizens of non-European countries or territories to those with which member states had an institutional relationship at that moment, and freezing

current migration arrangements with all remaining countries and territories (additions to the 1964 provision in italics):

This Regulation shall not affect the obligations of Member States arising out of:
- special relations or future agreements with certain non-European countries or territories, based on institutional ties existing at the time of the entry into force of this Regulation; or
- agreements in existence at the time of the entry into force of this Regulation with certain non-European countries or territories, based on institutional ties between them.

Workers from such countries or territories who, in accordance with this provision, are pursuing activities as employed persons in the territory of one of those Member States may not invoke the benefit of the provisions of this Regulation in the territory of the other Member States.

Clearly, now, all of the persons referred to were to be excluded from being able to make use of the freedom of movement of workers in other member states. But more than these textual changes did, the history of the negotiations that went on meant that this provision could no longer be read expansively to affect member state nationals who happened to be from a non-European country or territory. After all, the Netherlands and France were the only member states of the Six to even have non-European territories, and those associated with the Netherlands had now been expressly determined to be something other than the countries or territories referred to by the provision.

Moreover, other member states supported the Dutch position in these negotiations, particularly Germany, which had its own base of nationals living outside the territory where freedom of movement applied. This fact might be seen as providing additional support for a reading that freedom of movement could only be limited by Community law in its territorial scope, i.e. as to the territories where it was effective, but not in its personal scope, for the member state nationals from territories where it was not effective. Despite the initial attempts of the Commission, nationality, as well as entitlement to all the rights that went with it, was to remain a sovereign and indivisible prerogative of the member states. To the extent that personal entitlement to freedom of movement of workers constituted a sort of European citizenship at this stage, that citizenship was to remain free of (indirect) racial criteria as established by Community law.

Nevertheless, up to the time of writing of this thesis, the contentious provision of the 1968 Regulation remains in force in its modern-day successor, Regulation 492/2011 (in Art. 36(3)), of which the text has been changed only to expressly use the date of entry into force of the 1968 Regulation, 8 November 1968, as the reference point for the existence of agreements or institutional relationships. The continued existence of this provision, indeed its active re-adoption in 2011, could be said to still serve a purpose: it could be seen as cementing the limited reading of this provision, making sure that migration agreements between member states

121 ibid., p. 288.
and their fully sovereign former territories or countries, or between member states and their territories populated by non-nationals, cannot endow the beneficiaries with the right of freedom of movement in other member states the European Union. For instance: Suriname became independent from the Kingdom of the Netherlands in 1975. If the Netherlands had concluded a migration agreement with Suriname to allow Surinamese nationals to subsequently have the same freedom of settlement in the Netherlands that they had enjoyed as Dutch nationals, then this provision certainly would have excluded those Surinamese nationals from enjoying freedom of movement in other member states.

Yet it is of dubious value for this provision to remain in force, even in this very limited reading. In 1964, when the original formulation of the provision went into force, it was not yet taken for granted that freedom of movement of workers would, for far beyond the foreseeable future, be limited to nationals of the member states; for all anyone knew, that restriction could very well be rolled back in favor of a true freedom of movement of the “workers” of the member states, and not just their nationals, at some point in the future. By the time of writing of this thesis, however, that restricted personal entitlement has been so firmly established in so many other legislative instruments of Union law, including by the establishment of Union citizenship, that there is no ambiguity about the freedom of movement of workers in the Treaty (now the Treaty on the Functioning of the European Union) being solely for member state nationals. There is no danger that certain third-country nationals, bilaterally favored by a member state that is a former colonial power, could try to legally sneak their way into the freedom of movement of workers in another member state. The norm upheld by Art. 36(3) of Regulation 492/2011 can thus be viewed as entirely superfluous; indeed, it is desirable to abolish it for being a blot on the history of freedom of movement in Europe, having largely been the result of an attempt to (indirectly) racially subcategorize and disadvantage certain member state nationals in Community law.

In Chapter 8, we will further explore the nexus between member state nationality and personal entitlement in Community or Union law and see how Community law would go on from this infamous moment to ever more strongly uphold the indivisibility of member state nationality. However, as we will see in Chapter 6, when we explore the accession of the United Kingdom, member states can be guilty of racially “filtering” access to their respective nationalities in the first place. In Chapter 8, we will also explore the ways in which member state nationals who belong to ethnic minorities, particularly those originating from or living in former colonies of member states, can still be made de facto second-class citizens in the applicability of Community or Union law.
Freedom of movement: forms of equality

Let us return, at last, to my four forms of equality that can be entailed in a duplex citizenship—uniform equality for all citizens in the federal territory, non-discrimination for migrating citizens relative to citizens of the host state, uniform equality for all citizens in cross-border situations, and portability of rights from a home state for all migrating citizens—and apply them to the freedom of movement of workers. Almost all of the equalities introduced by the 1964 Regulation can be analyzed as forms of non-discrimination. So within any given member state, equalities were established between migrant workers from other member states and nationals of the host member state. The specific benefits and disadvantages of this equality could vary from member state to member state (the one might have more generous training programs, the other might allow employers to terminate workers more easily); but in theory, there was uniform equality in certain substantive areas within the territory of each of the member states of the Community.

(I should note, however, that formal equality with host state nationals is not always an advantage when a member state’s own laws do not create an advantageous situation for its own nationals. In fact, a correlation could be drawn between the progressive institution of freedom of movement of workers in the Community and a decrease in actual intra-Community migration, which could point to a drop in demand for migrant Community nationals in host member states. This would be precisely due to the fact that Community nationals had become unattractive to employers in host member states because they had to be paid the same as and be given the same working conditions as host member state nationals.122 Third-country nationals, on the other hand, including those who had immigrated via bilateral agreements, might have somewhat undercut the Community labor market by being cheaper and more temporary—or at least, this was an accusation leveled by trade unions in the Community.123)

But there was at least one other piece that the 1961 Regulation had already put into place, and which the 1964 Regulation had expanded, that cannot be analyzed purely in terms of non-discrimination relative to nationals of a host member state, defined by reference to the legislation of a host member state. That was the right, provided for by Title II of Chapter 1 (Articles 17 through 21) of the Regulation (expanding on Articles 11 through 15 of the 1961 Regulation), of legal residence for family members of migrant Community workers taking up residence in the host member state.

Again, this was something that Italy had pressed for in the negotiation process: it had originally backed a Commission proposal that the 1961 Regulation, which provided for the spouse and the children under 21 of the worker to have legal residence and the same right to work as the worker, be expanded to cover all

dependent blood relations of the worker and her or his spouse. Italy’s proven tactic of raising the stakes to a politically unachievable goal in order to gain at least something in a compromise may have once more paid off here. The compromise was to expand the automatic right of residence to all dependent blood relatives of the worker and his or her spouse in the ascending or descending line: so not only dependent parents and grandparents of the worker, but the worker’s minor stepchildren, dependent (grand)parents-in-law, and adult (step)children who could be demonstrated to be dependent (Article 17(1)). Article 17(2) additionally provided that host member states would “facilitate” the admission of all other dependent family members, thus leaving host member states some discretion on that particular matter. In all cases, the right of residence of family members was conditional on the worker having housing for his family members that was considered to be normal for nationals of the host member state (Article 17(3)). Children were to have a right to schooling and to occupational training (Article 21).

Strikingly, these provisions applied to the family members named regardless of nationality, as Article 17(1) expressly provided. Thus we see that Community law hereby introduced a cross-border equality: it was one that equally applied without variation to all member state nationals migrating to engage in work. It did not apply to member state nationals who stayed in their home state, the so-called sedentary member state nationals. Of course, arguably, other forms of cross-border equality had also been introduced that sedentary member state nationals were not really missing out on: the right to enter a host member state with nothing more than an identity card and an offer of work (which sedentary member state nationals, by definition, did not need), and the right to substantive and procedural protections against expulsion (likewise; as it was a principle of international law, codified in inter alia Article 3 of the Fourth Protocol of the European Convention on Human Rights, that a state could not expel its own nationals).

None of these equalities can be defined formally in terms of non-discrimination or the creation of a de facto citizenship. The right to enter with an identity card or passport and the protections against expulsion, in fact, implied that Community law recognized and had a certain tolerance for a residual alien status on the part of migrating member state nationals: based on this status, a host member state still had at least a limited ability to discriminate against migrating

124 ibid., p. 322.
125 This particular provision had been introduced largely at the behest of the Netherlands, which was still experiencing an acute post-war housing shortage. The Netherlands secured an additional interpretive statement to this provision that denied the right to bring family members to any Community worker who had not already lived in the Netherlands for one year and had not already obtained a contract for a second year of work. ibid., p. 314. The Netherlands had revealed itself to be concerned with housing ever since the beginning of negotiations on freedom of movement of workers. Van Walum (2008), p. 120.
member state nationals by controlling their entry and expelling them. The introduction of these cross-border equalities was meant to at least reduce the consequences of that formal discrimination to the extent that they interfered with freedom of movement of workers.

As to the right of migrant workers to bring their family with them, on the other hand: in this case, migrant workers were getting an advantage that formally, sedentary member state nationals did not have, rather than merely getting an amelioration of the disabilities of alienage. Of course, for the majority of sedentary member state nationals at this time, whose family members were equally nationals of the same member state, this was an equality that they did not need: their ability to be with their family without danger of family members being expelled or denied entry was not automatically guaranteed as such (although it was protected against infringement to a certain extent by Article 8 of the European Convention on Human Rights, the right to family life, effective in all of the member states of the Community), but was more primarily effectuated by the legal coincidence of having the same nationality and all individually having the unconditional right of residence.

Viewed this way, in terms of results, this particular cross-border equality that migrating member state nationals enjoy aims to increase substantive equality with host member state nationals whose family members were also nationals of the host member state. It has a clear teleology: not just to reduce the formal barriers to freedom of movement, but to reduce the substantive barriers to freedom of movement, indeed to encourage it. This cross-border equality is a clear expression of a vertical norm that would apply equally to all migrating member state nationals.

Nevertheless, this planted a seed of potential formal and substantive inequality with regard to nationals of a host member state whose family members were not nationals of their member state, indeed of any member state, who thereby did not derive any rights of residence from Community law. We could compare this cross-border equality to the one that the Articles of Confederation had introduced for citizens of one US state who moved to another, who by virtue thereof were exempted from any state restrictions on the import and export of goods. It was arguably aimed at creating substantive equality with sedentary state citizens who had accumulated all of their movable property within that state,

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126 Cf. Grabitz (1970), p. 97-98, who notes that a full equality can only be created when the mobile worker is not at all subject to the national immigration law of the host state.

127 Grabitz (1970) breaks down the forms of equality granted to mobile workers in terms of the areas in which equality is granted, rather than the modality of equality granted: equal access to the labor market, equal treatment in engaging in employment, and equal access to social security (p. 71-73). He places the right to bring family members along under the category of equal treatment in engaging in employment, but does note that this right aims to reduce the factual barriers to engaging in employment in a host member state (p. 73). For another analysis of Community law that makes use of the difference between formal and substantive equality, see Tobler (2005), p. 25 and generally.

128 Cf. supra Ch. 2 at n. 40
unhindered by restrictions; indeed, this provision practically encouraged citizens of one state to move to another with all their possessions in tow. That provision was in effect for too short a time for us to know if citizens of the destination state whose livelihood depended on the import and export of goods then felt unfairly disadvantaged. But in the development of Community law and Union citizenship, such a problem will become apparent time and time again.

In this chapter, we explored how the freedom of movement of workers developed in the political interplay between the “Europe of States” (in which Italy played a key role at the table) and the “Europe of Offices” (in which the European Commission acted), to again make use of Van Middelaar’s distinction. In the next chapter, we will see how these political provisions became fleshed out into the “Europe of Citizens” by virtue of their further legal development.

129 Supra at n. 44
Chapter 6: The *de facto* Community citizen emerges

The European Court of Justice confirms “an incipient form of citizenship”

We have seen now that by 1964, the legislative pieces were in place for citizens of member states, who had moved to another member state to work, to be able to make use of the equalities that had been promised to them by the Treaty (the so-called “primary legislation” of the Community, made by the states in unanimity) and by the so-called secondary legislation made on the basis of the Treaty, the directives and regulations adopted by the Council unanimously, on the initiative of the Commission. But how were these new legal norms to be interpreted in the case of a conflict? In particular, what would happen if a citizen of a member state who was working in another member state were to be denied the rights and equalities that Community law guaranteed her?

Picard does not offer any solution for this in his proposal for *intercitoyenneté*, or intercitizenship based purely on a horizontal norm of international law, by which all signatory states would treat each other’s citizens exactly as they treat their own. Nowhere does he anticipate such a problem. After all, his theoretical scheme assumes that the artificial constraints of immigration law would have been completely repealed to start with, and as to other areas, states would simply get used to applying their laws on a completely territorial basis, without regard to nationality. The only problems of legal reasoning that he anticipates are ones of private international law, i.e. conflicts of law related to purely private statuses (such as marriage) and obligations that attach to persons based on nationality.1 Otherwise, the only important determination to be made is when an *intercitoyen* has decided to take up long-term residence in a host state, and therefore is to enjoy complete equality there, and is not merely sojourning there temporarily.2

Picard expects that a coordination of legal systems, or even the adoption of a truly international system of law covering all kinds of matters, would follow, but only after *intercitoyenneté* had first been introduced,3 thus allowing the citizens of the signatory states to intermingle and come to share common values.4 He does, however, note that a prerequisite to the introduction of intercitizenship would have to be that the signatory states to start with share the same “moral culture” and the same general principles of public and private law, which is why he first and foremost envisages its institution in Europe.5

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1 Picard (1948), p. 45.
2 ibid., p. 37.
3 ibid., p. 89.
4 ibid., p. 99.
5 ibid., p. 36.
In any case, we can conclude that in a purely horizontal system of federal citizenship (at least in its most ideal form), states would simply be trusted to safeguard equality for migrant citizens as part of the obligation of international law that they had taken on. In any case, a migrant citizen would probably have recourse only to the courts of the host state.

At the other extreme, we can note the purely vertical solution to resolving conflicts surrounding the equalities derived from federal citizenship that the United States has. In this system, where all federal citizens are bound by a common nationality of a single overarching State that has its own court system, a migrant citizen (and since the development to completion of the case law based on the 14th Amendment, a sedentary citizen) can seek recourse in federal court against alleged violations of civil equality on the part of a state. This fully autonomous court system is there precisely to enforce those norms of equality that are vertically determined. (For that matter, the equality enforced by the federal court system goes both ways: a citizen can be prosecuted in federal court for violations of federal criminal law, and extradition for prosecution in a state from which the citizen is a fugitive can also be enforced by federal court—perhaps somewhat incredibly, federal enforcement of the Extradition Clause was only introduced as a fully vertical equality with the 1987 Supreme Court decision Puerto Rico v. Branstad. Long before the 14th Amendment, even before United States citizenship had become strongly vertical in form, it was expected that the federal court system would play a vital role in enforcing the equality inherent in citizenship, as Hamilton had written in Federalist 80.6

For the sake of comparison, and to give a fair chance to Picard’s horizontal model, it is worthwhile noting that there is a really existing legal system of equality that is based on a more “horizontal” norm of international law. Coincidentally, it also covers all of the nationals of the member states of the Community, but as Bastid noted, it does not cover them so much as citizens as it covers them as human beings resident on the territory of their states: the European Convention on Human Rights.7 We can look at the way the European Court of Human Rights applies these equalities concerning certain fundamental rights, which are theoretically territorially uniform over all of the member states of the Council of Europe, in order to find out how the equalities entailed in a more purely horizontal intercitoyenneté might have been enforced, in practice. This will help us to demonstrate in which ways “Community citizenship”, to the extent we can already speak of it, has a considerable “vertical” component, and cannot solely be analyzed as an intercitoyenneté, an Indigenat, or an isopoliteia.

On one level, the Court offers a very traditional forum, as an international tribunal set up to interpret a treaty, for states parties to resolve their

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6 Cf. supra Ch. 3 at n. 39.
7 Cf. supra in Ch. 5 at n. 18.
conflicts with each other about the provisions of the Convention (based on Art. 33). However, the Court is also able to hear allegations of infringements of the Convention brought by individuals against states parties (Art. 34). An individual must first attempt to obtain a legal remedy to the infringement from the national courts of the state; only once these remedies are exhausted will the Court hear a complaint, if filed within six months after the final decision was taken by a national court (Art. 35(1)).

However, when the Court applies the substantive provisions of the Convention to the complaint, it becomes clear that these were drafted and agreed upon unani mously by states that were not eager to surrender too much of their sovereignty. One equality—Article 3, the equal prohibition of torture and inhuman or degrading treatment or punishment—is phrased in absolute, inflexible terms. But most of them, including, notably, Article 8, the right to privacy and family life, include a provision allowing for the familiar causes for derogation (paragraph 2):

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Thus even if the Court determines that there was an infringement, the Court will always take the interests of the state, as expressed by its democratic legislative process, into account in determining if an infringement was justified.

As a corollary to this, the Court will also interpret the Convention’s flexible equalities differently in different states, taking political and moral sensibilities in a given state into account. This doctrine, that there is a so-called varying “margin of appreciation” of what constitutes an infringement in different states, would first be articulated in the judgment *Handyside v. United Kingdom* in 1976. In this case, a British publisher was prosecuted for publishing a book, with content that the British authorities found to be obscene, that had already been legally published in at least ten other European countries. The Court upheld the prosecution of Handyside, citing the specific moral standards of the United Kingdom relative to other member states of the Council of Europe.

We can imagine, then, that a more truly horizontal form of federal citizenship, if it were to be instituted in Europe, would, given conflicts between citizens and states, involve some amount of deference to states’ individual interests. In this regard, a freedom of movement and residence, along with other equalities based on this kind of citizenship might resemble one interpretation that had been given of the Privileges and Immunities Clause in the pre-14th Amendment United

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8  ECHR *Handyside v. United Kingdom* (7 December 1976)
States: that states could “regulate” these core privileges and immunities differently, as long as they did not abridge them. Like the flexible equalities in the Convention, these equalities could be qualified as uniform over the entire federal territory, but with shades of variation among the states. (But as we saw, of course: states showed an extremely wide band of variation when it came to the “regulation” of the privileges and immunities accorded to black Americans.)

What legal remedies were to be at the disposal of citizens of member states of the Community, then? Would the courts of law involved be acting purely “vertically”, imposing invariant norms of equality, like the United States federal judiciary? Would they act “vertically”, but then with respect for the “horizontal” interests of the states that signed the treaty, as the European Court of Human Rights does? Or would all judicial intervention be purely “horizontal”, where a citizen could only seek relief from the national courts of a member state, which would have to be trusted to enforce the Community norms (possibly with their own variations); or otherwise, if there were to be a supranational court, where only member states could confront each other as peers?

The member states certainly would have preferred to have the last type of judiciary in place. They probably thought, as well, that that was what they had unanimously agreed upon. The Treaty provided for a Court of Justice to “ensure observance of law and justice in the interpretation and application of [the] Treaty” (Art. 164 [cf. Art. 19(1) TEU]). Most of the rest of Section 4 of the Treaty dealt with the Court’s jurisdiction to resolve conflicts between member states, or conflicts between the Commission and member states, or between the institutions.

There were only two express provisions that provided for a citizen to have access to this rarefied forum. The first was Article 173 [cf. Art. 263 TFEU], which allowed “[a]ny natural or legal person” to appeal against a Community decision directed at him or her or directly or specifically concerning him or her (it is important to note that a “decision” is a specific type of legal instrument in Community law, directed toward a specific individual or member state, for instance a decision to close a specific mine, by contrast to an instrument of general legislation like a regulation or a directive). Furthermore, Article 175 [Art. 265 TFEU] provided that any natural or legal person could file a complaint if one of the institutions of the Community had “failed to address to him” an act that it was obliged to make. Clearly, the signatories of the Treaty had assumed that the only protection their citizens needed in the Community was from marauding or indolent Community institutions, especially the civil servants of the Commission.

According to Article 177 [Art. 267 TFEU], the Court was also to have jurisdiction over questions raised to it by a court or tribunal of one of the member states concerning the interpretation of Community law. This provision contained an obligation, in fact, for courts or tribunals of member states to refer such questions when they were the last instance and their judgment depended on the

\[\text{Cf. supra in Ch. 3 at n. 53.}\]
Court's answer. The Court's answer was therefore a "preliminary decision". In this provision, as well, we might recognize an intention on the part of the states to dilute the Court's power by allowing it to rule only indirectly, leaving the last word to national courts.

The “Big Bang” of the Community legal order: Van Gend & Loos and Costa v. ENEL

But, as it turned out, it was to be this unassuming provision of the Treaty that would provide the citizen with a point of access to the legal order of the Community. The conflict that set this off, as it happened, was not one involving a natural person but a legal person: the Dutch transport firm Van Gend & Loos. In 1960, it was transporting several tons of resin from Germany to the Netherlands which it duly declared at the border, and it was confronted with an increased import duty imposed by the Dutch authorities. The firm filed appeal against the increased duty, first in the form of an administrative appeal at the Dutch inland revenue agency, then, when the objection was declared inadmissible, to a Dutch tax court (the Tariefcommissie). The firm claimed that the increase in duty was a violation of Article 12 of the EEC Treaty [cf. Art. 30 TFEU], which provided:

Member States shall refrain from introducing, as between themselves, any new customs duties on importation or exportation or charges with equivalent effect and from increasing such duties or charges as they apply in their commercial relations with each other.

While the Dutch revenue agency had some arguments as to why the duty rate had not actually been raised for the substance in question, the tax court decided that the matter was one of interpretation of the Treaty. It asked the Court of Justice a preliminary question in two parts, of which the first was the far more interesting one:

[w]hether Article 12 of the EEC Treaty has direct application within the territory of a Member State, in other words, whether nationals of such a State can, on the basis of the Article in question, lay claim to individual rights which the courts must protect[.]

The answer of the Netherlands, and the two other member states who intervened in the case as it was heard before the Court, Belgium and Germany, was unsurprising: a resounding no. They claimed the point of view that the Court of Justice was nothing more than an international tribunal set up to arbitrate claims among the member states and the institutions, the Titans of the Community. The

civil servants of the Commission, on the other hand, took the opposite point of view: that individuals should be allowed to seek protection against violations of the principles of the common market. Finally, the Advocate General of the Court, of which two were appointed on the basis of Art. 166 [cf. Art. 253 TFEU] of the Treaty to present, "with complete impartiality and independence, reasoned conclusions on cases submitted to the Court", the German Karl Roemer, took the side of the states.

But the Court, in its decision of 5 February 1963, first waved aside the objections of the member states that it did not have procedural jurisdiction, and then went on as to the substance, diverging from the opinion of the Advocate-General [emphasis added]:

To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.

The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. […]

In addition the task assigned to the Court of Justice under Article 177 [Art. 267 TFEU], the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals.

The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.

Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.11

*Van Gend & Loos* is frequently referred to, in an explicit comparison with the US constitutional order, as the *Marbury v. Madison*12 moment in Community law: the moment when the judges declared themselves to have the authority to interpret

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11 ECJ *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, (5 February 1963), from section II.B
12 Cf. supra Ch. 2, at n. 119
the founding text based not so much on the text itself, as on the spirit of it. Van Middelaar describes this tactic as a masterful “bluff” on the part of the Court: “who can know the spirit of a pact? And who can decide that the judges, rather than the founders, are qualified to speak on behalf of that spirit?” The Court’s pronouncement that a “new legal order” had been constituted is described by some as “revolutionary” or a “coup”. Indeed, the Court had made law here; without this decision by the Court, the Community almost certainly would not have developed as it did. But the Court wisely identified the moment of creation of that new order retrospectively, as being the moment that the Treaty entered into force. In so doing, the Court was merely making use of a judicial tactic as old as Sir Edward Coke: rather than making new law with a constitutive pronouncement, it was claiming merely to be handing down a declaratory pronouncement on what the law already was. In practice, of course, the moment that the “new legal order” could really be said to have become settled law was when it became clear that the states accepted the Court’s decision and were not going to boycott it, as at least one had originally threatened as a possibility.

What is the relevance of this decision for citizens? With this decision, the Court makes a pronouncement about the Community as a legal order that should sound familiar: “this Treaty is more than an agreement which merely creates mutual obligations between the contracting states”. In other words, this Treaty is not just another multilateral agreement: it creates something bigger that hovers above the horizontal relationships among the states, in this case a legal order. We made this distinction before, but on the smaller scale of the citizen: that a true citizenship cannot be founded merely by instituting a multilateral establishment treaty. Does, then, this constitutional order have citizens of its own, not merely of the member states? The Court refers to the citizens of the member states, but it also notes that the citizens of the member states have become subjects of the new legal order, since the Treaty was addressed not only to states but to peoples. The

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15 Cf. supra Ch. 1, at n. 63
16 Some might find it to be curious that a court populated—at least at this point—exclusively by members from Continental European countries would make use of a tactic more frequently associated with English common law, which is often called “judge-made law” in contrast to the Continental legal tradition of hewing to the text of statutory law. A quote by Montesquieu is often cited as a motto of the latter tradition: that judges ought to be “la bouche de la loi”, i.e., that their role is to stay within the texts of the law as positively enacted by the legislator. An investigation by K.M. Schönfeld, however, uncovers the true meaning of this phrase as Montesquieu meant it, as well as its surprising roots in Calvin’s Case (cf. Coke’s assertion that “judex est lex loquens”, supra in Ch. 1 at n. 13) and even farther back in the British legal tradition. Schönfeld (2008), generally. The only point I am making here is that the dividing line between the common law and civil law traditions is much more porous than is usually supposed.
17 Van Middelaar (2013), p. 51; as to the threat to boycott the decision: Van Middelaar (2009), p. 82.
Court stops short of saying that there is such a thing as “Community citizens”, yet at the same time it implies that each one of the citizens of the member states has an equal right to invoke Community law before a national court, which was then bound to apply directly effective provisions of Community law. The Court goes on to assert that “[t]he vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 [Art. 258 TFEU] and 170 [Art. 259 TFEU] to the diligence of the Commission and of the Member States.”

The Court hereby complements the existence of (to use Van Middelaar’s terms) “Europe of Offices” and “Europe of States” with the “Europe of Citizens”. Although to a certain extent, it was clear that the interests of the “Europe of Offices” could be directly served by the citizens: Van Middelaar quotes the French judge from the Van Gend & Loos Court as later saying, in fact, “When a private individual turns to a judge for recognition of a right that he derives from the treaty, he is not merely acting out of self-interest but becomes thereby a kind of assistant to the Community.”

Van Gend & Loos is usually named in one breath with another decision of the Court, Costa v. ENEL, which completes this general constitutional sweep of the Court. In this decision, the Court not only restated that “the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply,” but went on to say that

[t]he integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity

; and finally, for good measure, “[t]he precedence of Community law is confirmed by Article 189 [Art. 288 TFEU], whereby a regulation ‘shall be binding’ and ‘directly applicable in all Member States’.” The Court hereby established not only that clearly formulated provisions of Community law had direct effect, but that they also had precedence over national law. (This had already been accepted doctrine in some member states, such as the Netherlands, which has a “monistic” or open approach to international law: Art. 93 of the Constitution of the Netherlands provides that provisions of treaties and decisions of international organizations that are binding for all persons are immediately binding and Art. 94 provides that national laws, including Acts of Parliament, are void if they conflict with such provisions of international law. But this was far from accepted doctrine in the "dualistic" member states that only accepted the validity of provisions of

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19 ECJ Costa v. ENEL (15 June 1964)
20 ibid., Grounds of Judgment, section “On the application of Article 177”, subsection “On the submission that the court was obliged to apply the national law”
international law to the extent that the national legislature or national government had expressly implemented them.)

The first Community citizen: Unger

But in between those two momentous stages of development of the Community constitutional order as a whole, mere months after Van Gend & Loos in fact, another decision was handed down by the Court, one directly concerning a citizen, i.e. a natural person, and her rights to freedom of movement as a Community national. It dealt with a German national living in the Netherlands who also happened to be married to a Dutchman; in fact, in the curious style of the day, her name was cited in full in the title of the decision as “Mrs. M. K. H. Unger, the wife of R. Hoekstra”, and for years the court’s decision was accordingly cited as “Hoekstra (née Unger)”. 21 (There is something of an irony in the fact that in accordance with the mores and legal standards of the age, Unger was identified with her husband’s full name, even though he had nothing to do with this case. As will soon be revealed, Unger had rights as a migrant member state national that her husband, presumably a sedentary member state national, did not.)

Unger had been working for a Dutch employer who was required by Dutch law to provide her with health and disability insurance. Unger took a leave of absence from her work to have a baby, and opted to enroll in a voluntary health insurance policy provided by a semi-governmental industrial insurance board; Dutch law provided that such a policy had to be made available to the formerly employed who were intending to resume employment at some later time.

While Unger was on leave, she was visiting her parents in West Germany and fell ill; she sought medical treatment there. Upon her return to the Netherlands, she asked her insurer to reimburse the medical expenses she incurred in Germany. Her insurer refused, citing its own policy regulations that those covered by a voluntary policy would not enjoy sickness benefits as long as they were abroad, unless they had previously asked for permission to stay abroad for purposes of convalescence.

We should pause here to note that from the perspective of non-discrimination, i.e. equal treatment with the nationals of a host member state,

21 ECJ Unger v. Bestuur der Bedrijfswerening voor Detailhandel en Ambachten (19 March 1964)
22 In fact, at the point in time the facts giving rise to this case took place, it had been barely five years since a change in the Dutch civil code had entered into force (on 1 January 1957) for the first time granting married women legal capacity to independently enter into contracts and dispose over property; however, at the same time, an existing law defining the husband as the “head of the marital union”, which meant that he alone could decide on matters of disposal over common property and the like, was left intact and would not be repealed until 1 January 1970. In fact, the last remnants of legal inequality in marriage between men and women in Dutch law would not be repealed until 1 January 1985. See Van Mourik (2010), generally, and Van Mourik (1998), p. 15-16; also Van Walsum (2008), p. 30-32.
there is absolutely nothing wrong with the way the insurer behaved in this case. The insurer was ostensibly applying exactly the same rules that it would have applied to Dutch nationals in the same situation. But Unger was going to claim the applicability of a cross-border equality that Community law granted her as a migrant worker with the nationality of a member state.

In the court case that followed, Unger appealed to Regulation no. 323 of 1958, providing for social insurance rights for migrating workers. Article 19(1) of the Regulation provided that a “worker or person made equivalent to an worker”24 had a right to coverage of expenses related to medical emergencies when staying temporarily in another member state. Unger’s insurer claimed, in the case before the highest Dutch social security court, that the term “workers or those made equivalent to workers” did not apply to Unger. The insurer argued that the Dutch statute mandating the insurance did not at all formally define persons in Unger’s situation as being equivalent to workers, but merely made a special arrangement for them.

Strikingly, the Dutch government did not present arguments to the Court; the only member state that did was Germany, which intervened. Even more interestingly, Germany was effectively choosing the side of its own citizen in the case, rather than representing the type of state interests that the Netherlands might have in wanting to prevent migrating member state nationals from getting extra social benefits that would cost a host member state money. Germany argued that to determine what a “worker or those made equivalent to workers” was, one would have to at least partially refer to national law, in particular with regard to the term “those made equivalent to workers”, for which the Regulation offered no definition. The national laws of many member states, including Germany, knew no such term either. Germany argued on the basis of the general applicability provision of the Regulation, Article 4(1), that the obvious point of this provision of the regulation was simply to cover anyone who had ever been covered by any kind of work-related social security benefit in a member state: this provision said that the regulation applied to “workers or those made equivalent to workers to whom the statutory regulations of one more Member States applied or had applied”.

The Commission, in its arguments, straddled the fence between the interests of the citizen and what the state interests of a host state like the Netherlands could be supposed to be. In taking such a moderate standpoint, the “civil servants” could not possibly have been responding to the storm of controversy that would be unleashed by Van Gend & Loos, since it presented its

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23 Verordening No. 3 inzake de sociale zekerheid van migrerende werknemers [Regulation No. 3], (Council of the European Economic Community 1958)

24 The official English translation of Unger renders this as “wage-earners or assimilated workers”, but I choose to use my own, clearer translation of the Dutch text of the Regulation. After all, there was never an authoritative English translation of the Regulation, as the accession of the United Kingdom was still some time away. For my analysis, furthermore, I am relying primarily on the Dutch text of the decision.
The Court first, and correctly framed the question put before it as one of whether the contentious term was one to be defined by reference to national law or if it had a supranational meaning; in other words, whether it presented a horizontal or a vertical norm. The Court went on to make its central, and groundbreaking pronouncement: that the definition of a "worker or those treated as equivalent to workers" was a matter of Community law and could not be defined in terms of national law. After all, if member states were free to define the term "workers" themselves, the Court reasoned, they could creatively avoid having to grant rights to workers from other member states, and the goals of Articles 48 and 51 [Art. 45 and 48 TFEU] could be frustrated. Considering that the Treaty expressly covered not just workers, but those who "live … in the territory of a Member State after having been employed there" (Article 48(3) EEC Treaty [Art. 45(3)(d) TFEU]), and considering Art. 4(1) of the Regulation, the Court determined that in any case, if a person had been insured under a work-related scheme, and subsequently remained insured in the expectation that she would return to work, then she certainly ought to be regarded as a "worker or someone made equivalent to a worker". The Court hereby declared the terms of access to Community law on freedom of movement of workers to be a vertical norm, even as it tacitly toed the Commission’s cautious "horizontal" line as well: the Community had no business dictating to member states that they had to provide an insurance benefit for persons who were on leave from working. But if a member state did provide this benefit, and if eligibility for it was somehow related to the beneficiary’s work history or work future, then (as a kind of non-discrimination) there was no room to deny the applicability of Community law to the worker from another member state. Notably, this was an entirely pragmatic criterion, having everything to do with the effective situation surrounding the insurance benefit in question and nothing to do with how the benefit was formally defined.
It is hard not to recognize the emancipatory implications of the Court’s decision. Through a vertically-determined norm of Community law (the Regulation), Unger had escaped the dictates of a member state authority that not only tried to qualify her as someone less deserving of protection than a “real” employee, but also tried to impose a notion of how a person on leave from employment ought to behave (i.e., asking for permission before going on a short trip abroad). Unger had now gained something that a sedentary Dutch citizen in a comparable situation did not have: a practical ability to travel to another member state for short trips and not have to worry about the expenses of emergency medical care. 

It is notable, furthermore, that Unger (or her lawyer, at least, and in the summary of Unger’s arguments provided by the court) had described her medical emergency in Germany in convoluted terms relating it to the economic necessity of freedom of movement of workers: “she was visiting her parents in Münster on 25 February 1962 where she fell ill and became disabled for performing any suitable work.”26 The Court, on the other hand, did not see the need to provide a specifically economic analysis of Unger’s situation, pointing instead to the general goal of the “establishment of as complete a freedom of movement for workers as possible, which thus forms part of the ‘foundations’ of the Community.”27 Indeed, the Court had just noted that the concept of “worker” also covered those who continued to live in a host member state after having been a worker there, which meant that that concept was not solely about those currently engaged in economic activity.

Moreover, the Court did not see any requirement to delve into the specific teleology of the cross-border equality introduced by Article 19(1) of the Regulation, i.e. why it was essential to the freedom of movement of workers for migrant member state nationals to have their health insurance from the host state be valid for emergency care during a temporary stay in another member state. However, the case of Unger herself reveals precisely why the Council would have seen fit for her to get this equality that sedentary Dutch nationals did not get: because for most Dutch nationals, routine travel, such as to visit family, would presumably not require them to leave the Netherlands. Thus this extra benefit that a worker like Unger obtained increased the substantive equality between her and most sedentary Dutch nationals.

25 The highest Dutch social security court went on to quash the decision of the lower court and the insurance board on 7 July 1964 (Centrale Raad van Beroep case no. ZW 1962/121, in Administratieve en rechterlijke beslissingen 1966, p. 380-383), ordering the insurance board to make a new decision on Unger’s application for benefits while taking the decision of the Court of Justice into consideration, so it is to be presumed that the insurer did ultimately grant Unger her benefits.

26 ECJ Unger (19 March 1964), p. 377 of the Dutch publication. Again, this is my translation from the Dutch version of the decision, which in my view more accurately captures the implication than the English version.

27 ibid., p. 184 of the English publication.
But to take a step back from the details of the case, and from the complex interrelationship of types of equalities and Community and state legal norms involved in this decision: the central pronouncement of the Court was every bit as groundbreaking as Van Gend & Loos, but then for the individual citizen. The Court was declaring, in Plender’s words, that there was a “common European definition of a class of persons akin to citizens”. Indeed, this is what led Plender to cautiously confirm the 1968 pronouncement by the then-Vice President of the European Commission that the freedom of movement of workers had heralded “an incipient form… of European citizenship”. \(^{28}\) The establishment of such a common definition was the first of the three essential features of citizenship that Plender identified: the other two being consequential rights (i.e., the cross-border equalities that we have identified in Community legislation) and abolition of discrimination (i.e., the formal equalities with host member state citizens).

The question of definition is not an unimportant one to citizenship, and we have already repeatedly touched on the importance of at the very outset, defining precisely who the primary set of persons is that have access to protection by Community law, to the exclusion of others. With Unger, the Court has made sure that there is also an unambiguous definition of the secondary condition for protection by Community law. To compare this matter to the history of citizenship in the United States: the central flaw in United States citizenship prior to the 14\(^{th}\) Amendment, as definitively pronounced by the Supreme Court in Dred Scott, was that some states refused to recognize other states’ citizens as United States citizens, or at least they used whiteness as a secondary condition for enjoying the rights of citizenship, even if the primary condition of citizenship of one of the US states had been satisfied. The European Court of Justice appears to have anticipated precisely such a problem and headed it off in Unger, at least with regard to the imposition of the secondary condition of being a “worker” subsequent to the satisfaction of the primary condition of being a national of a member state:

- If the definition of this term were a matter within the competence of national law, it would therefore be possible for each Member State to modify the meaning of the concept of “migrant worker” and to eliminate at will the protection afforded by the Treaty to certain categories of person.

I will not go into too much detail on the further legislative developments that fleshed out the content of cross-border equalities and equal treatment enjoyed by mobile Community workers. The final legislative stage in instituting freedom of movement of workers was Regulation 1612/68, which lifted virtually all remaining limitations on equal treatment that the 1964 Regulation had left in place for the wavering member states and dropped the formal requirement of a job opening having to be placed at a state employment agency. Thus the freedom of

movement of workers that had already been heralded by the Treaty was finally unfurled.

Indeed, the Court underlined the point of view that the freedom of movement was no longer dependent on the Council legislating it (at least, as to freedom of establishment, which can be considered to ideally work more or less analogously to freedom of movement of workers) in its 1974 decision *Reyners v. Belgium*, in which it ruled that "[s]ince the end of the transitional period Article 52 of the Treaty is a directly applicable provision," regardless of whether the secondary legislator had taken all the necessary steps to implement it [it must be noted, in referring to today's corresponding provisions, that the text of Art. 49 TFEU now provides for the direct applicability of the freedom of establishment, as does Art. 45 TFEU for the freedom of movement of workers]. Thus freedom of movement was no longer a programmatic commitment that the states could unanimously decide not to implement or decide to backtrack on, but a directly effective part of the Treaty and already "part of the legal heritage" of the citizens of the member states, to quote the Court in *Van Gend & Loos*.

It is, however, time to come to grips with the central question: to what extent can we already speak of a common *Community citizenship* for the citizens of the member states? If we use Plender's criteria, we can only say that there is a common citizenship in terms of pragmatic features (at least as to the cross-border equalities and equal treatment; the common definition of the class of persons entitled to those equalities is, of course, a fairly essential formal criterion). In other words, we are speaking of a *de facto* citizenship: we are saying that because it looks like citizenship, it walks like citizenship, and it quacks like citizenship, it can be described as citizenship, even if it does not bear that label.

Some thinkers cannot accept that one can ever speak of citizenship without there being a bond to a state or nation. Thus there can never be a "real" citizenship of the European Community or Union in the forms in which they have existed so far. Schönberger opens his study with the considerations of Raymond Aron in 1974, who when asked if there could be such a thing as a multinational citizenship, responded resolutely in the negative: for him, citizenship was bound up with the nation-state and with obligations, military service in particular. The German law professor Hans-Peter Ipsen, for his part, disparagingly referred to the rights entailed in freedom of movement as little more than "market citizenship", which according to his formal-dogmatic approach to

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30 Admittedly, however, the meaning of any general statement to this effect is highly determined by the language used. German, for one, lacks a general term for "citizenship" in a legal sense; its word for "nationality" of a state, *Staatsangehörigkeit*, is inextricably bound up with the state (*Staat*). That is why, in his analysis, Schönberger (2005) has to first define an entirely new concept, *Bundesangehörigkeit*, in order to be able to conduct a comparative analysis of federal citizenships in both state and non-state federal polities. P. 12. See also *supra* in Introduction at n. 9.
citizenship was far from resembling the “real” citizenship characterized by the relationship between an individual and a national state.\(^{31}\) Obviously, just as Schönberger concludes,\(^{32}\) we cannot enter into a productive dialogue with this point of view, as we would lose any ability to compare whatever there is in the European Community to existing state forms of federal citizenship like that of the United States.

We do have a fruitful basis for comparison, however, if we can conflate the supposed necessity to citizenship of a tie to a nation or state with a supposed necessity to have allegiance to a sovereign power at the core of citizenship. That is a proposition we can debate. We did, of course, already use allegiance as our basis for identifying an incipient form of United States citizenship at the dawn of the American Revolution. That does not, however, mean that allegiance itself is essential to citizenship. In fact, the establishment of an allegiance to the United Colonies, (then united States, then United States) was really more useful to us as a defining attribute for who was “in” and who was “out”. As we saw, American citizenship, in terms of equality grew like moss on the tree trunk of allegiance, and to a certain extent—at least initially—that very equality might have even been a function of a common allegiance on the part of the citizens.

But if we fast-forward to the present, allegiance is far from a prominent aspect of United States citizenship, notwithstanding the fact that millions of American schoolchildren “pledge allegiance” daily to the flag (which, indeed, can be qualified as allegiance by oath: in Coke’s breakdown\(^{33}\) not constitutive, but merely declaratory). The most consistent consequence to be drawn from the allegiance owed by United States citizens is subjection to prosecution for treason; but then again, arguably, an alien who is a long-term resident of the United States and a lawful permanent resident (a/k/a holder of a “green card”) could possibly also be prosecuted for treason on the basis of notions of “local allegiance”.\(^{34}\) The citizen and the green card holder both equally enjoy most of the protection of the civil rights listed in the Bill of Rights; both can be subject to interstate extradition

\(^{31}\) Schönberger (2005), p. 1-2. Grabitz (1970) makes extensive use of Ipsen’s term for his analysis, which is especially critical of the lack of political rights granted to mobile member state nationals. While it is outside the purview of this thesis, the mention of Ipsen’s name does oblige a reference to Joerges (2003), in particular at p. 182-184 and p. 190, for a critical analysis of the influences that Ipsen may have brought into his analyses of European law from his time as an influential law professor in Nazi Germany.

\(^{32}\) Schönberger (2005), Ch. 1 § 3, p. 31 et seq.

\(^{33}\) See supra in Ch. 1 at n. 29.

\(^{34}\) The Cokean substance of the very resolution of the Continental Congress that we saw as establishing an incipient form of US citizenship (supra in Ch. 2 at n. 23 et seq.) is still implemented in federal US law to this very day (in a rephrasing of an Act of Congress from 1790, see supra in Ch. 3 at n. 28), in 18 U.S. Code § 2381: “Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason...” (emphasis added) Arguably, the legal doctrine of the American revolution, i.e. that any person who continues to reside in the United States and does not move away can considered to owe allegiance, is still very much in force. See also Bickel (1973), who notes that treason is defined in terms of persons, not citizens, on p. 382
for prosecution. Both, in fact, have an obligation to file US income taxes even when resident outside the territory of the US (rather strikingly, US tax law uses the term “US persons” for the set of individuals bearing this obligation—including both US citizens and aliens who are green card holders—which in our terminology could just as easily be called US “subjecthood”). The main difference between the citizen and the green card holder is equality in terms of representation: voting for representative office and standing for it is a right generally reserved to the US citizen. The tree trunk of allegiance could largely rot away, leaving the moss of equality standing, and most citizens would not notice.

We will go on to explore in some depth two more decisions of the European Court of Justice that represent a significant developments in this phase of inductive citizenship in the European Community. However, since both of them happen to involve British nationals, we cannot skip over the development of the accession to the Community of the United Kingdom, Ireland and Denmark in 1973. We are going to deal specifically with the effect that Community accession had on British nationality law, and how that in turn defined who the new Community citizens would be. But we will also explore how British notions of citizenship had already been developing on a path away from the centrality of allegiance ever since the independence of the United States.

Excursion: British citizenship, allegiance, and the Community

We now return to the point in our historical narrative where United States citizenship split off from subjection to the British monarch. Only now, we will follow the path of British subjecthood in Britain and, particularly, its Empire. British subjecthood was to become a highly variegated legal institution in Britain and its (former) colonies. Its relationship to the institution of citizenship, as that became more relevant in Britain and its overseas territories, was complex: British citizenship would not simply take over the mantle of subjecthood in the Empire as American citizenship had stepped in for British subjecthood in the United States. Citizenship (or at least, a legal status including the right of settlement and the right of political participation) in the British Empire, in fact, became almost inevitably local, limited to the territory in question. Yet these citizenships did not always neatly correspond to what functioned as “nationality” in the sense of international law.

How the nationality (in the sense of Community law) of the United Kingdom proper would ultimately be delineated was through both developments in the British Empire, then the Commonwealth, in combination with domestic political developments, particularly in response to the issue of immigration. If the
French approach to nationality\textsuperscript{35} can be seen as primarily territorial, and the German approach to nationality can be seen as primarily ethnocultural,\textsuperscript{36} then the British approach will reveal elements of both, in addition to a concern for citizenship in its relationship to democratic government and the uniquely British legal element of allegiance.

The relevance of this excursion is threefold. For one, we will see British subjecthood, a formally uniform status throughout the British Empire based on allegiance, develop into Commonwealth citizenship. We can describe Commonwealth citizenship as a sort of duplex citizenship, layered with more local citizenships based on equality, right of entry and residence and democratic participation. Yet curiously, Commonwealth “citizenship” would remain based on allegiance to the British monarch, or later a more abstract notion of membership of a community headed by the British monarch. In particular, the way in which a citizenship of Britain proper would ultimately be carved out from Commonwealth citizenship will provide a vivid example of how allegiance alone cannot be a compelling source of equality in citizenship.

At the same time, for the second point of relevance of this excursion, the construction of British citizenship (even before it was named as such) is a prime example of how a citizenship can emerge \textit{de facto} from a bundle of equalities bestowed upon a defined set of persons. Indeed, the ability of scholars like Plender to see a citizenship emerge in Community law, even where it had not been formally named as such, may have been inspired by British developments in the area. And finally: we will see evidence that British citizenship was itself shaped and defined by the accession process of the United Kingdom to the European Economic Community.

In the colonies of the British Empire that remained after American independence, there continued to be a distinction between “local” naturalization, i.e. naturalization performed based on laws of the colony’s own legislature, and “imperial” naturalization, i.e. naturalization performed based on the 1740 naturalization act passed by the British Parliament. With the merger of the Kingdom of Ireland (which had had its own subjecthood) with the Kingdom of Great Britain by the 1800 Act of Union, Karatani can identify four subcategories of British subject: natural-born, naturalized with imperial effect, naturalized with local effect and denizens.\textsuperscript{37} Karatani distinguishes between British subjecthood as an overarching status, which she calls “citizenship-as-status”, and the complex of rights and obligations identified with any one of these subcategories, which she calls “citizenship-as-rights” and “citizenship-as-desirable-activity”.\textsuperscript{38}

\textsuperscript{35} Supra in Ch. 5 at n. 92 et seq
\textsuperscript{36} Supra in Ch. 5 at n. 97 et seq
\textsuperscript{37} Karatani (2003), p. 52.
\textsuperscript{38} ibid., p. 53 and 18-19.
This is a useful distinction, but it should be clear that in this thesis, I choose to reserve the use of the term “citizenship” to “citizenship-as-rights”, as citizenship must entail (at least theoretically) some form of equality. I would sooner describe an overarching status of belonging that may be only purely formal, such as British subjecthood clearly was, as a pure Bereitschaftsstatus, to borrow a term from German-language scholarship on nationality. A Bereitschaftsstatus is a “stand-by status”\(^{39}\) that is a point of assignment for further rights but does not necessarily entail any specific rights.\(^{40}\) English subjecthood may have already had the character, in pre-imperial times, of being a point of assignment for more local citi- zoenships (such as in towns) and memberships (such as in guilds).\(^{41}\) Likewise, citizens of towns in the Republic of the Seven United Netherlands after the abjuration of the Habsburg emperor were subjects of the Spanish king first of all and citizens on top of that, at least at the outset.\(^{42}\) Yet it is important to note, as Schönberger does, that a Bereitschaftsstatus being a prerequisite to further rights, such as rights of citizenship, does not necessarily imply that that it is chronologically anterior to those rights.\(^{43}\) Indeed, as we saw in the history of naturalization in the American colonies, one did not have to first become a British subject to become a naturalized citizen of a colony: the two statuses were acquired at once and were inextricably linked.\(^{44}\)

Yet the history of British subjecthood, in its relationship to the citizenships of the colonies and the mother country, would be an ambivalent one with regard to whether it was destined to become more substantial, something approaching a common citizenship. Its substantial development was at turns centrifugal and centripetal.

To start with developments in the mother country: while the United Kingdom tended to want to restrict immigration at the beginning of the 19th Century, largely due to the wars raging on the Continent, by mid-century it had changed its tune. Voices in Parliament now echoed that of MP Sir John Holland in 1664,\(^{45}\) noting the economic benefits that Britain stood to reap if it were to reform its restrictive naturalization law. In 1844 an Act of Parliament was passed that for the first time introduced an administrative naturalization procedure in Britain and rendered the practice of denization (previously the only way to abolish alienage by executive action) all but irrelevant. Administratively naturalized subjects were still disabled from taking public office. (The practice of naturalization by enactment, however, remained relevant and also became more

\(^{39}\) to use the English translation for this term used by Kadelbach (2003), p. 11, n. 42.

\(^{40}\) The use by De Groot (1989) of the concept of Bereitschaftsstatus, drawing on other scholars, to describe nationality as being “in and of itself [an] empty shell” is particularly definitive. P. 13.

\(^{41}\) See supra in Ch. 1 at n. 124

\(^{42}\) See supra in Ch. 1, n. 120.

\(^{43}\) Schönberger (2005), p. 162-164.

\(^{44}\) Supra in Ch. 1 at n. 164

\(^{45}\) Supra in Ch. 1 at n. 116 et seq.
attractive, as the 1844 Act also repealed the statutory requirement to introduce those disabilities in private naturalization bills.) It was as yet unclear whether this law applied to the colonies, i.e. whether this was the procedure to be followed for naturalization in the colonies. An 1847 Act swiftly clarified that it did not apply to the colonies, and furthermore that colonial governments were unrestrained in passing their own naturalization laws under the proviso that they would be purely local in effect.

Thus British subjecthood, at least for naturalized subjects in the colonies, was now stripped of imperial effect; and local naturalization in the colonies, which Britain had previously only ever tolerated, at best, was now encouraged. And where the British government had once been eager to meddle in the affairs of Her Majesty's subjects overseas, it now appeared increasingly indifferent to them, for better or for worse. Its practice of vetoing colonial laws had already largely come to an end by the mid-19th century. On the flip side of the coin, the British government appeared less willing to extend diplomatic protection to naturalized subjects from the colonies when they were traveling abroad, even ceasing to issue British passports to them in 1863, probably based on an implicit reasoning that the right to protection overseas was more properly a derivative of regular residence in Britain.

We see that the ancient feudal relationship between allegiance and protection has at this point substantively crumbled as the basis of British subjecthood. And formally, as well, the old doctrine would be dealt the coup de grâce by the Naturalization Act of 1870, which dealt with quite a bit more than only naturalization. It was in fact a thorough reform of what could now be called (at least an incipient form of) British nationality law. And intriguingly, it can be said to mark the point at which British subjecthood finally finds a common doctrinal ground with United States citizenship.

Britain had just signed conventions with the United States by which Britain finally relinquished its claims to the Americans of British descent whom it had previously continued to see as its wayward subjects. The 1870 Act implemented this understanding by finally abolishing the tenet, once cited by Coke, of nemo potest exuare patriam: British subjects were now permitted to voluntarily renounce their subjecthood (although the conditions varied depending on the particular subcategorical plumage of the subject). The immutable bond of allegiance to the person of the king had now been dissolved in favor of the

46 Act of 7 & 8 Vict., c. 66
47 Supra in Ch. 1 at n. 155, mentioned in Ch. 2 at n. 87
48 Act of 10 & 11 Vict., c. 83
50 Parry (1957), p. 76-77.
51 This difference in legal doctrine had at times caused practical conflicts when Britain would capture and impress American sailors, claiming that they were British subjects. Kettner (1978), p. 269-270.
52 See supra in Ch. 1 at n. 96.
contractual relationship between ruler and ruled. (Moreover, as mentioned above,\textsuperscript{54} the Act further largely abolished any restrictions on rights of property and inheritance that had previously applied to aliens in Britain, thus effectively extending the King’s judicial protection to aliens as well. This could be seen as yet another step confirming the territorial authority of the King-in-Parliament as the successor to the personal authority of the person of the king.)

We already saw that the Act of 1847 removed imperial effect from colonial naturalizations to come after that point in time. Yet it was unclear after the 1870 Act whether British naturalizations still had imperial effect, i.e. whether a person naturalized in Britain could emigrate to any of the colonies and automatically have rights of local citizenship there. Parry seems to think that this matter was as yet unresolved, or that in many quarters, the assumption was that a British naturalization only had citizenship effects in Britain, just as a colonial naturalization only had effect in the colony in question.\textsuperscript{55} But Karatani finds evidence in 1914 that the British government might have assumed all along that a person naturalized in Britain had every right to be in the colonies as well.\textsuperscript{56} If that was the case, then that would reveal that there was still an asymmetry between Britain and the colonies in terms of their respective citizens’ rights, i.e. that Britain was not just another province of the British Empire, but still the predominant one.

For their part, however, the colonies were increasingly developing their own identities, and they were increasingly mobilizing their own citizenships within British subjecthood as a means of immigration control. It must be noted at this point, however, that insofar as we are talking about the British colonies that are able to pass their own laws, such as for naturalization, we are excluding most of the British colonies that are not self-governing.\textsuperscript{57} The dividing line between the non-self-governing colonies and the self-governing colonies was quite precisely the dividing line between what once would have been called “conquered” colonies in Cokean doctrine,\textsuperscript{58} and what now could be called “settled” colonies. Indeed, the “settled” colonies had achieved the very constitutional status that the prerevolutionary Americans had once coveted;\textsuperscript{59} now that the British parliament left them to manage their own affairs, their only real remaining constitutional tie to Britain was their common subjecthood to the same monarch. Outside of legal formalism, however, most of the inhabitants of these colonies also had cultural and family ties to Britain: many of the citizens of the Australian colonies, New Zealand, and Newfoundland and at least the English-speaking citizens of Canada.

\textsuperscript{54} Supra in Ch. 1 at n. 34.
\textsuperscript{55} Parry (1957), p. 80-81.
\textsuperscript{56} Karatani (2003), p. 56 in n. 104.
\textsuperscript{57} Although it must be noted that even some “non-self-governing colonies” like Trinidad did have their own systems of naturalization. ibid., p. 56.
\textsuperscript{58} Cf. supra in Ch. 1 at n. 148
\textsuperscript{59} Cf. supra in Ch. 1 at n. 149
and the South African colonies, would have been separated from Britain by at most a generation or two of descent.

More viscerally, however, this meant that the line that divided citizens of self-governing colonies from inhabitants of non-self-governing colonies (and for that matter, divided the enfranchised citizens of self-governing colonies from their indigenous, “conquered” inhabitants) was largely a racial one. It was no accident that the self-governing colonies later came to be known as the “White Dominions”. The development of local citizenship in the dominions had therefore less to do with developing a separate identity from Britain as it did with maintaining a separate identity from the non-self-governing colonies, indeed from all persons of color in the world. The first colonial naturalization laws to significantly diverge from British naturalization laws aimed specifically to restrict the settlement of persons of Asian origin, as in New South Wales in 1888.60 And Canada was particularly concerned about immigration of fellow British subjects from Hong Kong, enacting a law in 1909 that indirectly barred them from entering Canada (not as residents or “citizens” of Hong Kong, but as persons traveling from Hong Kong),61 which may have reflected some uncertainty about what rights their British subjecthood would otherwise entitle them to there.

There was some departure from British naturalization practice in a less restrictive direction as well, in line with some colonies’ desire to attract immigration, much as some American colonies had desired,62 at the time of passage of the Act of 1870, New Zealand, in particular, allowed immigrants to apply for local naturalization upon landing. This not only created problems of legal certainty for British subjects naturalized under more lax regimes migrating to places that had more strict regimes (a person naturalized in New Zealand was certainly seen as an alien in Britain),63 but may have also made dominions with more restrictive naturalization practices nervous about having to filter out a flood of naturalized British subjects from elsewhere who were locally naturalized under a lax regime, analogous to the problem pointed out by James Madison in *Federalist* 42.64

This type of problem spurred Britain and the dominions to move toward harmonization of their naturalization laws, albeit over the course of decades, and ideally in the interest of creating a British subjecthood without territorial restrictions to Britain or any of the dominions. At a colonial conference in 1911, the process was started of creating the so-called “common code”, which would be created not through any hierarchical authority of the British lawmaker (although at least formally, the British parliament maintained the authority to legislate for the dominions), but more by the political will of the Dominions and Britain acting separately but in concert to adopt the same provisions of

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60 Karatani (2003), p. 57.
61 ibid., p. 77.
62 Cf. supra in Ch. 1 at n. 171.
63 Karatani (2003), p. 73.
64 Supra in Ch. 2 at n. 48.
naturalization law. But it was already clear by that point that the adoption of the common code would not at all entail the development of British subjecthood into anything approaching a global citizenship, i.e. with unrestricted leave to remain in any of the territories involved. At the colonial conferences, the Cape and Australian colonies had directly addressed their concern by name: they did not want to be bound to "recognize as a British subject any coloured person coming to reside therein, who [had] been naturalized in some other portion of His Majesty's Dominions where no colour distinction is made".65

The British government made assurances that British subjecthood would exist without prejudice to any dominion’s power to restrict immigration for any reason whatsoever, including race (so British subjecthood did not necessarily guarantee admission); moreover, on the flip side of the coin, dominions would be unrestricted in maintaining local naturalization practices that did not adhere to the common code (so local naturalization did not necessarily guarantee British subjecthood with imperial effect).66 Thus we see a curious echo of the situation that existed in the American colonies in the mid-18th century, of locally obtained local naturalization existing in parallel with locally obtained imperial naturalization.67 Only the difference now was that a naturalization based on the imperial rules was clearly eviscerated of any real imperial effect in terms of access to citizenship in other jurisdictions in the Empire. The main advantage of getting naturalized in Britain or any of the dominions based on the imperial rules (which mandated a five-year residency requirement), voted in as the British Nationality and Status of Aliens Act by the British Parliament in 1914, was that an alien could accumulate the five years of residence through consecutive residence in Britain or any of the dominions, as long as it included 12 months of preceding residence in the jurisdiction where naturalization was to be granted.68 Thus the alien benefiting from these rules would still first have had to satisfy the immigration laws of any of the series of jurisdictions he had lived, including any race requirements, and would not automatically be entitled to rights of citizenship in any other dominions by virtue of the ultimately acquired British subjecthood (although it does appear that Britain freely admitted all British subjects who were naturalized based on the imperial rules).69

The common code, when it was finally implemented, was practically stillborn. Despite the fact that Part II of the British Nationality and Status of Aliens Act of 1914 was meant to be the “mother template” for the acts to be passed by all of the colonial legislatures, their own enactments contained various departures and modifications that reduced the “commonality” that was intended

65 Karatani (2003), p. 73-74, and directly quoting a comment by General Botha at the 1907 colonial conference.
66 ibid. p. 75-76; also, less critically, Parry (1957), p. 82.
67 Cf. supra in Ch. 1 at n. 170.
68 Karatani (2003), p. 80-81; Parry (1957), p. 84.
69 ibid., p. 85-86.
to be created in the “white” British Empire. And Canada had already taken a unilateral step that made especially clear that the general trend was more centrifugal than centripetal by this point. The Canadian Immigration Act of 1910, for the first time in the history of any of the dominions or Britain, formally created a category of local citizenship, Canadian citizenship. (Until now, of course, we have only been speaking of local “citizenships” in the colonies as a purely descriptive term from our perspective; but the colonies themselves would not have called it that.) From the Canadian perspective, there were henceforth two kinds of British subjects: those who had Canadian citizenship and those who did not. And the latter were to be treated as aliens for purposes of immigration.

Britain had always been much less eager to control immigration than the dominions, since by contrast to the dominions it had a largely indigenous population that was neither defined by nor threatened by immigration. If anything, Britain at first maintained a comparatively lax attitude toward immigration (essential as it was, in Coke’s words, to “the life of every island”). At the same time, however, Britain was much less generous with naturalization than many of the dominions: this could be seen as aiming to discourage permanent immigration by denying sojourning aliens certain social goods, chief of which (now that property rights were no longer restricted) was access to the newly-established welfare services. But the First World War changed Britain’s attitude toward even non-permanent migrants: the day in 1914 after Britain declared war on Germany, Parliament passed the Aliens Restriction Act, which was the first of a series of increasingly draconian statutory restrictions on the immigration and internal movement of “alien enemies”.

At the same time, participation of citizens of the dominions in the war effort was to have the effect of strengthening the bonds between British subjects in the dominions and British subjects in Britain. Yet the way in which this happened would not ultimately revive the already moribund common code system: quite to the contrary, in fact. The way in which Canada participated in the war effort is telling: at the beginning of the war, tens of thousands of Canadians volunteered to go to Britain for military service, of whom very few were French Canadians. By the time Canada introduced conscription in 1917 (pursuant to the Canadian premier’s promise to do so at the Imperial War Conference in London), enthusiasm for participation in the gruesome war had waned considerably across Canada. But active resistance to conscription was strongest in Quebec, and when the Canadian government began to enforce

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71 ibid., p. 79-80.
72 Ch. 1 at n. 32
73 Karatani (2003), p. 77-78.
74 ibid., p. 84.
conscription in 1918, the ensuing “Conscription Crisis” fanned the flames of Québécois nationalism and set off violent disturbances.\textsuperscript{75}

Thus we see that those Canadians who did willingly participate in the war effort (be they volunteers or conscripts) were largely English Canadians, doing so not out of any sense of obligations that went with the abstract legal category of British subjecthood but out of a feeling of affinity with the British people, indeed out of their very genetic and cultural relationship to them. And reciprocally, the war warmed the feelings of the British public toward British descendants abroad, not only those in the dominions but the descendants of, in particular, British soldiers who had settled in occupied territories and had children there. In the years after the war, Parliament passed a series of statutes to significantly expand the entitlement to British subjecthood \textit{jure sanguinis}, i.e. by descent, to those who were separated from Britain by more than just one generation of descent.\textsuperscript{76} This increasing notion of personal ties to a worldwide British community, defined as it was by culture and consanguinity (and indirectly, therefore, by race), came at the expense of any notion of a legal relationship, based on a common subjecthood, between Britain and the dominions as polities (and all of their \textit{citizens en bloc}).

Indeed, the very Imperial War Conference in 1917 that had seen the leaders of government of the dominions pledging their commitment to the British war effort was also the site of a resolution confirming that the Dominions were now “autonomous nations of an Imperial Commonwealth”.\textsuperscript{77} (The new name “British Commonwealth of Nations” was formally clinched with the \textit{de facto} independence of Ireland in 1921,\textsuperscript{78} it being an arguably less controversial term than “British Empire” to describe the overarching relationship between Britain and the Dominions.) A series of conferences from 1926 to 1930 culminated in the agreement that Dominion governments had the right to establish their own respective nationalities; and in 1931 the British Parliament repealed the Colonial Laws Validity Act of 1865, largely abolishing the last formal powers of review and that Britain held over the dominions and formally freeing them to leave the common code system.

Ireland, unsurprisingly, was the first dominion to abandon the formal category of British subjecthood entirely with the Irish Nationality and Citizenship Act of 1935 that established Irish citizenship, although it continued to accord rights of non-alienage to British subjects and expected reciprocity for its own citizens, thus substantively continuing to implement the common code. Canada had already strained the formal limits of the common code system in 1921 by introducing the category of “Canadian national” as the international law dimension of Canadian citizenship (doing so in the interest of having its own judge in the Permanent Court of International Justice, where all British subjects might otherwise be seen as having only one nationality entitled to representation).

\textsuperscript{75} Auger (2008)
\textsuperscript{76} Karatani (2003), p. 85-86.
\textsuperscript{77} ibid., p. 87.
\textsuperscript{78} McIntyre (2002), p. 392.
And Canada was also the first to decisively leave the common code system in 1946 with its own citizenship act, which it passed without consulting any of the other members of the Commonwealth. 79

**British citizenship, Commonwealth citizenship, and decolonization**

One can assert, as Miles does, that it was the aforementioned move on the part of Canada that led the United Kingdom to finally delineate something approaching its own local citizenship, after centuries of having maintained few distinctions between metropolitan and imperial British subjecthood. 80 The British Nationality Act of 1948 (passed under a Labour government) defined four subcategories within British subjecthood (and also defined the term of “Commonwealth citizen” as being entirely synonymous with “British subject”81): Citizens of United Kingdom and the Colonies (CUKC), covering British subjects of the United Kingdom and its remaining colonies; citizens of independent Commonwealth countries; British subjects without citizenship (BWSC), intended to be a transitional category for British subjects in effectively independent realms that had not yet established their own citizenship laws; and British protected persons (BPP).82 The latter category, intended to apply mainly to persons from territories under some degree of *de facto* British protection yet not really under British control,83 was in fact a residual category of British subjecthood that did not overlap with Commonwealth citizenship84 and did not entail a right of entry into or residence in Britain.

As Karatani stresses, the BNA 1948 did not create a British citizenship,85 i.e. in the sense of “walling off” Britain and its colonies from all other British subjects in the same way as many of the dominions' local citizenships had “walled off” the respective dominions. In terms of effect, all British subjects (and Commonwealth citizens) were still seen as non-aliens in Britain and were free from controls on their immigration.86 (In fact, the class of “non-aliens” in British law was even larger than Commonwealth citizens and residual British subjects: it expressly included Irish citizens, since Ireland was about to depart

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79 Karatani (2003), p. 87-94.
80 Miles (1989)
81 This equivalence was specifically introduced to keep newly independent India and Pakistan, both clearly headed toward republican constitutions, in the fold by not forcing them to designate their citizens “British subjects”. India and Pakistan were economically and militarily too important for Britain to lose from its sphere of influence. Karatani (2003), p. 117 and 120-124.
82 ibid., p. 116.
83 Parry (1957), p. 89-91.
84 Sec. 32(1), which defines this category, read in conjunction with the silence of Sec. 1 on this category, British Nationality Act, (Parliament of the United Kingdom 1948); see also the commentary on Sec. 1 in Parry (1957), p. 228.
from the Commonwealth as a republic\(^\text{87}\)—despite the Commonwealth’s newfound agnosticism toward the British monarch.\(^\text{88}\) And the Republic of Ireland, as the Irish Free State had, continued to reciprocate the favor of non-alienage to British subjects in the Irish Nationality and Citizenship Act of 1956.\(^\text{89}\)

The innovation of the BNA 1948 may have lain more in the British legislator’s implicit acknowledgment that it really only had the power to legislate for Britain and the colonies and thus that there was only one citizenship—CUKC—that it had the power to admit aliens to by naturalization (or to admit non-aliens to by registration: any of the other types of British subjects/Commonwealth citizens, or Irish citizens, could apply for CUKC by registration after twelve months of residence in the UK or colonies\(^\text{90}\)). The British legislator was no longer claiming to admit aliens in the first place to a “master status” of British subjecthood as a type of global citizenship. Commonwealth citizenship as a \textit{Bereitschaftsstatus}—including in Britain—was doctrinally now more the consequence of citizenship in a realm of the Commonwealth rather than its source. In other words, as Parry writes: “Allegiance is now the consequence rather than, as before, the cause of the acquisition of nationality.”\(^\text{91}\) The last formal vestiges of the old doctrine of indelible allegiance had thus been wiped out in British law.

Nevertheless, the facts that Britain had previously expanded \textit{jus sanguinis} acquisition of British subjecthood by overseas descendants of persons born on British soil and their descendants, and that Britain had now at least delineated a local British citizenship, did set the stage for the use of citizenship to “wall off” Britain from British subjects who were ethnic outsiders. Interestingly, Miles notes, the debate in the Commons on the BNA 1948 barely touched on the effect that changes to British nationality/citizenship law would have (or would not have) on immigration to Britain. The members of the Conservative opposition were more nostalgically concerned about the dismantlement of British subjecthood as a legal institution, or the exclusive implications of the fact that not all British subjects would be automatically entitled to CUKC without a residence requirement. Race did play something of a role in their arguments, which clearly identified most of the far-flung British subjects as cultural outsiders, but these tended to emphasize the “white man’s burden” (to quote Kipling, not the record of the debate) Britain bore toward the “diverse and often primitive races of the world under the British flag”. A substantially significant subjecthood, paired with the protection of the monarch, was a means of securing their “loyalty and obedience”. And several MPs warmly recalled how British Foreign Secretary Lord Palmerston had once uttered the words \textit{“civis britannicus sum”} to justify

\(^{87}\) Karatani (2003), p. 117-118.
\(^{88}\) Supra n. 81; and see, generally, McIntyre (2002).
\(^{89}\) Parry (1957), p. 970-971.
\(^{90}\) Sec. 6 \textit{et seq.}, British Nationality Law 1948, Parliament of the United Kingdom (1948); statute text and commentary in Parry (1957) p. 253-263.
\(^{91}\) ibid., p. 99.
military action on behalf of a British subject (indeed, one who was not from Britain), Don Pacifico, in 1850.92

Yet at the same time, in the contemporary legislative and governmental processes that directly addressed immigration, British politicians could be seen to be eminently concerned with cultural and racial criteria. There was an acute post-war labor shortage, and time and time again, politicians concluded reluctantly that immigration would provide the best relief. Yet the Royal Commission on Population, in a 1949 report, was pessimistic about the chances of finding acceptable sources of migrant labor; it was concerned with identifying “immigrants […] of good human stock” who could “[intermarry] with the host population and [become] merged in it”. Moreover, its survey of possible sources of migrant labor was limited to Europe, thus implying that the readily available British subjects in the colonies and the Commonwealth were not even under consideration.93

In the same year, the Colonial Office more explicitly rejected the suggestion that British subjects from the colonies should be imported to alleviate the labor shortage. When it became apparent that (relatively small numbers of) British subjects from the Caribbean were already migrating to Britain on their own initiative, the government became gravely concerned. The Cabinet appointed a committee in 1950 to review the means that could put a halt to such migration. The committee concluded that any such measure would require distinguishing between “coloured” and “white” CUKCs (the committee was silent on the issue of Commonwealth citizens of independent countries), a distinction that would be difficult to find a legal justification for; at the same time, the committee concluded, it would ultimately be necessary.94 The Government did not move to implement that legal distinction, but it did put pressure on the colonial administrations to discourage inhabitants of the colonies from migrating to Britain, as well as to restrict the issue of passports95 (of which the latter move could be considered a very indirect way of de facto restricting the equal rights of citizenship).

While the BNA 1948, as we reviewed above, heralded a number of formal and doctrinal innovations, Commonwealth citizenship (the new guise of British subjecthood) still substantially functioned in the same way as it always had within Britain. If there was such a thing as a de facto citizenship for Britain in terms of effect, it was identical with Commonwealth citizenship. In terms of legal effect within Britain, there was still no difference between the formal categories of the Citizen of the United Kingdom and the Colonies, the Commonwealth citizen from an independent country, and the British subject without citizenship. And Britain was the only member of the Commonwealth that treated Commonwealth

93 ibid., p. 433-434.
94 ibid., p. 435-436.
citizenship as a substantial citizenship; for all of the other members, Commonwealth citizenship had become a purely nominal status attached to their own sovereign citizenships, and none of them accorded special rights to Commonwealth citizens from elsewhere.96 (The only country that did substantially reciprocate to Commonwealth citizens was Ireland, which was not even in the Commonwealth. This incidentally created the striking situation that the most really existing supranational citizenship that Britain was part of—the mutual non-alienage between Britain and Ireland—did not even have a name.)

As we saw, however, British politicians were already thinking of ways to restrict immigration of British subjects, even of CUKCs. As would transpire in the coming decade and a half, a more restricted British citizenship would not be created from Commonwealth citizenship by simply cutting along the dotted line that had been drawn to delineate CUKC. Rather, an entirely new line for eligibility to British citizenship was to be drawn that cut across the subcategories of Commonwealth citizenship: a line between persons from the Old Commonwealth (OCW) and persons from the New Commonwealth (NCW). In fact, this distinction was nothing new: it was more or less identical with the old distinction between (what had been) self-governing and non-self-governing colonies, and had nothing to do with contemporary independence from or dependence on Britain. This distinction was now quite frankly a racial one and not a legal one: the countries of the OCW outside of Britain, all the former “White” Dominions, were all at least de facto independent of Britain; while the countries of the NCW included countries that were both de facto and de jure independent (e.g., India and Pakistan) alongside completely dependent territories whose citizens were CUKCs (e.g., Jamaica).

What Britain was to do to practically enforce this distinction would precisely echo the practices of the Dominions surrounding the turn of the century: it would first implement immigration controls for certain Commonwealth citizens based on criteria other than their Commonwealth citizenship. The legal groundwork for this practice had already been laid in 1911, when Britain, eager to close a deal on the common code, had assured the Dominions that they would be free to impose immigration controls on British subjects for any reason whatsoever.97 The Australian and Cape colonies had wanted to introduce a legal distinction within British subjecthood between persons of European and non-European descent (where the former would not be, and the latter would be subject to immigration controls), and the British government at the time had felt such a legal distinction to be unacceptable. The only way to salvage the common code project was to cut the necessary link between British subjecthood and unconditional rights of entry and residence altogether.98

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96 ibid., p. 126–127.
97 supra at n. 66
government of 1911 had once almost grudgingly conceded to the Dominions would end up coming in handy for the British government of 1962.

The British government introduced what was to become the Commonwealth Immigrants Act (CIA) 1962 to Parliament in 1961. On the surface of it, the government justified the bill as an almost administrative measure for combating labor shortages, a law that would apply to all Commonwealth citizens and would only be temporary. In private, however, the government knew that it was responding to a public opinion that held that “racial tensions” were rising in Britain. An internal memorandum from the Home Office was unabashed about the real intended purposes of the CIA: limiting the “strain imposed by coloured immigration” on housing resources and ameliorating the “dangers of social tension inherent in the existence of large unassimilated coloured communities”. The government did not publicize this reasoning, as it wished to maintain at least the illusion that Commonwealth citizenship still had some substantive meaning.99

The CIA identified, first of all, a “core” of what was to effectively become a British citizenship in terms of the persons who were already entitled to unconditional rights of entry and residence and could not be deported, regardless of any dangers they presented to public safety or public health. This core consisted of persons who had acquired their Commonwealth citizenship 
\textit{jure soli} by being born in Britain or 
\textit{jure sanguinis} by being descended from a British father, or who had been naturalized in Britain or had become a CUKC by registration in Britain; the Act identified the persons possessing these qualities as immune from deportation.100 On the other hand, the persons who could not be denied entry, a largely overlapping set, were identified in terms of the formal documentary evidence they could provide: persons born in the UK, persons holding a British passport issued in the United Kingdom or the Republic of Ireland, and their dependents listed in the passport.101

The next concentric circle surrounding this core was made up of remaining Commonwealth citizens who were ordinarily resident in the UK, or had been within the last two years, their wives [\textit{sic}] and their children under 16. These persons could not be denied entry at the border102 (provided there was no deportation order pending against them),103 but they could be deported (as they were not covered by the immunity provision of the aforementioned Sec. 6(2)),104 as least as long as they were over the age of 17105 and had not been continuously ordinarily resident in Britain for five years.106

99 ibid., p. 128-129.
100 Commonwealth Immigrants Act, 1962, (Parliament of the United Kingdom 1962), Sec. 6(2).
101 ibid., Sec. 1(2).
102 ibid., Sec. 2(2).
103 ibid., Sec. 2(5).
104 \textit{Supra} n. 100
105 Parliament of the United Kingdom (1962), Sec. 7(1).
106 ibid., Sec. 7(2).
All remaining Commonwealth citizens made up the outermost circle. These persons could be denied entry for being a danger to public health or public safety\textsuperscript{107} and could be deported for a criminal conviction; their admission was subject to satisfying one of three conditions: (a) having been issued a so-called voucher by the Ministry of Labor admitting them to the employment market in the UK; (b) intending to study at an educational institution or (c) being economically self-sufficient.\textsuperscript{108}

It was the first of these purposes of stay that provided the British government the most room to treat OCW and NCW citizens differently, and therefore to impose an indirectly racial criterion on admission for the purpose of employment. There were three types of vouchers that the Ministry of Labor issued: voucher “A” was for what could be called “demand-based” labor migration, in other words it was issued to Commonwealth citizens who could show they had been offered a job by a British employer. Voucher “B” was for “supply-based” labor migration, or Commonwealth citizens who could demonstrate that they had skills valuable to Britain. The issuance of vouchers “A” and “B” was unlimited. Voucher “C”, on the other hand, was issued on a first-come, first-served basis to all remaining Commonwealth citizens who could neither supply skills deemed to be valuable or demonstrate demand for their labor, and the number issued could be limited at the government’s discretion.\textsuperscript{109}

Karatani finds convincing evidence that the government expected vouchers “A” and “B” to largely be issued to OCW citizens, and “C” to largely be issued (within the limits set) to NCW citizens, thus that the voucher system was the main locus of a racial filter on access to citizenship. After all, labor shortages were still a pervasive problem in the UK, and native workers were either unwilling to do the work that was in demand or unwilling to move to where the work was; only migrants from outside Britain could fill the gap. Irish workers were completely unrestricted in their access to Britain and the British labor market, and they did in fact migrate to Britain in great numbers. But they were not enough. It would have made sense that NCW citizens should have been the next most attractive source of labor; yet between 1962 and 1970, the number of work permits issued to aliens (in practice, mainly continental Europeans) increased while the number of work permits issued to NCW citizens decreased. While this may not have made sense in terms of immigration policy, it made perfect sense in terms of citizenship policy. In fact, aliens were even more desirable as immigrants because by their very legal nature, they were more likely to remain the sort of temporary immigrants that Britain had always prized for their value to the economy.

As soon as any Commonwealth citizen had been admitted, on the other hand, then he or she already had a legal foot in the door;\textsuperscript{110} she or he could be

\textsuperscript{107} ibid., Sec. 2(4) and 2(5).
\textsuperscript{108} ibid., Sec. 2(3).
\textsuperscript{109} Karatani (2003), p. 130.
\textsuperscript{110} ibid., p. 130-132.
discriminated against at the border, but not inside Britain (as long as he or she was not convicted of a crime that warranted deportation), where she or he possessed full rights of subjecthood. After five years of residence, he or she was anyhow immune from deportation. Or after only one year of residence, she or he could simply apply to become a CUKC by registration, or if already a CUKC, simply apply for a British-issued passport even sooner than that to guarantee unconditional admission at the border when leaving and returning to Britain. (In this regard, though, the at first glance only slight disjunction between the sets of the persons guaranteed admission at the border and those immune from deportation\textsuperscript{111} reveals the clearest form of systemic discrimination between OCW citizens and NCW citizens from the colonies: a Canadian citizen, for instance, could apply to become a CUKC by registration after one year of residence based on the BNA 1948 and thereby gain immunity from deportation; while a CUKC from Jamaica, who was not a CUKC by birth in Britain, could only gain that immunity after five years of residence.)

Thus the CIA 1962 had already clearly established what we could call an “incipient form of British citizenship”, one that was largely based on indirectly racial criteria of birth and descent for a starting set of “insiders” and the actual use of movement and residence on the part of a set of “outsiders”, who were to be grudgingly accepted. We can thus see what exactly the pragmatic approach to citizenship was\textsuperscript{112} that British jurists like Plender may have drawn on\textsuperscript{113} in identifying an incipient European citizenship defined not by deduction from a formal citizenship status, but by induction from the rights gained from engaging in certain kinds of movement and residence. (We must emphasize, of course, that it was not part of the accepted legal discourse in Britain at the time of the CIA 1962 to actually call the status that entailed a right to remain in Britain “citizenship”; but that status had in fact emerged out of British subjecthood in the same way—based on being circumscribed by rules of immigration law—as it had in dominions such as Canada and Australia, which did expressly call that status “citizenship”.)

We have also seen a striking parallel in Britain to the debate going on among the member states of the European Economic Community at almost exactly the same time (1963) about how best to exclude persons possessing a formal citizenship status in a member state, but coming from non-European (former) colonies, from being able to make use of their rights in Europe. Where the Community had half-heartedly legislated the exclusion of these persons, however, its member states ultimately did not dare to actually enforce that exclusion based on criteria such as place of issuance of a passport.\textsuperscript{114} Britain had

\textsuperscript{111} Supra at n. 100 and 101.
\textsuperscript{112} Supra in Ch. 5, n. 1
\textsuperscript{113} Supra at n. 28
\textsuperscript{114} Supra at Ch. 5, n. 114
no such compunctions, at least with regard to British passport holders with the status of CUKC.

British citizenship _avant la lettre_ , toward membership in the Community

Furthermore, it seems likely that Britain’s move to cut off its overseas subjects was not purely about the racial conditioning of Britain’s domestic population, but rather that considerations of Britain’s future accession to the EEC may have played a none-too-coincidental role as well. The UK’s first application to join the Community in 1961 can be seen as marking a shift in the UK’s priorities in international cooperation from the Commonwealth to the Community. It was no secret that De Gaulle wished that Britain would discard its loyalties to the Commonwealth in favor of the Community, declaring most pithily at one point: “I want her naked!” – i.e., naked of its former Empire. De Gaulle made a somewhat more nuanced statement of one dimension of this in his speech of 14 January 1963, justifying France’s veto of Britain’s first application:

> In short, the nature, the structure, the very situation (conjuncture) that are England’s differ profoundly from those of the Continentals. What is to be done in order that England, as she lives, produces and trades, can be incorporated into the Common Market, as it has been conceived and as it functions? For example, the means by which the people of Great Britain are fed and which are in fact the importation of foodstuffs bought cheaply in the two Americas and in the former dominions, at the same time giving, granting considerable subsidies to English farmers? These means are obviously incompatible with the system which the Six have established quite naturally for themselves.

Of course, these considerations on Britain’s links to the Commonwealth dealt more with the freedom of movement of goods and agricultural policy. But almost without a doubt, the Six were already casting a sidelong glance at the effects of a potential British accession on the pool of workers entitled to freedom of movement, even though the scope of freedom of movement of workers in the Community had not yet been definitively established.

And Britain’s redoubled attempts to join the Community after the 1963 veto were mirrored by Britain’s increasingly distancing itself from the Commonwealth, including the OCW. For their part, New Zealand, Canada and Australia had already reacted to Britain’s first bid to join the Community with apprehension, clearly jealous of losing their special relationship to Britain. Australia and New Zealand had even insisted on directly participating in Britain’s accession talks with the Six until they were rebuffed by Britain. And the CIA 1962 and Britain’s institution of further restrictions on the immigration of Commonwealth citizens, including from the OCW (for instance, by tightening

117 See, for at least some academic considerations of that issue, _supra_ in Ch. 5 n. 115
up the system of “working holidays” in 1965), was the cause of further umbrage on the part of the countries of the OCW. They clearly did not appreciate Britain’s moves to carve out what would effectively be its own local nationality from Commonwealth citizenship, even though they had done the same thing many decades before.

The case of the East African Asians

Britain’s next move to wall off its citizenship avant la lettre, however, was clearly based on domestic, racial considerations. And that would put Britain on a collision course with the values of the European legal community that it was already a participant in: the Council of Europe and the European Convention on Human Rights.

The British lawmaker had clearly anticipated with the system of the BNA 1948 that if a former British colony became independent, it would remain in the Commonwealth and all of its residents would go from being CUKCs to being citizens of the successor state, thereby remaining Commonwealth citizens. The CIA 1962, building on this assumption, aimed to regulate their entry into Britain as such. However, the transition in citizenship did not always go as smoothly as expected for the residents of former British colonies.

Newly independent Kenya, in particular, only automatically granted its citizenship to persons of African origin, leaving out the sizeable Kenyan communities of Asian (i.e. Indian) and European descent. Asian and European Kenyans were offered the option of applying for Kenyan citizenship within two years of independence on the condition of renouncing all their former citizenships; yet this placed the CUKCs among them before a dilemma. Considering the spirit of African nationalism that accompanied the run-up to Kenyan independence, many feared being hounded out of Kenya if they did not renounce CUKC and apply for Kenyan citizenship. Yet others feared even trying to apply for Kenyan citizenship, since they could be run out of Kenya anyways, and stateless at that, having renounced their CUKC to apply (unsuccessfully) for Kenyan citizenship.

Britain swiftly moved, on the eve of Kenyan independence, to protect the European Kenyans from ever having to regret the decision to opt for Kenyan citizenship, passing the British Nationality Act (No. 1) 1964. Under that Act, renunciation of CUKC could be reversed by registration if the former holder could show that she or he had done so in order to apply for the citizenship of a Commonwealth country. This registration was available to those with a “qualifying connection” to the United Kingdom or a colony or protectorate, if he, his father, or father’s father had been born, naturalized or registered a CUKC in

120 ibid., p. 154-157.
121 British Nationality Act (No. 1), (Parliament of the United Kingdom 1964); Karatani (2003), p. 158.
the UK or a colony, or had been born in a protectorate. Crucially, however, Section 1(5) of the Act specifically defined “colony”, in this sense, as meaning still a colony at the time of registration, thus excluding those persons who had acquired their CUKC status or were descended from someone who had acquired that status in a territory that was now independent of Britain. This was the first time that a color line had been introduced into British nationality law: it did not directly affect any persons who possessed, and continued to possess, the status of CUKC, but it made the decision to renounce CUKC, for those who had done so to acquire the citizenship of an independent Commonwealth country, irreversible for those who did not have roots in Britain.

Thus while European Kenyans had nothing to lose from British nationality law by opting for Kenyan citizenship, Asian Kenyans (who, as India had already made clear, had no entitlement to Indian citizenship) most certainly did have something to lose. At the same time, existing British immigration law, combined with intervening developments, now opened the door to Britain wider to Asian Kenyans with CUKC. The CIA 1962 did not use racial criteria (in the sense of British descent) for determining admissibility to Britain at the border, but rather the place of issuance of a passport for a CUKC. Before Kenyan independence, of course, this criterion was something of an indirectly racial one as well: a passport issued to a CUKC in Kenya, by the British administration there, was still a “colonial-issued” passport whose holder was subject to immigration control in Britain. Presumably, mainly those CUKC in Kenya who had been born in Britain or who were the dependents of a British-born CUKC would have had the “documentary citizenship”, not to mention the habit of traveling back and forth to Britain, that would allow them to enter Britain and have their passports issued there. But subsequent to Kenyan independence, passports for CUKC were issued by the British High Commissioner (i.e. embassy) in Kenya, and such a passport counted as a “British-issued” passport that entitled the holder to unrestricted entry to Britain.122

Meanwhile, it had become clear that Asian Kenyans’ fears were coming true. In 1967, the government of independent Kenya, with its program of “Africanization”, was introducing ever-more restrictive laws with regard to resident non-citizens, making it practically impossible for Asian Kenyans to live and work in certain areas. Asian Kenyans holding UK passports increasingly began to seek refuge in the country of their citizenship, Britain. The arrival of the first Asian Kenyans sparked a political debate in Britain hallmarked by the infamous “Rivers of Blood” speech by opposition Conservative MP Enoch Powell, in which he claimed that there were 200,000 Asian Kenyan CUKCs who were all planning to come to Britain.

On 8 February 1968, Labour Home Secretary James Callaghan subsequently proposed the introduction of a law, and as quickly as possible, to bar the entry of East African Asians into Britain. One member of the

122 ibid., p. 159.
Commonwealth immigration committee, George Thomas, resolutely opposed the proposal, stating that the enactment of a new immigration act to bar them “might turn [them] into stateless persons”, thus violating international law.\(^{123}\) We see, at least in Thomas’ statement, a clear recognition that whatever British “citizenship” or “nationality” was, it was not merely about having the formal status of Commonwealth citizenship, but that it was inseparably intertwined with the unconditional right of entry and residence in Britain: specifically, Thomas did not say that the law could render Asian Kenyans “effectively” stateless, but actually stateless. Nevertheless, and despite an agonizing debate in the Commons, the bill for the Commonwealth Immigration Act 1968 was passed less than a week after its introduction.

The BNA 1948 had drawn no color line, maintaining the fiction of the various subcategories of Commonwealth citizenship as being purely formal statuses. The CIA 1962 had left the structure of British nationality law, as such, untouched, while employing indirectly racial criteria (birth in Britain or dependence, as a minor child, on a British-born father; which might have at least been barely defensible as being based more on cultural attachment to Britain than race) only in British immigration law to favor some CUKC over others. The BNA 1964 had introduced a color line in British nationality law for re-opting for CUKC status, but of course left the option open of not renouncing CUKC in the first place. But the CIA 1968 implemented an even more frankly racial criterion in immigration law by abolishing the documentary entitlement to unconditional entry into Britain (which at least maintained the illusion of a being a purely formal, non-race-based criterion) and replacing it with a purely descent-based one: only those who were themselves born, naturalized or registered in Britain, or who were descended from a father or grandfather who was, were exempt from immigration controls.\(^{124}\) British citizenship had hereby been definitively “racialized” and the purely formal status of CUKC, or the documentary status of holding a British-issued passport, had lost almost all remaining substantive citizenship value in Britain (aside from political rights, i.e. the right to vote for and stand for Parliament, which to this day continues to be an equal right of all Commonwealth citizens and Irish citizens resident in Britain\(^{125}\)).

Thomas’ prediction, that this effect of the CIA 1968 would be seen as a violation of international law, proved true. In 1969, 25 East African Asians with CUKC status filed a complaint\(^ {126}\) to the European Court of Human Rights, alleging a violation of Article 3 of the Convention, the ban on torture or inhuman or degrading treatment. (The Fourth Protocol of the Convention, of which Article 3(2) protects the right of a national to enter his or her country of nationality, had not and still has not, at the time of writing of this thesis, been ratified by the United Kingdom.) The admissibility of the complaint was first

\(^{123}\) ibid., p. 159-161, and Lester (2003), p. 10.
\(^{124}\) Karatani (2003), p. 162.
\(^{126}\) ECHR Application No. 4314/69, 32 CD 96, 97.
reviewed by the European Commission of Human Rights (ECmHR). The Commission first established that the lowering of an individual in rank, position, reputation or character could be qualified as “degrading treatment” in the sense of Article 3 of the Convention, and that this ban did not solely apply to physical maltreatment. When it examined the legislative process leading up to the passage of the CIA 1968, the Commission found that the British legislature had had clear motives of racial exclusion in passing the Act, and thus that the Act was racially discriminatory. Finally, the Commission examined the motives of the East African Asians who had made the decision to retain CUKC and not renounce it to obtain Kenyan citizenship. It concluded that they had specifically retained that status in order to safeguard their rights of entry and residence in Britain. Thus, the denial of that right to those citizens based on their race constituted inhuman and degrading treatment in the sense of Art. 3 ECHR.127

The ECmHR decision condemning the UK was not directly effective. In the then-effective Commission system (which was ultimately abolished in 1998), there was an intermediate phase before an admissible complaint would go on to the Court itself, in which the state involved had an opportunity to remedy the situation in the eyes of the Committee of Ministers of the Council of Europe. The British government decided not to proceed to the Court, and instead pledged to increase the annual quota of East African Asian CUKCs who could enter and settle in Britain. Seven years after all of the applicants involved had individually been admitted to Britain, the Committee of Ministers decided, essentially, that the infringement that was the subject of the complaint had been remedied. Essentially, the problem had been reframed in this way from an abstract legal one (that Britain had illegally deprived an entire class of persons of their citizenship) to a concrete political one (the deprivation of citizenship remained as a legal fact, while Britain provided the “squeaky wheels” who clamored for entry into Britain with a remedy).128

This resolution proved to be retrospectively convenient for Britain, which meanwhile had gone ahead with its practice of eviscerating the formal status of CUKC of any substantive citizenship content, at least in terms of rights of access to Britain. In 1970, the Conservatives came to power in government on the basis of an election platform that promised even more restrictions on immigration. In 1971, Parliament passed the Immigration Act (IA), which first of all dropped the illusion that the immigration of aliens and Commonwealth citizens had to be regulated separately by law: they were both now covered by the IA. Furthermore, the formal status of CUKC (which anyhow by that point was only a prerequisite

127 Guild (2004), p. 71-73; see also, for an even more detailed account written by the legal representative of the complainants, Lester (2002)
128 ibid., p. 55-56. While Lester criticizes the acceptance of this resolution as a politically motivated “non-decision” on the part of the Committee of Ministers, in a later speech, he also expresses his doubts as to whether the complainants would have had luck obtaining a legally more satisfactory resolution if the case had gone on to the Court. Lester (2003), p. 6.
to other, descent-based criteria for unconditional admission to Britain) was made even less relevant.

The key status to be held for a right of unconditional admission to Britain under the IA was “right of abode”. The persons who possessed this right of abode, in turn, were called “patrials”; and patriality was defined roughly in terms of the same criteria that the CIA 1968 had used to determine those CUKCs who were exempt from immigration control (with at least the minor improvement that the language was made gender-neutral, thus expanding the entitlement to those descended from a mother or grandmother who was born, naturalized, or registered a CUKC in Britain or one of its closely associated islands). However, the set of “patrials” was also expanded to include any Commonwealth citizen who was descended from a British-born parent (so not from a grandparent, and not from a parent who had been naturalized or registered a CUKC in Britain). Thus the entitlement to unconditional access to Britain, and thereby to the incipient British citizenship, had been expanded to certain Commonwealth citizens (who in practice, would be citizens of OCW countries) on, once more, an indirectly racial basis.

In fact, this was the final brick in the wall establishing what would ultimately become British citizenship. In 1981, the British Parliament (again under a Conservative government), finally formally established the category of “British citizenship” by conferring it on all patrial CUKCs. Curiously, however, the accession of the UK to the European Economic Community had long preceded this moment: in fact, the UK had finally acceded in 1971, not long after the enactment of the IA. How would the term of Community law “national of a member state” be applied to Britain in order to determine those who were entitled to the freedom of movement of workers? The British government, at the time of signing the EEC Treaty, simply unilaterally declared that “nationals”, as a term of Community law, was to be understood to refer to all CUKCs or residual British subjects without citizenship who had the right of abode in Britain; as well as CUKCs born, naturalized or registered in Gibraltar or those with a father who was. Again, this was largely identical to the set of persons who would ultimately become British citizens.

Thus, strikingly, “British national” had already been defined as a formal category in Community law long before the “British citizen” had been formally

129 Immigration Act 1971, (Parliament of the United Kingdom 1971), Sec. 2(1)(a) and (b)
130 ibid., Sec. (2)(1)(d)
132 ibid., p. 180.
133 ‘Declaration by the Government of the United Kingdom and Northern Ireland on the definition of the term “nationals”,’ (1972b)
defined internally to British law. What from the perspective of other Community member states was a formally defined, unitary status common to those who had rights of free movement in the Community was still largely defined in British law by various criteria of status and descent. Of course the “Community citizenship” that British nationals were now entitled to itself only existed in an incipient form, thus far. In Chapter 5, after Union citizenship has been formally established, we will revisit the situation of an East African Asian who had been deprived, prior to the UK’s accession to the Community, of her (incipient) British citizenship and later tried to appeal to the formal category of Union citizenship.
Levin: further defining the worker

Nearly two decades after Unger, the Court would once more rule on preliminary questions referred by a Dutch court, this time the Raad van State in its role as the final court of appeal in immigration cases. The case had to do with the refusal of the Netherlands to issue a residence permit to Mrs. D.M. Levin, a British national residing in Amsterdam. The Dutch government claimed that Mrs. Levin, who had only part-time employment as a hotel chambermaid and earned less than the monthly standard subsistence norm, could not be qualified as a “worker”.

One telling contrast between this case and Unger’s however, was that this case was not really so much about the rights in the Netherlands of Levin herself. By this point in history (1981, when the preliminary questions were referred), it was already almost second nature on the part of member states to more or less automatically assume that migrant member state nationals (who could display a passport or an identity card proving that they had the nationality of a member state) had a right to stay, so it is clear that Levin didn’t really need a residence permit for herself. Rather, this case was about right to stay of her husband, who was a national of South Africa. Her husband aimed precisely to make use of the provisions of Community law that granted the family members of a Community citizen a right to stay, regardless of nationality. Thus, in order to answer the question of whether Mr. Levin was to be issued a residence permit, one had only to answer the question of whether Mrs. Levin was to be issued a residence permit.

To be sure, the language of the 1968 Directive still spoke of the issuance of a “residence permit” (e.g. in Art. 4(2) and (3)) to qualifying member state nationals (a word implying that the host member state was bestowing permission on them to stay), and it also spoke of the host member state “granting” a right of residence (Art. 1). Yet at the same time, it occasionally alternated with the term “residence document” (remarkably, for the non-member state national family member [Art. 4(4)]) and noted that the residence permit was not itself necessary to exercise the right to work (Art. 5: “Completion of the formalities for obtaining a residence permit shall not hinder the immediate beginning of employment under a contract concluded by the applicants.”), both of which point to a more automatically enjoyed right of residence on the part of member state nationals. In fact, the Court specifically ruled in its 1975 decision Royer that a residence permit in this sense is not constitutive of a right of residence, but rather only confirms a pre-existing right conferred on the basis of the Treaty.

Considering that the member states had formed a Community with each other, they may have been starting to accept that “foreign” member state

134  ECJ D.M. Levin v Staatssecretaris van Justitie (23 March 1982)
136  ECJ Jean Noel Royer (8 April 1976)
nationals were free to join the “community of solidarity”\textsuperscript{138} of a host member state. After all, once a state accepts that an alien has a right of residence, it is also implicitly pledging its willingness to provide social security to that alien; and the Dutch state, as we saw, ultimately had an obligation to provide social security to Unger. In this regard the traditional walls separating the nation-states in the Community were becoming more porous. However, for non-member state nationals, member states were less prepared to let them slip past the traditional barriers of immigration law to enter into the community of solidarity.

As to Mrs. and Mr. Levin, it was not their actual presence that the Dutch state feared so much as the prospect of having to show solidarity with a “foreign” member state national who might be unable to take care of herself, and worse yet with her husband, a third-country national. And in fact, in refusing Mrs. Levin her residence permit, the Dutch government admittedly based its decision on the fact that granting a residence permit would be in violation of the state’s “general interest”\textsuperscript{139}, since Mrs. Levin had not worked since 1978. (In this, the Dutch state had similar concerns to certain of the United States under the Articles of Confederation, which denied freedom of movement to “vagabonds” and “paupers”.\textsuperscript{140})

Besides, she had not worked full time and had not earned the minimum subsistence income. In subsequent filings, the Dutch government argued that the entire purpose of the Treaty was to enable member state nationals to contribute to the economic development of the Community and improve their standard of living at the same time. Since those engaged in full-time employment were generally assured by law of earning at least the subsistence income in the Netherlands, those who worked only part time could not be said to be improving their standard of living.\textsuperscript{141}

In addition, the Dutch government argued\textsuperscript{142} that the “subjective will to pursue an occupation” was necessary for a member state national to be qualified as a “worker”: in Mrs. Levin’s case, it went on, her subjective will was only to help her husband obtain a residence permit.

In its answers to the preliminary questions, the Court made short shrift of the Dutch government’s arguments, and went somewhat farther in Mrs. Levin’s favor than the European Commission’s position did. As to whether a member state

\textsuperscript{138} Schönberger (2005), p. 134.

\textsuperscript{139} ECJ Levin (23 March 1982), par. I.1

\textsuperscript{140} Cf. supra in Ch. 2 before n. 40.

\textsuperscript{141} Eijsbouts notes a tension in the Dutch word for “citizen”, \textit{burger}: on the one hand, this word refers to the political and legal citizen in the Roman tradition, the \textit{civis}; but on the other, it also refers to the \textit{bourgeois}, that basic unit of the middle class ever since the rise of the town, with a distinctive accompanying set of social and economic values. Eijsbouts (2002), p. 351-352. If any notion of citizenship played a role in these considerations of the Dutch government on the meaning of freedom of movement, it does seem to lean more heavily toward the latter notion, defined by the value of a certain standard of living.

\textsuperscript{142} ECJ Levin (23 March 1982), par. I.1
national engaged in part-time work with income under the subsistence level could be called a "worker", the Court referred expressly to Unger,\textsuperscript{143} stating that the concept of "worker" was a term of Community law and could not be defined by reference to national legal orders.\textsuperscript{144} The Court first referred to the ban on discrimination based on nationality.\textsuperscript{145} The Commission had already noted\textsuperscript{146} that nationals of the host member state were free to accept part-time work and to earn less than the subsistence minimum it would therefore be discriminatory to exclude “foreign” member state nationals from the ability to engage in the same activity.

The Court went on to cite the goals of the economic development of the Community and the improvement of the standard of living, but in a very different way than the Dutch government had: part-time work was in fact an effective means for many to improve their standard of living, and it would frustrate the useful effect of the Treaty to restrict member state nationals from engaging in any less than full-time work.\textsuperscript{147} We thus see the court citing a combination of two, interwoven norms. The first, speaking of the ban on discrimination based on nationality, was purely horizontal and based on formal equality with host member state nationals. The second, on the other hand, was a vertical one, identified by the reference to the “useful effect” (\textit{effet utile}) of the Treaty: this expressed a Community interest in granting a form of equality specifically to member state nationals who crossed borders to work.

The Court clarified this norm by setting a Community standard: in order for the member state national to qualify as a “worker” in the sense of Community law, the employment engaged in had to be “effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary”.\textsuperscript{148} The Court did not elucidate what kind of work did not qualify, but commentators at the time\textsuperscript{149} referred to a 1975 decision of an English court, \textit{R. v Secchi},\textsuperscript{150} in which an itinerant Italian national who had only done “casual work of the washing-up-in-restaurants type” in the UK was determined not to qualify as a “worker”. O’Keeffe noted that the Court’s somewhat vague qualification of “worker” would create problems for national immigration authorities, who would be required to determine on a case-by-case basis whether a member state national qualified.\textsuperscript{151}

Finally, the Court ruled on the claim of the Dutch government that Mrs. Levin could not qualify as a “worker” because she had only found a job in order to get her husband a residence permit; in other words, because working was not her main objective in the Netherlands. The Court ruled that as long as the

\textsuperscript{143} Supra n. 21.
\textsuperscript{144} ECJ Levin (23 March 1982), par. 11-12.
\textsuperscript{145} ibid., par. 7.
\textsuperscript{146} ibid., par. II.5(b)
\textsuperscript{147} ibid., par. 15.
\textsuperscript{148} ibid., par. 17.
\textsuperscript{150} Metropolitan Magistrate, Marylebone, \textit{R v Secchi} (25 March 1975)
\textsuperscript{151} O’Keeffe (1983), p. 578.
member state national “pursues or wishes to pursue an activity which meets the criteria specified above”, the member state national’s aims were irrelevant. Sufrin predicted, quite accurately, that the judgment in Levin would lead to member state nationals finding part-time work in other member states for the sole purpose of bringing in their spouses and other family members.

In that regard, Levin would be a harbinger of the type of cases involving right of residence that the Court would most often rule on in the future: there would only rarely be cases exclusively concerning whether or not a national of a member state herself was in danger of being deported or was to be denied a right of residence in another member state for not engaging in the proper sort of economic activity. Rather, in most of the cases to come regarding right of residence, the question of whether or not the member state national enjoys legal residence is really only a proxy for the question of whether or not her third-country national family member also has legal residence. This development would have much to do with the fact that Community law, which had always provided for the same right for family members to stay with mobile member state citizens, had stayed in the same place; but the national immigration laws of member states had changed in a direction that was increasingly concerned (as we already saw in the case of the United Kingdom) with shaping and defining the population to fit political ideals of what the “nation” was meant to be.

The impetus for this development in the legislation of member states was a demographic trend: to start with, the third-country nationals whose cheap labor member states had so eagerly made use of, especially from Morocco and Turkey, ended up not being the “guest workers” that they had once been expected to be. Many of them stayed in the long term, some becoming naturalized citizens of the member states. Moreover, decolonization led to many former colonial subjects of member states (or citizens of overseas territories of member states) to move to the European (former) metropoles to pursue economic opportunity or maintain their legal tie of citizenship (Algerians to France, Surinamese to the Netherlands, Commonwealth citizens to Britain). Member states introduced strict norms into immigration law that aimed to ensure that not only these first-generation immigrants, but the ensuing generation as well had to satisfy economic and sociocultural requirements for exercising rights of family reunification with foreign spouses and partners. It was hoped that those who could not satisfy these requirements would “return” to the country of their roots with their foreign family members. Member states would increasingly see the comparatively unregulated migration of family members of Community workers as a threat to these aims; and member state nationals, for their part, would increasingly discover

152 ECJ Levin (23 March 1982), par. 21.
154 Van Walsum (2008) explores in depth how these political aims in response to immigration were enacted in Dutch immigration and nationality law. Ch. 3 (p. 139-199).
Community law as a way to circumvent the strictures of member states’ immigration law.\footnote{See infra in Ch. 8, section “Substantively second-class Union citizens: Sedentary Union citizens” on p. 353}

But to return to what Levin said about the right of stay of the member state national herself, it could be said to represent a further development of the “incipient form of European citizenship” that Plender had cautiously heralded seven years prior; and indeed, Plender had predicated this development on, among other things, “the courts [rising] to the challenge presented by Articles 48 to 51 of the EEC Treaty [Art. 45 to 48 TFEU]”.\footnote{Plender (1976), p. 48.} With its decision, the Court had inserted substantial breathing room for the incipient European citizen into the interstices of national immigration law. On the one hand, the Court had established that the member state national’s engagement in employment or serious intention to engage in employment was an \textit{objective} criterion, not a subjective one, with the worker’s possible ulterior motives playing no role. This took away one basis for a host member state to arbitrarily or speculatively deny that a worker did not have legal residence. Only the lack of objective evidence that a member state national was working, such as pay slips or an employer’s statement, or evidence that the member state national was seeking work, could deliver grounds to deny a member state national legal residence.

At the same time, the Court reasserted the sole authority of Community law in evaluating this evidence: national standards of what constituted employment could not be applied, and while the Community standard was rather vague, it clearly excluded only the most absurdly minimal forms of employment. The vagueness, indeed the \textit{subjectivity} of this criterion (yet another reversal of what the Dutch government would have wanted, namely an \textit{objective} salary criterion) was another asset to the incipient citizen: for it would never be enough for a host member state to unilaterally assert that a foreign member state national was not engaged in “effective and genuine activities”. If the member state national were to dispute that, then the member state national would be at the very least entitled to a legal debate on that qualification before being ejected.\footnote{We can see echoes here of the vagueness of the provision that determines under what circumstances a member state can expel a migrant member state national (\cf{supra} in Ch. 5 at n. 81).} The threat alone of so many casuistic discussions snarling the courts and the administrative apparatuses of a host member state was almost bound to tip the scales in favor of at least a preliminary benefit of the doubt of legal residence for the working foreign member state national, indeed to a certain extent for other foreign member state nationals who could prove their nationality with a passport or an identity card.

Yet at the same time, the rights of residence and non-discrimination for member state nationals and their family members were still suspended from a

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155 See infra in Ch. 8, section “Substantively second-class Union citizens: Sedentary Union citizens” on p. 353


157 We can see echoes here of the vagueness of the provision that determines under what circumstances a member state can expel a migrant member state national (\cf{supra} in Ch. 5 at n. 81).
thread, be it ever so slender, of being a “worker” or equivalent to one (and now there was a Community definition of that equivalence) on the basis of Regulation 1251/70: for member state nationals who had either already worked for three years in the host member state, become disabled while working, reached retirement age while working, or who were frontier workers, working in one member state while living in another member state.

“Reverse discrimination”: Morson and Jhanjan

A curious effect of cross-border equalities for mobile member state nationals, as we already briefly noted, is that they can lead to a paradoxical inequality to the disadvantage of nationals of the host member state. Unger, as a temporarily unemployed person covered by a work-related health insurance plan, was able to go on short trips abroad without fear of not having emergency medical care be covered; her Dutch neighbor (or even her Dutch husband), if in the same situation, was not covered. Levin, by satisfying a fairly minimal definition of being a “worker” in the sense of Community law in the Netherlands, likewise was able to secure a right of residence for her third-country national husband. But a Dutch co-worker of Levin’s, who was working at the same hotel, doing the same kind of work would almost certainly not have been able to have been able to do the same for his or her third-country national spouse.\textsuperscript{158}

As it happened, just over a half a year later, the Court handed down a decision\textsuperscript{159} about the unequal treatment that two family members of Dutch nationals had been subjected to in this regard. They were both nationals of Suriname (which since 1975 was independent from the Netherlands) and the dependent parents of Dutch nationals, and they claimed the applicability of Art. 10 of the 1968 Regulation on freedom of movement of workers, since each of their respective adult children could be qualified as a “worker” in the sense of Community law. They claimed, referring to a 1979 article on the subject,\textsuperscript{160} that this constituted a form of “reverse discrimination” against host member state nationals in the Community.

\textsuperscript{158} We can refer to the archive of Dutch migration policy kept by the Centre for Migration Law to find out what the applicable provision would have been at the time Levin was decided. Chapter C/XL.B.2.e of the Vreemdelingen circulaire 1966 [Aliens’ Circular 1966], in the version that entered into force on 2 September 1982, provides, among other things, that one of the requirements for admission of a spouse is that the Dutch citizen in question has to have “sufficient means of subsistence”, which is defined as the indexed subsistence minimum for a couple, excluding any public assistance payments that the Dutch citizen might happen to be receiving. This happens to be more or less the same income standard that the Dutch state had wanted to hold Levin to for her qualification as a “worker”. Vreemdelingen circulaire 1966, Part C, Chapter XI-B, 33rd revision <br />, (Staatssecretaris van Justitie 2 September 1982)

\textsuperscript{159} ECJ Morson and Jhanjan v. The State of the Netherlands (27 October 1982)

\textsuperscript{160} Mortelmans (1979)
The Netherlands and the United Kingdom (intervening) insisted that the Regulation only applied, according to its own text, to the “worker who is a national of one Member State and who is employed in the territory of another Member State”. A national of a member state who had not left that member state to work was therefore entirely subject to the immigration law of his own member state when it came to her third-country national family members.

The Commission’s arguments were somewhat more nuanced, but implied the same result for the plaintiffs. The Commission said that the Regulation had to be applied equally to nationals of a host member state and nationals of another member state who had come there to work. However, the Regulation did not apply to a situation that was “purely internal” to the host member state, “for example where the worker concerned has spent all his working life in the Member State in question”. (If the logical connection between these two statements appears a bit cryptic at first, please bear with us.)

The Court made a ruling that came down to the same result as both the member states’ and the Commission’s arguments, but it did not unequivocally embrace either of their arguments. The Court ruled that

- Community law does not prohibit a Member State from refusing to allow a relative […] of a worker employed within the territory of that State who has never exercised the right to freedom of movement within the Community to enter or reside within its territory if that worker has the nationality of that State and the relative the nationality of a non-member country.\footnote{ECJ Morson and Jhanjan v. The State of the Netherlands, (27 October 1982), par. 18}

The Court’s arguments supporting its ruling were teleological: Articles 7 and 48 of the Treaty [Art. 18 and 45 TFEU] aimed to ensure freedom of movement in the Community. The Dutch children of the plaintiffs were not making use of their freedom of movement, therefore nothing about the case could be “link[ed] […] with any of the situations governed by Community law”\footnote{ibid., par. 16} and the Treaty was not applicable.

Notably, the Court implicitly rejected the textual justification advanced by the member states, which obviously represented the interest of the “Europe of the states”: i.e., “we decided on the text as it stands, so it must be literally applied”. Yet nor did the Court adopt the idealistic language of equality that the Commission had wrapped its arguments in, which at least implicitly was based on the notion that there existed some kind of Community citizenship and that all citizens were entitled to equal application of Community law.

How, then, had the Commission been able to argue for equal applicability of Community law on freedom of movement, and yet still conclude that it did not apply to the adult children of Morson and Jhanjan? In fact, all of the parties involved were consciously framing their arguments by reference to a 1979 decision of the Court,\footnote{ECJ Knoors v. Staatssecretaris voor Economische Zaken (7 February 1979)} which we initially skipped here in order to heighten the dramatic
tension between the cases of Levin, on the one hand, and Morson and Jhanjan, on the other.

**Bringing cross-border equality back home**

*Knoors*

*Knoors* was the first case in which a member state national had successfully been able to invoke a cross-border equality of Community law against the member state of his own nationality. Knoors was a Dutch national who had lived in Belgium for a number of years and learned a trade there, plumbing and heating, from working as an employee in that field. Now Knoors owned his own business in that trade in Belgium, close to the Dutch border, and he applied to the Dutch authorities for an exemption on having to obtain a Dutch certification to be allowed to do work in the Netherlands. He based his application on the relevant Dutch law on establishment, which expressly provided for the possibility of obtaining an exemption from the need to obtain authorization to practice a trade if Community law so provided, together with Directive 64/429, which provided for the abolition on all restrictions on establishment for nationals of one member state wanting to engage in self-employed activity in another member state. Furthermore, the transitional measure Directive 64/427, applying to certain trades including Knoors’ own, provided that a host member state requiring specific qualifications for a given trade was to accept—as equivalent to those qualifications—a certain number of years of experience working in the trade in another member state.

Before the Court, the Dutch government countered this first with a strictly textual reading of Article 52 of the Treaty [Art. 49 TFEU], which provided for the abolition of “restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State”. This, according to the Dutch government, meant that it precisely did not apply to nationals of a member state seeking to establish themselves on the territory of their own member state. Therefore, those nationals of the host member state could not be understood as beneficiaries of the Directives.\(^{164}\)

The Dutch government went on to present a point of view that flatly refused to recognize the provision of Directive 64/427 concerning the equivalence of a number of years of experience to a qualification as a specific form of cross-border equality, i.e. a vertical norm of Community law, that member state nationals establishing themselves in another member state were entitled to. The Dutch government claimed that abolishing restrictions on establishment was really about equality in terms of pure non-discrimination (i.e. a horizontal norm), since Article 52 [Art. 49 TFEU] provided that migrating member state nationals could establish themselves “under the conditions laid down by the law of the

\(^{164}\) ibid., p. 404 of the English Official Report.
country of establishment for its own nationals”. If Dutch citizens were required to obtain a qualification to practice a trade, it reasoned, then nationals of other member states “must comply with the same conditions”. It was anyhow undesirable to allow member state nationals to abuse what was intended as a transitional measure in order to be able to obtain an exemption from an objective qualification in a host member state, which the host member state undoubtedly had a public interest in requiring.165

The Commission’s rebuttal of the Dutch government’s position was threefold as to the text, the practical interest at stake, and a more ideal (but also practical) principle at stake. The text of Directive 64/427, which spoke only of “nationals of Member States” as its beneficiaries, left no room for an interpretation excluding nationals of member states establishing themselves in the member state whose nationality they possessed. Rather, it was meant to benefit all member state nationals coming from one member state to another to pursue their activity. The Commission went on to shift the focus from the specific text of Article 52 [Art. 49 TFEU] of the Treaty and instead take the “principles” of Articles 52 and 59 (regarding the free supply of services [Art. 56 TFEU]) and the “general objectives” of the Treaty into account, specifically of creating “a single large market” for all of the nationals of the member states to pursue their livelihoods. But finally, the Commission went on to cite a principle that could be implicitly derived from a notion of citizenship and the idea that the accumulation of equality can only go forwards, not backwards: legal certainty. Member state nationals who move to another member state and acquires a qualification there must have, “for themselves and their children, the certainty that they may resume, if they desire, a trade in their country of origin”.

The Court largely followed the line of the Commission, ruling that

The nationals of all Member States must be able to avail themselves of the liberalizing measures which [the Directive] lays down, provided that they come objectively within one of the situations provided for by the directive, and no differentiation of treatment on the basis of their residence or nationality is permitted.166

The equalities of Community law were therefore not just about ameliorating the disabilities of alienage (in which case a national of a member state would not be able to invoke Community law), but rather about equally enabling all nationals of member states to enjoy the protection of Community law if it covered their objectively demonstrable situation.

The Court additionally parried the argument of the Netherlands as to the undesirability of the equivalence based on years of experience with a quite practical argument: the specific conditions of the years of experience as set by the Directive had the precise effect of ruling out the possibility of abuse. The Court reminded the Netherlands, moreover, that the Council was always free to

166 ibid., par. 17.
harmonize the legislation of the member states on trade qualifications.\textsuperscript{167} (Anyhow, it had been something of an odd argument on the part of the Netherlands to argue for the non-applicability of a norm of which it itself had been co-legislator in the Council. We see in its argument both an echo of the old intergovernmental thinking, which sees a treaty norm as ultimately subservient to state interests, and the split personality that a national government has in both participating in the Council and defending one idea at the European level, but going home and defending another idea at the level of the national politics of the member state.\textsuperscript{168} The Court provided the Netherlands with a convenient fig leaf in this case, both with the primacy of Community law, already asserted in \textit{Costa/ENEL}, and by not rubbing the Dutch government’s face in the fact that it, or at least its predecessor in 1964, had helped to institute the contentious norm.)

As to the legitimate expectations of the citizen, the Court ruled in line with the Commission, but from a different angle, not making any use of an idea of legal certainty implicit in citizenship, but rather ruling more teleologically, in terms of the objectives of the Community:

\begin{quote}
In fact, these liberties, which are fundamental in the Community system, could not be fully realized if the Member States were in a position to refuse to grant the benefit of the provisions of Community law to those of their nationals who have taken advantage of the facilities existing in the matter of freedom of movement and establishment and who have acquired, by virtue of such facilities, the trade qualifications referred to by the directive in a Member State other than that whose nationality they possess.\textsuperscript{169}
\end{quote}

This was therefore the first time that a member state national was able to invoke Community law against his own member state, thereby abolishing “reverse discrimination” against member state nationals returning to their own member state from another one.\textsuperscript{170} Admittedly, as Lenaerts writes, the Court’s abolition of reverse discrimination in this case is not so much based on the principle of equality as it is a functional extension of the economic liberties supporting the common market. We can at least partly concur with that point of view and rephrase it in our terms: \textit{Knoors} was not about applying “equality” in the sense of a horizontal norm of non-discrimination (in fact, Knoors would not have won his case if pure non-discrimination within a destination member state had prevailed), but about equally applying a vertical, cross-border norm.

This was yet another incremental step in the unmooring of Community law from the tethers of the member states, which might have otherwise expected to ever have the Treaty (and indeed, their own nationals) under their control. This was also the opening that Morson and Jhanjan later tried to make use of: it may have looked, after \textit{Knoors}, like there was a possibility that norms of Community

\footnotesize
law might become applicable to nationals of all the member states as “Community citizens”, no matter what their situation. As we saw, the Court did not confirm that point of view in Morson and Jhanjan: for Community law to apply to a member state national, that person had to be in a situation that could be linked to Community law. In one way or another, that situation would have to be a cross-border situation. Thus, the cross-border equalities granted as vertical norms by Community law were, for the time being, to only apply across borders.

To return to Morson and Jhanjan, however: we see that the Court refused to recognize the situation of their member state national children as being a cross-border situation covered by Community law. However, the Court did not give any definite clue as to whether a cross-border situation as in Knoors could lead to the applicability of vertical Community norms concerning a right of residence for family members. The Court’s ruling in Morson and Jhanjan was tantalizingly narrow since it was an answer in the negative, saying only that Community law “does not prohibit” a member state from denying a right of residence to the family members of a worker if that worker has never made use of the right of freedom of movement and “if that worker has the nationality of that State and the relative the nationality of a non-member country.”

It was therefore a bit unclear if the third-country national family members of a national of a member state, returning to that state from working in another member state (like Knoors), would get a right of residence, or if the fact of the worker being a national of that member state would still carry the day against the applicability of Community law. Evans, writing not long after Morson and Jhanjan was handed down, speculates that the Court might find a member state’s interest in preventing its own nationals from circumventing national immigration law to be sufficiently compelling for the Court not to allow Community law to be applied to that situation.171

Surinder Singh

It would take ten more years for the Court to confirm that the right of third-country national family members to remain with a cross-border worker was in fact a vertical, cross-border norm that applied with little difference from the norm on trade qualifications that Knoors had relied on.172

Surinder Singh was the Indian husband of a British citizen, Rashpal Purewal, who had gone to Germany to work in employment; he had accompanied her there and had had the right to stay in Germany as the spouse of a working member state national. They returned to the United Kingdom, where she


172 ECJ The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department (7 July 1992)
established a business, and divorced shortly thereafter. Singh asserted that he had the right to continued residence, based on Directive 73/148, as the ex-spouse of a worker under Community law. Singh (or his Queen’s Counsel, really, who was none other than Richard Plender) and the Commission based their claim on Article 7 of the Treaty [Art. 18 TFEU], i.e. the non-discrimination provision, and Article 52 (freedom of establishment) [Art. 49 TFEU], saying that Purewal had to be treated equally to any member state national from another member state who established a business in the United Kingdom.

Unsurprisingly, the British government disputed Singh’s claim, saying that only British law applied to the situation of the (ex-)spouse of a British citizen. The British government further echoed the Dutch government’s argument in Knoors that any confirmation that Singh had a right to stay based on Community law would encourage circumvention of national laws that were there for a good reason: in this case, it would encourage fraud and entering into sham marriages. It furthermore argued that considering Purewal, a British citizen, to be covered by Community law would have the paradoxical consequence of allowing Purewal to be deported for reasons of public order, public health, or public security (in other words, the British government implied that Purewal would have to be considered an alien, like nationals of other member states coming to the UK).

The Court ruled, however, that because Purewal had been a worker in the sense of Community law in Germany, her return to the UK was not merely a return to her home country, but rather was a use on her part of the freedom of movement of workers within the Community (par. 23). Memorably, the Court ruled, it would have a deterrent effect on member state nationals’ use of that freedom if they could not be certain that family members who had accompanied them to a host member state would be able to return with them to the home member state under the same conditions (par. 20). Rebutting Britain’s suggestion that entitlement to Community law would render Purewal an alien subject to deportation, the Court noted that as a national of the United Kingdom, she had a right based on international law not to be expelled from or denied entry to the UK. Thus her rights under Community law were additional to her rights as a British citizen and did not subtract from them.

Notably, the Court did not bite on the Commission’s and Singh’s suggestion that the applicability to Purewal of Article 52 [Art. 49 TFEU] was to be viewed in conjunction with the non-discrimination principle relative to other member state nationals. It may have been so that Plender (on behalf of Singh) and the Commission wished to obtain a ruling that formally grounded Purewal’s

173 The Court had long ago cited this same principle of international law to a rather different effect, justifying the effectively discriminatory treatment of denying a member state national the right to work on the same basis as a host member state national where the migrant member state national posed a threat to public order, public health or public security, since this principle provided the necessary basis for national laws regarding the admission and residence of aliens (i.e., they could always be expelled to their home country). ECJ Yvonne van Duyn v. Home Office (7 July 1972) par. 22
rights on the very principle of equality that Lenaerts had been missing in *Knoors*,174 thereby laying an even stronger foundation for a notion of Community citizenship, i.e. the equality of all member state nationals as a vertical norm. Instead, the Court grounded its ruling solely on the freedom of movement as a vertical norm and the objectives thereof.

Yet at the same time, the Court’s choice of language in describing the effect of not equally applying Community law to a returning member state national as *deterring* that person from making use of her freedom of movement is striking: by contrast to its decision in *Knoors*,175 the Court here expressly refers to the subjectivity of a mobile member state national, rather than to a more abstract notion of the “realization of liberties”. In this it can be seen to, perhaps consciously, echo the argument of the Commission in *Knoors*, which identified *legal certainty* as a key principle to be safeguarded.

Anyhow, *Surinder Singh* was a decision of the Court that was handed down on the very threshold of the foundation of the European Union and the formal introduction of European Union citizenship by the Treaty of Maastricht. The Treaty had already been signed on 7 February 1992, exactly five months before *Singh* was handed down, and would enter into force on 1 November 1993. Henceforth, it would not be necessary to try to construct *a de facto* “citizenship” out of the bundle of equalities enjoyed by member state nationals; and it would become at least theoretically possible to try to deduce new forms of equality from the formal status of Citizen of the Union.

174 *Supra* at n. 170
175 Cf. *supra* at n. 169
Chapter 7: The Maastricht Treaty introduces European Union citizenship *de jure*

Moving toward formal citizenship

I will begin the history of European Union citizenship some time before its introduction, with the proposals for political action that aimed to vertically confer a status or formal rights, in order to either consolidate the grab bag of equalities that went with freedom of movement or to grant the citizens of the member states a more tangible feeling of common identity. The “Europe of Citizens” so far, as we have seen, was really a “Europe of Lawyers”, based on an only indirect idea of citizenship.\(^1\) It should be obvious that the “civil servants” of the institutions of the Community had an interest in using citizenship to open up a direct line to the nationals of the member states; but various member states—and even occasionally all the states at once—also recognized opportunities in enlisting the citizens in the European project by more formally recognizing them as European “citizens”.

One of the most commonly repeated suggestions for introducing a more tangible citizenship was to grant citizens of member states political rights when they were living in member states other than their own. The first territorial expansion of the Community, by the accession of the new member states the United Kingdom, Ireland, and Denmark, (with the minor setback of Norway, at the last minute, rejecting accession in a referendum), buoyed ideas of deeper integration. In October 1972, the first joint summit of the government leaders after that accession took place. Belgium and Italy suggested granting mobile member state nationals the right to vote in and run for office in local elections. Italy’s interest in mobilizing citizens for the European project, given its historically “federalist” bent and its diaspora of mobile nationals, should already be obvious. But the Council as a whole embraced the idea of increasing the democratic content of the Community, likely as a pointed contrast to the state of affairs in socialist Eastern Europe.\(^2\) In any case, there was a broad consensus that the European Parliament, which until that point was merely a pool of national parliamentarians, should be directly elected and should also gain more powers.\(^3\)

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3 This “consensus”, at least, had become possible after De Gaulle had tried and failed to pull France out of the Community (the so-called “empty chair crisis”) out of his opposition to, among other things, granting the European Parliament real powers. Van Middelaar (2013), p. 54–62.
By the summit in Paris in 1974, the last such meeting to still be called a “summit” before the foundation of the European Council, further ideas for involving citizens had become quite ambitious. These included establishing a passport union, harmonizing immigration law (as to third-country nationals), and abolishing passport controls. The Italian delegation was the first to utter the name of the “holiest of holies” that all of these other ideas had only been orbiting around: it asked when European citizenship could be granted to the citizens of the member states. The result of this summit was that Belgian prime minister Leo Tindemans was given the assignment to study these proposals and write a report.\(^4\)

The resulting report\(^6\) had an ambitious title (European Union) but, true to form for a report coming more from the perspective of the states, had fairly modest goals for the citizens when compared to another report\(^7\) that had previously come out from the European Commission, titled “Towards European Citizenship”. The “civil servants’” report, in its first part had mooted the introduction of a “European passport”: and of course, this ambition was realistic as to any vertical goals, recognizing that “[i]t cannot be imagined that the Member States would in the near future grant the Community authority to issue passports, and that this authority would be recognized by the international community.” The European passport was to mean only a harmonization of the appearance of the passports of the member states, which would have a “psychological effect” on the citizens of the member states “of belonging to the Community”.\(^8\) In the second part of the report, the Commission proposed granting “special rights” to mobile citizens of member states, essentially political rights. Again, it did not make itself any illusions that “complete assimilation with nationals as regards political rights”, especially as regards eligibility for election on a national level, could be achieved in the short term, but it did see political rights on a municipal level as feasible.\(^9\)

Tindemans, in the section of his report titled “A People’s Europe” (in French, notably: “l’Europe des citoyens” [italics added]), and in the subsection “External signs of our solidarity”, supported the abolition of frontier controls “as a corollary of passport union”, as the Commission had. He stopped short of suggesting the introduction of reciprocal political rights, however, but did propose making Europe vertically relevant to the citizen in the areas of consumer and environmental protection. He also suggested making cross-border medical

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\(^4\) …which was more than merely a new name for the periodic summit, but rather an institutionalization of the “intermediate sphere” that the national governments existed in when they were meeting neither as the Community institution of the Council, nor as states at an intergovernmental conference. ibid., p. 23, 30.


\(^6\) ‘European Union: report by Mr Leo Tindemans, Prime Minister of Belgium, to the European Council’, (1976)

\(^7\) Commission of the European Communities (1975)

\(^8\) ibid., p. 9.

\(^9\) ibid., p. 28-29.
treatment easier and promoting student exchanges. Van Middelaar identifies the Tindemans report as the birth of the “Roman” strategy for enlisting support for the Community: finding “customers” for the Community by doing its citizens favors. In fact, it was in this report that the oft-repeated catchphrase, that Europe had to be “close to the citizens”, was first uttered.

For its part, the not-yet-directly elected European Parliament had also been pushing for more rights of citizenship. In August 1975, frustrated by the inaction of the Council, the Parliament (with a center-left majority) had adopted a resolution on European Union that called on the member states to draft a “Charter of Rights of the Citizens of the European Community”, including the right to vote and eligibility for office in local elections. Two years later, subsequent to a report by its political committee under leadership of Mario Scelba, it adopted another resolution calling for extensive rights for citizens, including suffrage rights not limited to local elections, and integration of fundamental rights into the treaties. The European Parliament would, unsurprisingly, become an ever-greater supporter of the idea of citizenship after its election by direct suffrage was finally realized in 1979.

In that same year, the Commission drafted a directive to realize a freedom of movement for member state citizens that was finally cut loose from their engagement in economic activity. However, rather than repealing the existing norms on freedom of movement based on economic activity to replace them with one consolidated norm based on citizenship, this draft directive merely aimed to supplement the existing norms. In other words, as it was, freedom of movement was not granted to persons as such, but rather to categories of actors such as “workers”, “self-employed”, etc.; this was merely to be a new category of persons not covered by the other categories.

Significantly, the Commission chose as a legal basis for the directive Art. 235 of the Treaty [cf. Art. 352 TFEU], which allowed the Council to pass “necessary” measures that the Treaty had not provided an explicit basis for, but required a unanimous vote. The Commission considered that the only provision of the original Treaty mentioning freedom of movement of persons, Article 3(c) [cf. Art. 3(2) and (3) TEU, which could at best be considered to be distant

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11 Van Middelaar (2013), p. 253-254. The other two strategies Van Middelaar identifies are the “German” strategy, named after one of the most successful models of building national identity in European history, which aims to have the ruled identify themselves with their rulers based on cultural or historical factors; and the “Greek” strategy, referring to the democracies of ancient Greece, which aims to have the population feel like owners of their political community. P. 223-224.
13 See, for the history of direct elections to the Parliament, Shaw (2008), p. 163-165.
descendants], that “the activities of the Community shall include […] the abolition […] of the obstacles to the free movement of persons, services and capital”, provided no basis for the Council to legislate on the issue. Magnette notes, critically, that this choice represented a departure from the concept of the “Europe of the citizen” that had been ascendant since the 1974 Paris summit, which held that the introduction of further citizenship rights eminently served the functional interests of the Treaty. In other words, choosing Art. 235 [cf. Art. 352 TFEU] as the basis for additional rights of residence implied that the member states would have to “endow” citizens with rights of residence on the member states’ say-so, not because there was any notion of citizenship already inherent in the Treaty.15

As to the content, in a further nod to the hesitant member states, the draft directive provided for a host member state to be able to require that mobile citizens who didn’t fit into one of the existing categories be able to provide proof of having sufficient resources and health insurance. The Parliament attacked the proposed measure for too highly circumscribing this right of residence to give it much meaning.

But even this cautious step was one too far for the political climate of the time. The Euroskeptic Margaret Thatcher had just become prime minister of the UK, and the Council was already anticipating accession of the poorer Mediterranean states Spain, Portugal and Greece (which in fact had already been some of the favorite sources of third-country national workers in the Community, and represented sizeable communities already living in the Nine).16

Nonetheless, the realization of another of the oldest dreams in the European integration project, predating the Community,17 was in fact finally put into motion in 1981: the “Representatives of the Governments of the Member States of the European Communities, meeting within the Council” resolved18 to introduce a passport of uniform design, as a measure to “strengthen the feeling among nationals of the Member States that they belong to the same Community”.19 The long-winded name for the group that made this resolution refers to none other than the member states meeting, not as the Community institution of the Council, and not entirely as an intergovernmental conference, but as the old club of players in Van Middelaar’s “intermediate sphere” (to the pointed exclusion of the President of the European Commission, who otherwise was a member of that slightly more inner-oriented club, the European Council).

Following up on this resolution some time later, the Council and the representatives of the governments of the member states (thus now with a bit more of a Community character) resolved on 19 June 1984 to abolish all checks at

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16 Maas (2007), p. 34.
17 Cf. supra in Ch. 5, at n. 34.
internal borders for nationals of member states; or at least, in the absence of truly open borders, to more or less wave through holders of the uniform passport.20 A core of member states, however, was ready to completely open the borders. On 14 June 1985, France, (West) Germany and the three Benelux states (five of the original Six) signed the Schengen Accord at the village of the same name in Luxembourg; committing by 1990 to the complete dismantlement of border posts and the institution of a common border control policy for their common external border.

Meanwhile, there had been further movement in the European Parliament, spurred on by one of the earliest true idealists of the “Europe of the citizens”, Altiero Spinelli.21 The Parliament’s 1984 Draft Treaty establishing European Union (DTEU)22 called for a citizenship of the Union, which all citizens of the member states would share.23 Article 3, providing for this citizenship, primarily aimed to add a long-lacking political dimension: “Citizens of the Union shall take part in the political life of the Union in the forms laid down by this Treaty…”; while Article 47 echoed the freedom of movement provisions of the Community treaty, but any reference to “workers” was now gone, to be replaced with “persons”. The Fontainebleau European Council of June 1984 instituted two committees to further elaborate the notions of citizenship and Union, chaired by Italian MEP Pietro Adonnino and Irish senator James Dooge, respectively.24

The report by the “ad hoc Committee on a People’s Europe”, titled “A People’s Europe” (more commonly known as the Adonnino Report; again, notably, the French name of the Committee and title of the report referred to “l’Europe des citoyens”),25 largely revived and consolidated the 1975-76 proposals of the Tindemans report and “Towards a European Citizenship”. As to proposals to strengthen European identity, the Adonnino report repeated the Tindemans report’s idea of fostering educational exchange (this idea, which held that mobile students would be the Europeans of the future, ultimately became the Erasmus program), and also added that there was a need to introduce a European flag and anthem. As to freedom of movement: the Commission’s report had only emphasized freedom of movement in terms of removing border controls; but perhaps now that that goal seemed to be realistically within reach, the Adonnino report now cautiously revived the Commission’s 1979 notion of a “general right of residence for all citizens of the Community”. However, this right was still to be

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20 Resolution of the Council and the representatives of the Governments of the Member States of the European Communities, meeting within the Council of 19 June 1984, (19 June 1984)
21 Cf. supra in Ch. 4, at n. 52.
22 ‘Draft Treaty establishing a European Union’, (a)
24 ibid., p. 35.
25 ‘A People’s Europe: Reports from the ad hoc Committee’, (1985)
subject to the condition that they “not become an unreasonable burden on the public purse in the host country”.  

**Gravier and the constitutional struggle to establish a vertical citizenship through equality**

So far, we have reviewed the political developments toward establishment of a vertical citizenship from the “inner sphere” of the institutions of Community and the “intermediate sphere” of the member states acting jointly in a Community spirit. At the time of foundation of the European Economic Community, we saw that the initial developments toward the foundations of something resembling citizenship arose largely from the idealistic interests of the Commission interacting with the more prosaic interests of certain member states (Italy, in particular). The political structure thus established was then sealed as a proto-citizenship by the pronouncements of the Court.

By 1985, the constitutional players involved have become much more diverse: the Court has established its authority, the Commission (now under the leadership of Jacques Delors) has become more confident, the Parliament is directly elected, there are now more member states, and, importantly, there is now a legal discourse that has been elaborated by academics and by lawyers representing the interests of citizens. In short: the impetus for establishing a European citizenship no longer comes solely from the Commission and the member states. From this point forward, we will see decisions of the European Court of Justice gain in importance. The further embellishment of the existing *de facto* Community citizenship on the part of the lawyers (through the Court and through academic debate) will in turn put pressure on the political players in the Community and influence the form that European Union citizenship *de jure* was to take.

In particular, one citizen, the Frenchwoman Françoise Gravier, would bring a case,  

26 ibid., p. 14.

27 ECJ Françoise Gravier v. Ville Liège (13 February 1985)

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26 ibid., p. 14.

27 ECJ Françoise Gravier v. Ville Liège (13 February 1985)
Gravier appealed the rejection decision to the local tribunal, asserting a violation of the ban on discrimination based on nationality enshrined in Art. 7 EEC Treaty [Art. 18 TFEU] and the freedom of movement for services based on Art. 59 of the Treaty [Art. 56 TFEU]. The tribunal stayed the proceedings and asked the Court of Justice in a preliminary question whether member state nationals who lived in another member state purely for the purpose of vocational training were covered by the ban on discrimination based on nationality.

The Belgian state and the French Community, the federal region of Belgium ultimately responsible for education in Liège, argued that there were more foreign students in Belgium than Belgian students abroad: therefore it would create a fiscal imbalance for the Belgian state not to charge students who were not taxpayers and whose parents were not taxpayers. They argued for an interpretation of the non-discrimination principle to the disadvantage of foreign students like Gravier (i.e., they argued for substantial equality in terms of burdens): after all, they were only being asked to pay what Belgian students had paid by other means.28

The Commission duly noted that Belgium was in fact the member state with the highest percentage of students from other member states. But it also noted that the cost of higher art education in Belgium was effectively borne by foreign students and not by Belgian students. Although in some exceptional cases, citizens of other member states did not have to pay the fee for studying in Belgium, the existence of the general rule pointed to a formal inequality between citizens of Belgium and citizens of other member states, which was thus a violation of Art. 7 [Art. 18 TFEU], considering that vocational training fell within the purview of the freedom of movement of workers, establishment and services in the Treaty.29

The United Kingdom and Denmark, intervening, were clearly concerned about what the potential implications would be of Gravier’s claim being granted. They argued that Art. 7 [Art. 18 TFEU] did not preclude a member state from treating its own nationals more favorably in the area of education, especially with regard to the financial aspects of education. For good measure, they denied that Gravier could be qualified as a recipient of services in the sense of the Treaty.30

The Court did not see the need to rule on Gravier’s claim that she was a recipient of services. Instead, it noted that education was “not unconnected with Community law”: it pointed to the fact that workers and their children were entitled to equal access to vocational training on the basis of Regulation 1612/68. Furthermore it pointed to the programmatic provision in Art. 128 of the Treaty [cf. Art. 166 TFEU] that the Council was to establish a common vocational training policy in order to contribute to the development of the common market.

28 ibid., par. 12.
29 ibid., par. 13-15 and 17.
30 ibid., par. 16.
The Council had in fact gone on to establish these general principles in Directive 63/266, which stated that “the general principles must enable every person to receive adequate training, with due regard for freedom of choice of occupation, place of training and place of work”, and had taken other steps on the basis of Art. 128. But in case these considerations might have been seen as little more than references to the spirit of the Treaty, the Court topped off its considerations with a plainly teleological one:

The common vocational training policy referred to in Article 128 of the Treaty is thus gradually being established. It constitutes, moreover, an indispensable element of the activities of the Community, whose objectives include inter alia the free movement of persons, the mobility of labour and the improvement of the living standards of workers.

Vocational training, therefore, fell within the scope of the Treaty, and charging nationals of other member states a fee constituted discrimination based on nationality in the sense of Art. 7 [Art. 18 TFEU].

This made many member states’ worst nightmare come true: economically inactive students migrating from other member states would find that the principle of equal treatment was a “lucrative source of rights”, to use O’Leary’s title of a chapter she wrote on this subject. Admittedly, Gravier had only to do with the terms of access to vocational training; it did not, on the surface of it, entitle economically inactive students to student financing or maintenance grants from a host member state. But the entire floor of the Community was now tilted to the disadvantage of member states with well-funded educational systems that did not charge their own nationals any, or not charge a high tuition for vocational training. (Not even in the United States, which normally rigorously enforces equality for citizens migrating from one state to another, do mobile citizens immediately get the right to the so-called “in-state” tuition at state universities that is reserved to longer-term residents of the destination state. Yet that was now the case in the European Economic Community.) And in fact, certain member states’ institutions of vocational training had in fact come to rely on contributions from foreign students: Belgium, in particular, stood to suffer a serious financial blow if students from other member states who were already enrolled were to apply for a refund of the “minerval” they had already paid. This development (while it may have inspired the Adonnino commission to see students and educational exchange as the future of Europe) almost certainly made certain member states now extremely allergic to the Commission’s proposal to introduce a general right of residence for nationals of

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31 ibid., par. 18-26.
32 O’Leary (1997)
33 Schönberger (2005), p. 400, referring to Vlandis v. Kline, (1973), which confirmed the right of destination states to impose a minimum residency requirement for the so-called “in-state” tuition. See also supra in Ch. 4 at n. 157.
34 O’Leary (1997), p. 124-127. O’Leary goes on to review Belgium’s subsequent attempts to circumvent Gravier one way or another, only to be put in its place once more by the Court.
member states. And in the final negotiations in December 1985 for what was to become the Single European Act, the first major Treaty revision (which went into effect on 1 July 1987), the DTEU’s proposal to introduce a European citizenship had to be sacrificed in order to salvage the goal of a single European market; for that matter, proposals for liberalizing the provisions on the freedom of movement of persons also failed to make the cut.35 The DTEU, in what was to be a directly effective provision, had replaced freedom of movement of workers with freedom of movement of persons; but this was to survive in the SEA as only a semi-programmatic provision, to be inserted into the EEC Treaty as Article 8a [Art. 26 TFEU], that

The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992 […] comprising an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.

Thus it is clear that everything had been moving a bit too fast for the Ten: moreover, the SEA was drafted on the threshold of the accession of Spain and Portugal in 1986 (Greece had already acceded in 1981), which may have changed the older member states’ feelings about the value of unrestricted freedom of movement. The accession treaties for Spain and Portugal had already included transitional measures (echoing previous measures adopted with the Greek accession) allowing member states to suspend the freedom of movement of workers with regard to Spanish and Portuguese citizens (and in a nod to formal equality, for Spain and Portugal, with regard to other member states’ citizens) until 31 December 1992.36

The Court, for its part, later seemed to recognize that Gravier might have been a rather impolitic decision. Less than three years after Gravier, the Court limited the retroactive effect of Gravier in another decision,37 citing the importance of legal certainty for the member states: in particular, less than a year before Gravier was decided, the Commission had advised Belgium that it saw no problem with the “minerval”. At the same time, however, the Court did also clarify that it considered “vocational training” to include purely academic university curricula as well, thus dashing any hopes on the part of member states that that concept would remain of limited breadth.

Gravier continued to embolden legal thinkers who imagined that they saw the Court finally liberating equal treatment based on Art. 7 of the Treaty [Art. 18 TFEU] from the limited Treaty scope of freedom of movement for workers, establishment and services. (Gravier also emboldened the political program of the European Commission, which began to see mobile students as the future of

36 ibid., p. 42.
37 ECJ Vincent Blaizot v. Université de Liège (2 February 1988)
European citizenship—it proposed the ERASMUS program as a realization of this idea soon afterward.39) After all, if the Court had stretched the significance of those economic freedoms so far as to be able to cover virtually any situation, then member state citizens could conceivably be entitled to equality with each other in both directions: migrant member state nationals would be entitled to an unconditional right of residence due to their equality with host member state nationals, and host member state nationals would be entitled to the applicability of norms of Community law due to their equality with migrant member state nationals. Thus something approaching a vertical citizenship could be constructed from an unlimited right to equal treatment.

At least two legal academics directly entered the fray in an effort to test this theory: one was Richard Plender in Singh,39 who, one might surmise, wanted to see the Court view Surinder Singh’s British ex-wife through the lens of a vertical norm of territorially uniform equality, i.e. not just a cross-border norm of equality as a functional extension of freedom of movement.40 Another was Koen Lenaerts, who represented the applicants in the case41 Wolf and Dorchain (before becoming a judge at the Court of First Instance; in 2003 he became a judge in the Court of Justice; at the time of writing of this thesis he is its vice president). It is clear what Lenaerts was driving at in his role as one of the legal representatives of Wolf and Dorchain, because he later commented on the case in an academic context.

In brief, Wolf and Dorchain were Belgian nationals who were both employed (separately) in Germany. At the same time, each of them was the owner of a business in Belgium, where they each resided. Belgian law required self-employed persons to pay special social security contributions; however, the law provided for an exemption to this requirement for persons who were also engaged in employment as a principal activity. The core of the Belgian social security agency’s claim was that only employment in Belgium counted for this exemption, because the point was that social security contributions would then be being made through that employment. Wolf and Dorchain, on the other hand, claimed (against their own member state) that this provision violated their freedom of establishment in Belgium based on Article 52 [Art. 49 TFEU], and moreover the ban on discrimination based on nationality based on Article 7 of the Treaty [Art. 18 TFEU].

The Court discarded the claim based on Article 7, stating that on the face of it, the Belgian regulation did not discriminate based on nationality: formally, it was equally applicable to all self-employed persons based in Belgium, regardless of nationality, thus there was no direct discrimination based on nationality. Moreover, the parties did not submit documents to the Court to prove that the regulation substantively disadvantaged persons of one nationality

39 Supra in Ch. 6 at n. 172.
40 Supra in Ch. 6 at n. 174.
41 ECJ RSV Z. v. Heinrich Wolf et al. and Wilfried Dorchain et al. (7 July 1988)
more than another, thus there was no indirect discrimination based on nationality either.42

However, the Court went on, the Belgian regulation had the effect of restricting the freedom of establishment and the freedom of movement of workers for member state nationals who were self-employed in Belgium and employed in another member state. Thus it had to be disapplied to persons in the position of Messrs. Wolf and Dorchain.43 What is interesting about this case, compared to Knoors, is that the nationality of the persons made absolutely no difference for the parties on either side of the dispute, or the Court. Belgium was not trying to claim a privilege as against its own nationals, so this was not a case of “reverse discrimination”.

Yet, where nationality did matter in this case was that the persons involved were nationals of a member state of the Community and therefore entitled to the equal protection of their freedom of movement. This is what leads Lenaerts to assert, in his own commentary, that this decision goes beyond the prohibition of discrimination based on nationality. (i.e., in our terms, it does not just horizontally establish zones of equality in each member state where migrant member state nationals are treated equally to host member state nationals.) Rather, it effectively grants them the status, independent of nationality

of ‘Community citizens’, who as such have an equal right not to be divided into categories that are incompatible with the Treaty (such as in this case, those who work in one Member State and those who work in multiple Member States.)44

In other words: a vertically conferred status approaching formal citizenship.

Looking at the case and Lenaerts’ 1991 commentary now, it is hard to see what actually distinguishes Wolf and Dorchain from Knoors. Both cases can also be analyzed as simply the equal application of a vertical norm, not equality as such (i.e. an equality that is uniform over the entire territory of the Community for all member state nationals) but rather the equal right to freedom of movement (i.e. a cross-border equality for mobile member state nationals), derogating norms of a member state. Both cases involved a national of a member state invoking a norm of Community law against the member state of his own nationality, although in the latter case, it could have just as easily been a German national who lived in Belgium and owned a company there but worked in employment in Germany. It was more the constellation of facts in the latter case (and the specific national norm that was to be disapplied) that made the application of a norm of freedom of movement result in something that was identical in result to the application of a vertical norm of equality as such, in which Community law was completely blind to the actual nationalities of the member state nationals involved. Outside of this particular situation, though, it would be hard to recognize this case, in and of itself, as an expansion of Community citizenship.

42 ibid., p. 8-9.
43 ibid., p. 16.
But if we look at the political developments at the time, we can see why Lenaerts might have seen this as a harbinger for a further expansion of norms of equality for citizens in Community law to areas “that hardly have anything more to do with economic activity”. Lenaerts saw the new Article 8a of the EEC Treaty [Art. 26 TFEU], added by the Single European Act, as a significant change to the previous primary legislation, with the Act’s prescription to establish the freedom of movement of persons. We can see this as progress compared to the provision of the original Treaty, Article 3(c), that “the activities of the Community shall include […] the abolition […] of the obstacles to the free movement of persons, services and capital”, which can be read as a programmatic provision, or even as less directly effective than that. Furthermore, in light of all of the political movement toward European citizenship, of which the new provision of the new Article 8a was an expression, it might not have been unreasonable to expect that the Court would be increasingly receptive to arguments based on Article 8a. After all, if it covered any movement of persons, then any denial of residence to a mobile Community citizen by a member state could be banned with the non-discrimination provision of Art. 7 [Art. 18 TFEU]. “If this evolution takes place,” Lenaerts writes, probably in a conscious reference to the Tindemans and Adonnino reports, “even if it is only step by step, it will contribute greatly to the realization of the ‘Europe of the citizen’.” We will now see how other constitutional players also saw this as a very real possibility, for better or for worse.

Incidentally, the further development of equality for workers (and those treated as equivalent to them), which had never been formally controversial, was continuing apace, even raising the specter for the member states of incurring them more costs than they bargained for. In 1991, in another case in which Plender was QC, Antonissen, the Court confirmed a right of residence for jobseekers that for the first time was truly legally binding. Evans had written of the “non-binding” agreement that the Council, at the time of adoption of Regulation 1612/68, had made to give jobseekers a right of residence for that purpose for up to three months. This agreement was never published, Evans wrote, “but its existence was well known.” As it happened, the agreement was published, in the Council minutes at the time of the adoption of Regulation 1612/68 and Directive 68/360, as was revealed by the Court of Justice in Antonissen. (We can clearly recognize this agreement as one that was arrived at not by the Council as such, but in the

45 ibid., p. 25.
46 ibid., p. 28-29.
47 Cf. the 1979 considerations of the Commission on that Article as a legal basis, supra at n. 15.
49 ECJ R. v Immigration Appeal Tribunal, ex parte Antonissen (26 February 1991)
50 Evans (1984), supra in Ch. 5 at n. 87.
“intermediate sphere”, to use Van Middelaar’s terminology.) It is telling, however, that such clubby agreements would no longer carry much weight in 1991: the Court ruled it to have “no legal significance”.52 In particular, a host member state could not inflexibly apply any maximum time limit as long as the migrant member state national could demonstrate that he had "genuine chances of being engaged".53

Gravier, at least, had not granted mobile students (as economically inactive students) any right to student financing in a host member state. But in the 1992 decision Raulin,54 the Court essentially restated its main holding in Levin and held that the fairly minimal proviso of “effective and genuine activities” also entitled a student maintaining such employment to more complete equal treatment with member state nationals as to entitlement to student financing. Thus in Levin, the Court had confirmed that qualification as a “worker” entitled a member state national to the equal application of a vertical norm of Community law (the right of residence for a family member); in this case it confirmed that the exact same qualification as a “worker” entitled a member state national to equality with host member state nationals, i.e. through the horizontal norm of non-discrimination.

To return to the position of economically inactive migrant citizens: in May 1989, the Commission finally discarded its draft directive for a general right of residence because it had already been amended too many times to have any useful effect. Instead, it proposed three new directives, one for students, one for retirees, and one for all remaining economically inactive, but self-sufficient persons.55 (The latter two directives would soon be nicknamed the “Pensionado Directive”, referring to the elderly Northern Europeans colonizing the Mediterranean coast, and the “Playboy Directive”.) All of them would provide that the persons in question had to have sufficient resources and health insurance, and all of them excluded the beneficiaries from full equality in the area of social security. Yet for the first time, there were rights of residence that were not dependent on being economically active or on one of the statuses corollary to economic activity.56

It seems likely that by this point in time, in the wake of Gravier, the member states realized that they could no longer delay legislating on rights of residence for persons other than the economically active. If they took action to legislate, on the other hand, then they could at least be the ones determining what

52 ibid., par. 18.
53 ibid., par. 22.
54 ECJ V.J.M. Raulin v. Minister voor Onderwijs en Wetenschappen (26 February 1992)
56 One of the predictions of Sufrin (1983) (supra in Ch. 6 at n. 153) was hereby rendered irrelevant: she had said that on the basis of Levin, member state nationals would use the pretext of first taking a part-time job for three years in a host member state in order to then be able to "retire" there as an ex-worker.
those rights would be, rather than losing control and allowing the Court to continue with a possibly ever-expanding interpretation of rights of residence based on Art. 7 of the Treaty [Art. 18 TFEU]. The Council was apparently so afraid of the construction of rights of residence out of non-discrimination, in fact, that it also decided to take a stand on what the proper legal basis should be for rights of residence of economically inactive citizens.

It was not only on principle that the Council opposed basing the rights of residence for economically inactive member state nationals on Art. 7 of the Treaty [Art. 18 TFEU]. Measures based on that provision of the Treaty, pursuant to the Single European Act, required only a qualified majority in the Council to adopt, but cooperation with the Parliament in the legislative process as well; and that cooperation meant that the Parliament would get two readings, two chances to torpedo the Council’s desire to sharply limit the rights that economically inactive member state nationals would be granted. The Commission’s proposal for students was based on Art. 7 and its proposal for pensioners was based on Art. 49 and 54 [Art. 46 and 50 TFEU] (freedom of movement of workers and freedom of establishment, likewise legal bases that called for cooperation with Parliament in the legislative process). But the Council revised the proposals to choose the legal basis of Art. 235 [cf. Art. 352 TFEU], which required a unanimous vote, and crucially, limited Parliament’s role in the legislative process to a single consultation. It was that legal basis, the only one anyone had considered to be possible prior to Gravier, that had been the reason why the member states had never previously been able to agree to adopt the Commission’s draft directive. But now the member states found unanimity in their insistence that if there were to be rights of residence for economically inactive citizens, it would be because the member states said so and on their terms, speaking as states unanimously about what the “necessary measures” would be.

Nonetheless, the member states, united in their old-fashioned intergovernmental resolve, were to be challenged by an institution of the Community in the “inner sphere”. Not the “civil servants” of the Commission, who were anxious not to lose the incremental progress that had been made, but the Parliament, now flexing its muscles on behalf of the citizens. The Parliament sued the Council at the Court of Justice over the proper legal basis for the student directive, Directive 90/366, and the Court decided in the Parliament’s favor in 1992. As a result, the student directive was declared invalid (although the Court determined that its effects would persist in the interest of legal certainty), and was

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57 Van Nuffel (1990), p. 896-898. See also Taschner (1993), who additionally describes the history of the member states attempting to limit the set of family members that these various categories of economically inactive member state nationals could bring with them (relative to the set that workers could bring, see supra in Ch. 5 before n. 125): ultimately it was limited only in Directive 90/366 for students, who could bring only their spouse and children. P. 431–432, 435.
58 Yet see the critical comments of Magnette (1999), supra at n. 15.
60 ECJ Parliament v. Council (7 July 1992b)
ultimately replaced by the Council with Directive 93/96, which was based not on Art. 235 [cf. Art. 352 TFEU], but on Art. 7 of the Treaty [Art. 18 TFEU], the ban on discrimination based on nationality. The Council could no longer afford to ignore the Parliament.61 The further provisions of the new Directive were otherwise identical, but the Parliament had hereby put European citizenship back on the agenda by identifying it as something that was no longer fully under the control of the member states.

The Treaty of Maastricht, the foundation of the European Union and the formal introduction of Union citizenship

The member states’ considerations of closer political union were given additional impetus by the fall of the Berlin Wall in 1989, which in a way marked the real end of the Second World War (and by extension, of the Great European Civil War, for those who viewed it in those terms) and raised the tantalizing prospect of European union not only in Western Europe, but Eastern Europe as well. Yet we must return to the “outer sphere” of the member states and their interests in order to trace the source of the formal introduction of citizenship in this new European Union and what the states meant it to mean. Again, it would be the member state that was the biggest net contributor of mobile workers that would agitate for a provision to directly benefit those workers, and thus the state: now no longer Italy, but Spain.

The ball had first been put into motion with a resolution drafted by a Parliamentary committee, which had asked the member states to increase the social and human rights content of the treaties, not merely to work on economic and monetary union. The Delors Commission soon got on board, as did a number of states. It was an Italian delegation that again named European citizenship in this context, and the idea began to snowball with states recognizing what this could be useful for. Belgium saw citizenship, both in terms of political rights and more human rights and freedom of movement, as a remedy to the democratic deficit of the Union. At that point the idea really caught on, and France and Germany were soon sold on it, urging the introduction of Community citizenship. The Dublin European Council of April 1990, the first after the fall of the Wall, suggested that the new treaty “include and extend the notion of Community citizenship”.62

Of the new member states, Spain, Portugal and Greece had never forgotten the humiliation of being subjected to the transitional measures on their nationals’ freedom of movement after accession. Moreover, Spain and Portugal had not been involved in the drafting process of the Single European Act, so they wanted to be sure not to miss their chance to have their say in the negotiation process for the new treaty.63 After the Dublin European Council, it was Spanish prime minister Felipe González who most consistently began to push for the member states to not only negotiate economic and monetary union, but European citizenship and political union as well. And during the negotiating process, Spain continued to act as a motor for the introduction of Union citizenship specifically.

We can skip over most of the details of the negotiation process, which Maas has excellently summarized, but we can briefly note how Union citizenship, like most momentous constitutional provisions, arose from a diversity of interests and negotiation positions on the part of the member states and the institutions.

63 ibid., p. 40.
The Mediterranean member states and the smaller, more pro-integration member states supported the idea almost from the outset, favoring the benefits of freedom of movement, in and of itself, or the introduction of local voting rights for migrating citizens as a source of legitimacy. Germany favored any increase in the democratic legitimacy of the Union. As to the position of Germany's partner in the "motor" of European integration, France: François Mitterrand personally supported the idea both of citizenship and of suffrage in municipal elections; he saw the introduction of suffrage in municipal elections, which would require a constitutional amendment in France, as a convenient way to divide his political opponents at home; and anyhow the entire integration project was of great personal prestige to him.64

The only real resistance to European citizenship came from Denmark and the United Kingdom, both of which did not want European citizens to be able to directly invoke rights of citizenship in a court of law.65 This fear was somewhat assuaged by the European Parliament passing a resolution that European citizenship would be additional to national citizenship.66 Denmark ultimately gave in to citizenship on the condition that it would get a longstanding wish of its own in the Treaty, the European Ombudsman. And while Britain opposed citizenship, it opposed a common foreign policy and the common currency even more, and so it was satisfied when it could weaken the former and opt out of the latter.67 The Treaty was signed on 7 February 1992.

There was something of a last-minute hitch when it came time for Denmark to ratify what ultimately became the Maastricht Treaty, though: its population rejected ratification in a referendum. Only after Denmark secured a number of opt-outs, and a statement from the Council that Union citizenship would not “in any way take the place of national citizenship”, among other assurances, did its population approve ratification in a subsequent referendum.

Union citizenship was now a fact as of 1 November 1993, the date of the entry into force of the Maastricht Treaty. Considering that the Union would set itself the objective of “[strengthening] the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union’ (Title I, Article B), the Treaty provided that “[c]itizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union’ (Art. 8(1) [Art. 20(1) TFEU], to be inserted into the old European Community Treaty, which remained in effect next to the new Treaty on European Union). The first right to be attached to this citizenship was 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

64 ibid., p. 46-50.
65 Mazzucelli (1997), p. 145
conditions laid down in this Treaty and by the measures adopted to give it effect' (Art. 8a(1) [Art. 21(1) TFEU]).

The second set of rights to be attached to Union citizenship were electoral rights: the Treaty provided, first of all, (in Art. 8b(1) [Art. 22(1) TFEU]) that a Union citizen residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State.

Second of all, Art. 8b(2) [Art. 22(2) TFEU] provided that a Union citizen residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State.

Formally, indeed by their own admission ("under the same conditions as nationals of that State"), these provisions could be seen as simply adding new forms of horizontal equality in the form of non-discrimination for Union citizens living in a host member state. But substantively, and somewhat more excitingly, these provisions constituted the introduction of a territorially uniform vertical equality for Union citizens: the right to vote for and stand for municipal council and the European Parliament wherever in the Union one lived.

The Spanish contribution to Union citizenship

Before we go into the legal developments that would arise from this new, formal basis for citizenship, we will briefly return to the position of Spain in the negotiating process, because it was the member state that arguably had the most comprehensive idea of what Union citizenship was meant to be, and how it would differ from merely being a bundle of all of the citizens of the member states and their Community rights. It seems that almost every other member state merely signed on to the idea of Union citizenship in order to get one part of the package, be it freedom of movement, democratic legitimacy, a "Europe closer to the citizens" or as a tradeoff. Spain was all too glad to sell Union citizenship as being all things to all people, playing each of the angles of interest of the other member states.

According to the standard narrative, Spain had a great deal to gain due to the large number of emigrant citizens in other member states. As González explained to a Spanish magazine in 1992, there were 623,965 Spaniards in other member states and 158,243 nationals of other member states in Spain, thus clearly showing Union citizenship to be to Spain's advantage. Yet it would be selling the Spanish position a bit short to merely say, by comparison to Italy at the foundation of the Community, that the Spanish merely wanted the goods of freedom of movement and used the rest of the citizenship bundle as selling points.

68 ibid., p. 258.
The evidence points to Spain wanting European citizenship to be a real legal status as close as possible to the citizenship of a state, rather than merely being a status that meant that member state nationals were “privileged aliens”. And this is made all the more plausible by the fact that Spain had anything but idealistic motives in wanting that, but rather very hard-headed motives of state interest.

Of course the foremost interest of Spain was freedom of movement. Again, if we look at the spirit of the times that we already saw in the constitutional developments, the traditional destination member states might have been justified, in light of Gravier, in being scared that freedom of movement was now a genie that had escaped from the bottle. And Spain, for its part, would have been justified in thinking that even freedom of movement of workers, that cornerstone of the Treaty, was at risk of being restricted due to its increasing unpopularity in Northern Europe. If an inalienable form of equality could be granted to all European citizens, on the other hand, then it would be much more difficult to roll back rights of residence in other member states.

But there was another form of equality inherent in citizenship that Spain was seeking to introduce. Until now, the equalities that the incipient Community citizen enjoyed in host states were largely a bundle of rights and advantages, with next to none of obligations that the citizens of the host state had as such: no obligation of military service, for instance. But there is evidence that Spain sought to introduce one form of equality with Union citizenship that could be viewed as a common obligation or burden: specifically, the abolition of the right of asylum in any member state. As Schönberger noted, the ability to apply for asylum is by definition reserved to aliens. We also saw how the interstate extradition clause of the US Constitution (and the Articles of Confederation before it) is an expression of an equality inherent in a common citizenship, implying that a citizen of one state cannot seek refuge in another state if she is being sought for prosecution by her own state, just as she cannot seek refuge in her own state from prosecution by another state.

Spain had a specific interest in preventing, in particular, its own citizens from being able to seek asylum in other member states: for decades, it had been engaged in a struggle with the armed Basque liberation movement, ETA. Since the Basque country straddles the Spanish-French border, ETA members, during the years of the Franco dictatorship in Spain, would regularly operate out of France with the tolerance of the French authorities. But after the democratization of Spain, a development crowned by Spain’s accession to the Community, ETA members found it increasingly difficult to operate in France. ETA members who were being sought for prosecution in Spain then made use of the tactic of seeking asylum in other member states such as Portugal or Belgium. While they were never actually granted asylum in the end, the procedural guarantees allowed them

71 Schönberger (2005), supra in Ch. 2 at n. 43.
in the procedure enabled them to delay extradition for as long as possible, reaping benefits of public relations in the other member state that could be embarrassing to Spain.72

There is no direct evidence in the documents from the negotiation process for the Maastricht Treaty that this was specifically what Spain envisaged with Union citizenship. But the Maastricht Treaty had also brought into existence another constitutional institution with the European Union: the so-called “third pillar” regarding cooperation in justice and home affairs (JHA). Within this pillar, but also in the context of intergovernmental negotiations for changes to the Treaties, the Spanish government (two successive governments, in fact: one socialist and one conservative), Spain fought hard to either generally limit procedural rights in asylum procedures, in the areas where the Union was harmonizing asylum procedures, or specifically exclude Union citizens from being able to apply for asylum in other member states.

While almost certainly, some theoretical conception of a common equality through citizenship was lurking in the background here, Spain’s express arguments for excluding Union citizens from asylum were based on the political dimension of the citizen in a democracy. In a democracy with a well-functioning rule of law, by definition, there is no political persecution of citizens. Not only is democracy a prerequisite to a state being admitted to the Union, but a principle of the Union is that the member states should trust the democratic functioning of each other’s systems. Thus, the claim of a citizen of one member state that he is being politically persecuted cannot be admissible by another member state, Spain argued.73

At any rate, in light of this revelation, we can re-examine some of the Spanish proposals during the negotiations for the Maastricht treaty. And in fact, we do find that the Spanish proposals for Treaty provisions on Union Citizenship tend to emphasize the “obligations” of Union citizenship in addition to the “rights”. And the following proposal makes it crystal-clear what Spain was driving at:

[Every citizen of the Union] may not, through the exercise of his right to freedom of movement and residence, evade the duties which are incumbent upon him with regard to his State of origin or any other member State.74

In the end, however, the only trace of obligations or duties that the EC Treaty, as amended by the Treaty of Maastricht, was to be found in Art. 17(2) EC [Art. 20(2) TFEU]: “Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. […].” Nowhere would the Treaties further specify any of these duties, although they would go on to specify any number of rights. In addition to the aforementioned (conditional) right of

73 ibid., p. 397.
The Maastricht Treaty introduces European Citizenship de jure

free movement and residence, these also included the right of suffrage in elections for European Parliament and municipalities, in whatever one’s place of residence is, the right to diplomatic protection by another member state in a third country where the citizen’s own member state did not have a consular representation, and finally, the right to petition the European Parliament and the European Ombudsman, and to address the European institutions and advisory bodies of the Union in any Treaty language.

It thus seems likely that in the negotiations for “Maastricht”, no single other member state than Spain had any interest in giving Union citizenship a hard, burdensome edge of equality, preferring instead to only give their citizens “gifts” in the form of advantages in order to sell them on the European project. (It must be noted that in 2002, the member states did ultimately introduce a new equal burden for Union citizens with the European Arrest Warrant [Framework Decision 2002/584/JHA]: Union citizens (and everyone else living in the EU) could, at least in theory, no longer seek refuge from prosecution in any member state. However, this Framework Decision did not at all reference Union citizenship or any “duty” thereof. This was merely one of the most significant legislative instruments introduced within the Justice and Home Affairs pillar, which had of course been instituted at the same time as Union citizenship. We can therefore qualify this, like the Extradition Clause of the US constitution, as at least effectively constituting an equality in the form of a burden on Union citizens.)
Rights of movement and residence in Union citizenship: the first decade

We can now move on to the legal developments in the case law of the Court of Justice, subsequent to the introduction of the de jure status of Union citizenship, that would reveal if and how that status would be a source of vertical equality for Union citizens.

The Treaty of Maastricht attached rights to movement and residence to that citizenship with the provision (then Article 8a [Art. 21 TFEU]):

1. Every 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.

The clause “subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect” showed that the member states signing the Treaty did not consider the general right of movement and residence for Union citizens to be unconditional. Rather, it was only to exist in the matrix of the secondary legislation that the Council would adopt unanimously, with the cooperation of the Parliament:

2. The Council may adopt provisions with a view to facilitating the exercise of the
   rights referred to in paragraph 1; save as otherwise provided in this Treaty, the
   Council shall act unanimously on a proposal from the Commission and after obtaining the assent of the European Parliament.

How, then, could the general right of movement and residence be used to build on the existing rights of freedom of movement?

Of course, it will be cases of economically inactive Union citizens living in a member state other than their own that ultimately will be the most illustrative. The general right of movement and residence was already significant for the legal position of the 1990 Directives (and the 1993 Student Directive) on economically inactive member state nationals in cross-border situations. Now the right of movement and residence for economically inactive Union citizens was implicitly elevated from being a favor bestowed unanimously by the member states to a more directly effective Treaty provision; for that matter the Student Directive no longer had to be based on an interpretation of the non-discrimination provision, thereby potentially increasing the hierarchical importance of the rights introduced by the Directives.76

75 Tellingly, the new Student Directive entered into force on 29 October 1993, the last business day before the Treaty of Maastricht entered into force. It seems likely that the Council, at the same time as admitting defeat in its previous legal battle with the Parliament, was attempting to assert that the new Student Directive would continue to be valid under the terms of ‘old’ Community law.

At the same time, it is important to note that the worker was still the most privileged kind of Union citizen. While the aforementioned directives provided that certain provisions of the workers’ directive were to be applied analogously to economically inactive Union citizens (specifically with regard to the validity of the residence document and the requirement of nothing more than a passport or identity card for initial entry), and they also provided for a right to live and work for the family members of the member state national, there were two glaring differences. One was that for economically inactive member state nationals, the amount of money they had in their bank accounts or made from an income source such as a pension or a job in another member state was in fact relevant, by contrast to the Levin case law.77 In any case, it had to be enough to ‘avoid becoming a burden on the social assistance system of the host Member State’ (art. 1(1) of the ‘Pensionado’ and ‘Playboy’ Directives; while art. 1 of the Student Directive lightened the requirement somewhat by allowing a student to merely declare that she had sufficient resources); they also were required to have health insurance. The other difference was that they did not enjoy the protection of the non-discrimination principle as far as a right to social assistance on the basis of Regulation 1612/68 (the successor of the Regulation No. 3 that Unger had relied upon); this was to continue to apply only to workers.

**Konstantinidis**

The first decision78 that we will touch on was handed down on the eve of the introduction of Union citizenship, but was clearly decided in its shadow. It involved an ostensibly economically active member state national, but it showed the strain of a primarily economic construction of the mobile member state national and the promise that Union citizenship held.

Christos Konstantinidis, a Greek national, had made use of the freedom of establishment to live in Germany as a self-employed masseur and medical lifeguard. However, the municipality of Altensteig, when registering his 1983 marriage in the civil register, transcribed his surname into Latin letters as ‘Konsta

dinidis’. In 1990 he requested that his registered surname be corrected to ‘Konsta

ntinidis’, a spelling with which German-speakers would more accurately be able to pronounce his name. The court of Tübingen, where he had filed his request, ordered the municipality to correct his name to a very literal letter-by-letter transcription based on an ISO norm: Hrésos Kónstantinidés. Konstantinidis objected that the pronunciation of his name was distorted by this transcription, and the court referred preliminary questions to the European Court of Justice.

The court ruled that Konstantinidis’ freedom of establishment had been violated. Article 52 of the Treaty [Art. 49 TFEU], establishing that right,

77 But see the critical comments of O’Leary (1997), p. 128.

78 ECJ Christos Konstantinidis v. Stadt Altensteig (30 March 1993)
"constitutes one of the fundamental legal provisions of the Community". That right could not be interfered with in such a way as to put him at a disadvantage relative to nationals of the member state. And then came the stretch:

Such interference occurs if a Greek national is obliged by the legislation of the State in which he is established to use, in the pursuit of his occupation, a spelling of his name derived from the transliteration used in the registers of civil status if that spelling is such as to modify its pronunciation and if the resulting distortion exposes him to the risk that potential clients may confuse him with other persons.

One might hazard a guess that Konstantinidis, while he was happy with the results this decision, did not primarily see his right to have his name written as he wished in terms of its effect on his business operations; rather, he saw it as a basic civil right.

Advocate-General Jacobs, in his Opinion, had in fact given expression to that very feeling. Jacobs famously stated that a Community national, when going to another member state to work, “is entitled to say ‘civis europaeus sum’ and to invoke that status in order to oppose any violation of his fundamental rights”. (We see here the “European” reference to Cicero and the story of Paul of Tarsus, after the “American” and “British” references.)

Now Jacobs was not referring to Union citizenship, which did not yet exist; rather, he was referring to the fundamental rights enshrined in the European Convention on Human Rights. But Jacobs was most certainly aware of what Union citizenship was meant to be and probably presciently referring to it, even though on the day he delivered his opinion, 9 December 1992, it was not yet a sure thing that it would be introduced (Denmark had already rejected the Treaty of Maastricht in its first referendum in June 1992, and the Edinburgh European Council, offering the Danes compromises, would not begin until 11 December).

**Martínez Sala**

It would take until almost five years after the introduction of Union citizenship for the Court to finally use it to apply the equality standard of the Treaty to an economically inactive Union citizen, albeit in a very modest way, and at last break free of the old mode of reasoning. Ms. Martínez Sala was a Spanish national who had been living in Germany since 1968. She had a baby and applied to the state of Bavaria for a child-raising allowance in 1993, which was denied on the grounds that she did not hold a valid residence permit, as was required by German law. In fact, Martinez had not had an actual valid residence permit since

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79 ibid., par. 12.
80 ibid., par. 16.
81 ibid., Opinion, par. 46.
82 Supra in Ch. 6 at n. 92.
83 ECJ *María Martínez Sala v Freistaat Bayern* (12 May 1998)
THE MAASTRICHT TREATY INTRODUCES EUROPEAN CITIZENSHIP DE JURE

1984; since then she had remained in Germany using purely procedural rights to stay, by repeatedly applying for a renewal of her permit.

The Court did review various provisions of the Treaty regarding freedom of movement of workers, and the equal right to social advantages for workers, and recalled\(^4\) its decision in *Royer*\(^5\) that the right of residence of a member state national is not constituted by a residence permit, but that a residence permit could only be declaratory of a pre-existing right of residence. The Court noted that within the sphere of application of the Treaty, it constituted a violation of (by this point) Art. 6 EC [Art. 18 TFEU] (the ban on discrimination based on nationality) for a host member state to impose the formal requirement of holding a residence permit if its own nationals were not required to produce such a document.\(^6\) The Commission, clearly arguing for an expansive understanding of the general right of residence, had suggested that Martínez now had a right of residence based on the new Art. 8a EC [Art. 21 TFEU], and thereby fell within the realm of application of the Treaty.\(^7\)

But the Court pointed out that it was not necessary to determine whether Martínez had a right to stay based on Community law; the fact that she clearly had a right to stay based on German law was enough to establish that she was covered by Art. 8(2) EC [Art. 20(2) TFEU], which provided that “Citizens of the Union shall enjoy the rights conferred by this Treaty”. This was enough to bring her into the field of application of the Treaty, including the non-discrimination provision of Art. 6 [Art. 18 TFEU].\(^8\) In fact, *Martínez Sala* merely represents an extension of *Gravier*, i.e. the application of non-discrimination as a form of equality. If in *Gravier*, the Court could assert the applicability of Community law due to fact that the Community had an interest in education, in *Martínez Sala*, the Court could now use Union citizenship to assert the applicability of Union law.

This was a very cautious application of Union citizenship on the part of the Court, but it does endow Martínez, by contrast to Konstantinidis, with the crucial ability to utter the words “*civis europaeus sum*” and finally to activate an equality which she might not have ever been entitled to before. The Court is cautious because it did not assert that Martínez had a right of residence based on her Union citizenship; rather, it deferred to the law of the host member state, which had already granted her a right of residence.

But if we leave the realm of the purely formal and look at the facts of this case, we see that Martínez was born in 1956 and had lived in Germany since 1968: thus since the age of twelve. Presumably, she had come to Germany as the child of Spanish workers, who at that time would have been coming to Germany

\(^4\) ibid., par. 53.
\(^5\) ECJ *Jean Noel Royer*, (8 April 1976), *Supra* in Ch. 6 at n. 136.
\(^6\) ECJ *María Martínez Sala v Freistaat Bayern*, (12 May 1998), par. 54-55.
\(^7\) ibid., par. 59.
\(^8\) ibid., par. 60-63.
as third-country nationals entitled to only a very limited equality with German nationals. From the other facts of the case it would appear that Martínez, 37 years old at the time of her application, had fallen between a number of cracks in life; it is unclear whether this was directly a result of to her status as, effectively, a second-class citizen in Germany. But in any case, the accession of Spain to the Community, the entry into force of the Maastricht Treaty, and the Court’s decision had had a clearly emancipatory effect for her.

**Bickel and Franz**

Only months later the Court would hand down a decision in which it could have derived a right of movement from Union citizenship, but used it as little more than a “container” for the economically active member state national.

H.O. Bickel, an Austrian truck driver, and U. Franz, a German tourist, were separately prosecuted for criminal activity in Italy. They each claimed a right to have their trials conducted in German, since that was a co-official language of the region of Trentino-Alto Adige (Südtirol). In the province of Bolzano, members of the German- and Ladin-speaking minorities had a right to be dealt with by administrative and judicial authorities in their own languages. The Italian government put forth that the right to a trial in German was reserved to Italian nationals residing in the province of Bolzano who belonged to the German-speaking minority.

The Court noted, first, that Bickel and Franz were covered by the Treaty-guaranteed freedom to provide services, since in their travels in Italy they were likely to receive services. However, this time, the Court immediately followed this stretch with a more general reference to the right of Union citizens “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”. Since they were hereby within the scope of Community law, the non-discrimination principle guaranteed them the same right to court proceedings in German that the Italian nationals in the region enjoyed.

This was another cautious deployment of Union citizenship on the part of the Court for two reasons. First of all, it grounded Union citizenship on its very legal-positive limits: the specific goals granted it by the primary and secondary legislators. As such, this use of Union citizenship was not very different at all than Konstantinidis’ ‘freedom of establishment’. Second of all, as the Court noted: the courts in the area in question were already equipped to conduct trials in

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99 ECJ *Criminal proceedings against Horst Otto Bickel and Ulrich Franz* (24 November 1998)
90 ibid., par. 59.
91 ibid., par. 15-16.
92 ibid., par. 30.
German. Therefore, what Italy was required to do as a consequence of this decision would cost it virtually nothing.

Grzelczyk

So far, we have reviewed one decision (Martínez Sala) in which the Court, deferring to national immigration law, merely indicated that a Union citizen who had already been admitted was entitled to equality. And we have reviewed another (Bickel and Franz) where the Court confirmed that the Union citizens involved had at least a short-term right of stay in the host member state and therefore were entitled to equality: but an equality which did not cost the host member state any money.

Less than three years later, however, the Court would be more daring.93 Rudi Grzelczyk was a French national studying in Belgium. He held down a part-time job for the first few years of his studies in order to qualify for the same student financing that Belgian students were entitled to.94 However, he quit his job in the final phase of his studies and applied for the minimex. This was essentially a form of need-based social assistance, and it was fairly standard practice for Belgian students to go on it in the final phase of their studies. The municipal social assistance agency granted Grzelczyk the minimex, but then retracted it on the grounds that he could not be qualified as a ‘worker’ (and never could have been qualified as a ‘worker’, since he was primarily in Belgium as a student), therefore did not enjoy the protection of the non-discrimination principle for social assistance.

   The Court skirted this contention of the Belgian government (which fairly clearly failed to pay heed to the rights confirmed in Levin and Raulin) with the observation that the referring court had not chosen to frame the problem in those terms. Rather, the referring court had asked the more far-reaching question of whether the existence of Union citizenship, combined with the general non-discrimination principle of Community law, meant that all Union citizens, and not only workers, were entitled to non-contributory social benefits. The Court answered this question with the momentous words (par. 31):

93 ECJ Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve (20 September 2001)
94 This was, of course, a textbook application of Raulin. Quite obviously, Grzelczyk’s main subjective intention in Belgium was not to work, but to study, yet this could not mean that he would be excluded from the enjoyment of public funds.
Union citizenship is destined to be the fundamental status\textsuperscript{95} 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, subject to such exceptions as are expressly provided for.\textsuperscript{96}

It must, of course, be noted that this observation was preceded by quite a number of references to the intent of the primary and secondary legislators, such as that education had been added to the Treaty as a Community competence, and that the secondary legislator had passed Directive 93/96 providing for the rights of residence of students. Yet it must be noted that the Court came tantalizingly close to qualifying the right to equal treatment enjoyed by the Union citizen as all-encompassing to start with (i.e., a general right of residence, “subject to such exceptions as are expressly provided for”) rather than as starting from zero (i.e., only in the areas provided for).

Furthermore, the Court did conclude (in its operative judgment) that Union citizenship precluded a member state from requiring legally resident Union citizens to be qualified as “workers” to qualify for social assistance, if it did not require the same of its own nationals. This was quite daring in effect, as it was an application of the non-discrimination principle that could potentially cost member states a considerable amount of money, even more than Gravier had.

The Court did, of course, leave room for a cautious reading of its ultimate judgment. One qualification for a cautious reading is “legally resident” Union nationals: clearly, the Court was not opening up the floodgates to any and all Union citizens who wanted to move to another member state to claim legal assistance. “Legally resident” did imply that the decision’s effects were limited to those Union citizens who derived rights from either secondary Union legislation\textsuperscript{97} or national immigration law (as in Martínez Sala). In this regard, the Court’s “fundamental status” declaration could be regarded as largely a formal leap,\textsuperscript{96} ECJ Grzelczyk (20 September 2001), par. 31

\textsuperscript{95} Notably, rather different formulations for “destined” and “fundamental” were used in different language versions of the decision: “a vocation à être le statut fundamental” [the French, which was the original language of the case, is perhaps the closest to the English], “ist dazu bestimmt, der grundlegende Status … zu sein” [German, is “meant” or “determined” to be], “dient de primaire hoedanigheid … te zijn” [Dutch, the “primary” status].

\textsuperscript{96} Schönberger (2005)(in his analysis of Grzelczyk at p. 343-349) sees indications that for the Court, the rights of residence of students is not solely based on secondary legislation (the Directive), but rather has a basis in the primary legislation as well, particularly in light of the Court’s consideration (pars. 42-44) that termination of legal residence cannot be the automatic consequence of a student no longer having sufficient means of subsistence. However, at the time Schönberger wrote this, he could not be certain whether this would have consequences for all economically inactive Union citizens (in other words, whether Union citizenship provided the primary-legislative basis) or whether it only had consequences for students (in other words, whether it was the Treaty provisions about education that were decisive). He cites Castro Oliveira (2002), p. 84 to support his assertion (at p. 348-349) that Grzelczyk does not provide any easy guidelines for application on the part of member states, an interesting echo of O’Keeffe’s commentary (supra in Ch. 6 at n. 151) in the wake of Levin.
consolidating the grab bag of different types of functionally qualified member state nationals (workers, establishers, service-providers, pensioners, etc.) into one term: Union citizen.98

The Court’s decision was also cautious in that it found support for its position in express provisions of the Student Directive (and the two 1990 Directives as well), or at least the recitals of those directives. Recall that economically inactive Union citizens, according to the text of the Directives, had to have “sufficient resources to avoid becoming a burden” on the social assistance system of a host member state, by contrast to economically active Union citizens.99 The Court, however, seized on the sixth recital of the Student Directive (thus the spirit, if not the letter of the Directive), which crucially said that “beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State” (italics added here). Thus, the Court concluded, this legislation accepted a “certain degree of financial solidarity” between economically inactive Union citizens and host member states, “particularly”—and the Court softened the blow for the host member states even more here—“if the difficulties which a beneficiary of the right of residence encounters are temporary.”100

**Baumbast and R: a “layer cake” of cross-border equality**

It would not be long, however (just under one year, in fact), before the Court would dispel any illusion that Union citizenship was to be understood merely as a bundling or consolidation of the rights that had explicitly been granted by the secondary legislator.101 We will first explore the part of this judgment relating solely to the party Baumbast and Union citizenship. We will then deal with the parts of this judgment relating additionally to the party R., the freedom of movement of workers, and the right to family life as guaranteed by the European Convention of Human Rights. In focusing on the two parts of the judgment separately, we can see how the Court weaves and layers different legal norms in its conception of Union citizenship.

**Baumbast**

Mr. Baumbast was a German citizen who had resided in the United Kingdom first as a worker, working for a British employer; then, after that employer went bankrupt, as an economically inactive Union citizen, based on Directive 90/364 (i.e. the “Playboy Directive”, although Baumbast was in fact working, just not in the United Kingdom: his means of subsistence consisted of income from a

98 See also Bierbach (2008), p. 355-357.
99 Supra, after n. 77.
100 ECJ Grzelczyk (20 September 2001), par. 44.
101 ECJ Baumbast and R vs. Secretary of State for the Home Department (17 September 2002)
German employer, for work that he did for that employer in China and Lesotho). He resided in the United Kingdom with his wife, who was a Colombian national, his stepdaughter, also a Colombian national, and his daughter together with his wife, who had German and Colombian nationality. All of the members of the family had originally been granted residence permits by the British authorities, pursuant to Regulation 1612/68, when Baumbast had still been a worker. After five years of residence in the United Kingdom, Mrs. Baumbast applied for indefinite leave to remain on the basis of British immigration law, which allowed aliens to apply for that status after five years of legal residence.

It is somewhat unclear whether Mrs. Baumbast’s application for indefinite leave to remain was approved, but she, Mr. Baumbast and the children also applied for renewal of their existing residence documents. The Secretary of State denied renewal for Mr. Baumbast, and as a consequence for his family members, on the grounds that Mr. Baumbast had failed to comply with one of the provisions of Directive 90/364: that an economically inactive member state national and his family members must possess comprehensive medical insurance covering all risks in a host member state. The Baumbasts did not have British medical insurance, but German medical insurance, and traveled to Germany for any necessary medical treatment.

In its third question, the referring court asked the European Court of Justice whether a Union citizen could rely directly on Art. 18(1) of the EC Treaty [Art. 21(1) TFEU], which provided for the right to reside and move freely for Union citizens, if he no longer satisfied the conditions of the secondary legislation. The Court seized this opportunity (since the referring court in Grzelczyk had not quite asked a sufficiently direct question about rights of residence based on this provision of the Treaty) to declare that a Union citizen can derive rights of residence directly from that provision. The Court hedged this bold statement, of course, to possibly only apply to a Union citizen “who no longer enjoys a right of residence as a migrant worker”, and gave a nod to the “limitations and conditions referred to” in Art. 18(1).

The governments of the United Kingdom and Germany, which had intervened, had argued that these “limitations and conditions” meant that Art. 18(1) was not a freestanding provision,102 but rather one that only pointed to the secondary legislation implementing it. In other words, unsurprisingly, these member states were once more insisting that rights of residence for economically inactive Union citizens only existed on the secondary legislator’s (thus the Council’s, and thus the member states’) say-so.103

102 ibid., par. 78.
103 Cf. supra at n. 15 and n. 59; this insistence on the part of the member states that economically inactive citizens could only get a right of residence on their unanimous say-so had already met a setback in Parliament v. Council, supra at n. 60.
Already, however, the basis for any new secondary legislation implementing the rights of Union citizenship had slipped out of the control of the member states speaking unanimously. The original provision on rights of movement and residence for Union citizens, (then-)Art. 8a(2) of the EC Treaty after “Maastricht” [corresponding to 21(2) TFEU] had provided that such measures had to be passed unanimously by the Council, after obtaining the “assent” of Parliament.

The Treaty of Amsterdam, which had gone into effect on 1 May 1999, had made legislation based on the (now-)Art. 18(2) EC [Art. 21(2) TFEU] partly subject to the “codecision” procedure of Art. 251 EC, which required substantial involvement by the Parliament in the legislative process. (The codecision procedure was similar to the original “Community method” in that the Council had to vote unanimously to reject amendments to legislation introduced by the Parliament). Nevertheless, legislation based on Art. 18(2) after “Amsterdam” still had to be unanimously approved by the Council in the first place, which meant that the member states speaking unanimously still acted as the gatekeeper to the legislative process on the detailed rights of movement and residence of Union citizens.

But the Treaty of Nice, which had been signed by the member states on 26 February 2001, six months before the Court handed down Grzelczyk, had amended Art. 18(2) to provide for the possibility of adoption of such measures by qualified majority in the Council [thus at this point, this provision is substantially identical to today’s Art. 21(2) TFEU]. As Van Middelaar notes, it is the transition from unanimity to majority as the basis for decision-making that is the hallmark of the establishment of a political community: the minority (in this case, made up of the member states that disagree) accepts that legislation can be passed that binds it despite its dissent. Of course, qualified majority voting had already been the standard for most areas in which the Community legislated. But it took some time for the member states to come around to letting go of the “international law method” when it came to the rights of movement and residence of Union citizens, particularly the economically inactive Union citizens who were not covered by the freedom of movement of workers and the freedom of establishment. Moreover, the introduction of qualified-majority voting in the Council in this area meant that the Parliament was finally a real participant in the legislative process.

To return to Baumbast: it might have come as a surprise to some that the European Commission, in its submission to the Court, more or less agreed with the United Kingdom and Germany, saying that rights of movement and residence for economically inactive Union citizens only existed by the grace of the secondary legislation. It may well be that the civil servants (who had already issued their
proposal for new secondary legislation, which we will discuss below) were already satisfied with the fact that “Nice” had broken the legislative chokehold that the member states had had on the general freedom of movement and residence, and did not wish to further antagonize the member states by encouraging the Court to hand down an impolitic decision in the vein of Gravier.

Without a doubt, the Court was aware that it had to walk a tightrope between the promise of Union citizenship and the skittishness of the member states about losing control over internal migration. The Court acknowledged the “legitimate interests” of the member states, and the fact that the limitations and conditions of Art. 18(1) [Art. 21(1) TFEU] and the Directive were intended to protect those interests; again citing the Directive that the beneficiaries should not become an “unreasonable burden on the public finances of the host Member State”.107 Nevertheless, the Court went on: those limitations and conditions had to be applied while taking the principle of proportionality into account.108 In the case of Mr. Baumbast and his family, in particular, it was patently obvious that their presence did not constitute an unreasonable burden, if any burden at all, on the public finances of the United Kingdom. It would thus be disproportionate to deny them legal residence simply for not having British medical insurance that did not cover emergency care.109

This marked, perhaps, the tipping point in the freedom of movement entailed in Union citizenship: the moment that the member states lost most of their remaining control over the movements of Union citizens, the control that they had historically exercised over the nationals of other European states entering their territories. Historically, states forging treaties allowing for freedom of movement had decided those matters unanimously, and had built in exceptions of “public policy”, “health”, and “economic necessity” that were completely up to host states to interpret broadly for purposes of deporting would-be beneficiaries or denying them entry. In 1953, commentator Suzanne Bastid had expected the freedom of movement of workers, provided for in an admittedly limited scope by the European Coal and Steel Community Treaty, to fall victim to the member states’ jealously guarded interests.110

By now, however, the member states had not only lost their ability to determine these matters unanimously, but they had lost their ultimate ability to deport the beneficiaries of freedom of movement on a host state’s simple say-so or its own interpretation of its legitimate interests. The member states had long come to accept that economically active member state nationals, defined in broad terms, could simply enjoy their right to move freely, without having to ask for special permission for themselves and their families. But with regard to economically inactive Union citizens, the member states had drawn lines that the

107 ibid., par. 90.
108 ibid., par. 91.
109 ibid., par. 92–93.
110 Cf. supra in Ch. 5 at n. 39.
beneficiaries were expected to strictly adhere to. The member states wished to treat them much like aliens petitioning a host state for admission under national immigration law, who could be denied entry or renewal for a minor administrative slip-up when filling in an application form: economically inactive Union citizens were to satisfy specific requirements, including having specific amounts of money, and were to be subject to specific limitations. Now the Court had taken away even this last bastion of permissible restrictions from the member states, admonishing them not to construe their legitimate interests so broadly as to inhibit Union citizens’ freedom of movement and residence.

Admittedly, so far, Art. 18(1) [Art. 21(1) TFEU] did not show much evidence of being more than a “safety net” for Union citizens who fell between the cracks of the existing secondary legislation.111 D’Oliveira, speaking at a symposium held in The Hague not long after Baumbast and R. was handed down, said that if Union citizenship was meant to coalesce like a layer of “mother of pearl” over the original “grain of sand” of the freedom of movement of workers, it still constituted a flawed and limited form of citizenship. These new rights were merely an addition to the bundle of rights that had previously existed without Union citizenship, a “pretty bow” tied around it whose content was as yet fairly arbitrary. For D’Oliveira, moreover, it seems that only a citizenship forged by the citizens’ own “political struggle” was truly compelling, compared to rights that had merely been “thrown into the lap” of Union citizens.112

But at the same symposium where those critical words were uttered, the Dutch judge at the European Court of Justice at that moment, Christiaan Timmermans, cited Baumbast as evidence that Art. 18(1) [Art. 21(1) TFEU] had become an autonomous source of enforceable rights, not at all dependent on the Treaty’s ban on discrimination based on nationality113 that had been the site of previous attempts to establish an equality approaching citizenship. Timmermans closed his comments by referring to the US Supreme Court’s Edwards v. California114 and its establishment of a “constitutional right to travel” based on the premise that the several states must “sink or swim together”.115 As we know from our analysis above, this right to travel was construed by the Supreme Court as a vertical equality for US citizens, an at least implicit right of US citizenship, rather than a horizontal equality of non-discrimination for citizens of different states.

R.

We will also discuss the Court’s answers to the first and second questions in this case, which I have saved for last because they do not involve Union citizenship as

111 Schönberger (2005), p. 325.
113 Timmermans (2004), p. 18-19; see also Timmermans (2003), the English-language article from which Timmermans adapted his comments at the symposium, at p. 202.
114 Supra in Ch. 4 at n. 112.
such. These involved not only the Baumbasts, but also R., a United States citizen who had moved to the UK together with her French husband and their two young daughters, who were of dual French/U.S. nationality. A few years later, R. had divorced her French husband, but had maintained custody of the children; her ex-husband also continued to reside in the UK as a worker. When R. applied for indefinite leave to remain for herself and her daughters after five years of residence in the UK, the Secretary of State denied her application because R. supposedly no longer derived a right to stay from Community law and because there were no humanitarian reasons to grant her application.

The questions that the referring court asked as they applied to R. (and to Mrs. Baumbast and her children, as well; but I will refer to this part of the decision simply as R.) were, first of all, whether Article 12 of Regulation 1612/68 gave children of a Union citizen residing as a worker a right to reside in a host member state for the purpose of undergoing educational courses. (Literally, Article 12 only guaranteed children the right to be admitted to educational courses under terms equal to those for nationals of the host member state.) And if so: whether this right to reside varied depending on whether their parents were divorced, the Union citizen parent had ceased to be a worker, or the children were not themselves Union citizens. The second question was whether a programmatic provision of Article 12, obliging member states “to encourage all efforts to enable such children to attend these courses under the best possible conditions” thus also meant that the children’s primary carer had to have a right to stay with them.

The British government submitted, and the Commission agreed, that R.’s children, in any case, had a continued right to stay based on the Regulation, as their father continued to reside in the UK as a worker. The situation of the Baumbast children was a bit trickier, however, as they no longer derived a right to stay from the Regulation, since their Union citizen father was no longer a worker. The Commission proposed, somewhat cautiously, that the Baumbast children should have a continued right to stay based on an extensive interpretation of some previous case law of the Court. The British and German governments and the Commission were unanimous, however, that the Court’s answer to the second question should be negative: by no means could the primary carer of the child, if she was no longer married to a Union citizen, derive her own right of residence from the Regulation.

As to the first question, specifically with regard to children such as Baumbast’s, the Court ruled that the children did have a continued right to stay. But rather than extensively reinterpret its own case law, as the Commission had proposed, the Court broke new ground. First of all, crucially, it cited the spirit of the Regulation (as reflected by its fifth recital) which reveals a concern for the

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116 ECJ Baumbast and R vs. Secretary of State for the Home Department, (17 September 2002), par. 43–44.
117 ibid., par. 45–46.
118 ibid., par. 66–67.
integration of the families of workers in a host member state. Second of all, it asserts that if Mr. Baumbast had known that his children would not always be entitled to stay in the UK to complete their education, he would have been dissuaded from making use of the freedom of movement in the first place. (In this, the Court was almost exactly echoing—without citing—the potential “deterrent effect” that played a key role in Surinder Singh.) Thus regardless of whether the children were actually capable of continuing their education elsewhere, the children had to have a right of continued residence to continue the education.

As to the second question, the Court built on its answer to the first question by further citing the significance of the integration of families of workers to the freedom of movement of workers. It cited its 1989 decision Commission v. Germany, in which it had extensively elucidated the doctrine of integration as a part of the freedom of movement of workers guaranteed by the Regulation. The literal text of Article 12 of the Regulation, in any case, covered children of a worker who had ceased to work in a member state.

Moreover, as the Court had already ruled in Commission v. Germany, the Regulation was to be interpreted in light of the right to family life as guaranteed by Article 8 of the European Convention on Human Rights. Thus, if the other parent of these children, i.e. the one who was not a Union citizen or had not made use of the freedom of movement of workers, were to be denied legal residence for the purpose of taking care of them and enabling them to complete their education on equal terms, this would effectively deny those children a right that had been granted them by Community law. The carer parent (such as R.) derived a right to stay to care for the children from the Regulation.

In what I will call the “R.” part of the decision, we see the court interweaving two strands of legal norms: the freedom of movement of workers, on the one hand, and the right to family life, as guaranteed by Art. 8 of the ECHR. In 1968, at the time the freedom of movement of workers had been fully established in Community law, it could be said that the Convention’s protection of family life almost certainly did not play a role in the considerations of the Commission and

119 ibid., par. 50.
120 ibid., par. 52.
121 Supra in Ch. 6 at n. 172.
122 ECJ Baumbast and R vs. Secretary of State for the Home Department, (17 September 2002), par. 54.
123 ECJ Commission v Germany (18 May 1989)
124 ECJ Baumbast and R vs. Secretary of State for the Home Department, (17 September 2002), par. 68.
125 ibid., par. 69.
126 ECJ Commission v Germany, (18 May 1989), par. 10.
127 ECJ Baumbast and R vs. Secretary of State for the Home Department, (17 September 2002), par. 72.
128 ibid., paras. 71-75.
the Council. And for its part, and by contrast to Community law, the ECHR was an instrument of international law \textit{par excellence}, a treaty meant to stay under the control of its signatories. The fact that the European Court of Human Rights was expected to balance individual rights against a given state’s political interests\textsuperscript{129} meant that the traditional state interests of protecting public order, public health and public finances from immigrants would almost always win out against an alien’s claim to legal residence.

It was only in the 1980s and 1990s that the European Court of Human Rights (in Strasbourg) first started to develop a line of case law that broke through states’ historical sovereignty on matters of immigration, construing certain immigration rights for aliens out of their right to family life with family members who were citizens of or already admitted to a state.\textsuperscript{130} It was one thing to admit that the respect for family life might entail a “negative obligation” on a state to leave existing family life undisturbed and not deport previously admitted family members, as in the case \textit{Berrehab v. The Netherlands}.\textsuperscript{131} But the ECHR had also—very cautiously—admitted that there could be a “positive obligation” on a state to enable persons to build or continue a family life with their as-yet-unadmitted spouses in \textit{Abdulaziz et al. v. United Kingdom}\textsuperscript{132} (a case in which the first-named party, incidentally, was an East African Asian whose plight was arguably brought about by the changes in British nationality law discussed above\textsuperscript{133}).

Nevertheless, in 1989, at the time the European Court of Justice (in Luxembourg) first read the right to family life into the freedom of movement of workers in \textit{Commission v. Germany} (admittedly based on the fact, as it noted, that its previous case law\textsuperscript{134} and the third recital of the Single European Act had already incorporated the ECHR into Community law\textsuperscript{135}), the European Court of Human Rights had still been largely reluctant to aggressively break through the wall of state sovereignty on the matter. (And ultimately, despite further developments in the 21st century,\textsuperscript{136} the Strasbourg Court will still always be limited by the Convention, with its “no interference … except” provisions, to deferring to some degree of state prerogatives.) The member states of the Community certainly could hardly have found the incorporation of the Convention in Community law to be a threat in 1989.

\textsuperscript{129} \textit{See supra} in Ch. 6 at n. 8.
\textsuperscript{130} Thym (2008), p. 96.
\textsuperscript{131} ECHR \textit{Berrehab v. The Netherlands} (21 June 1988). This case involved a Moroccan national originally admitted to the Netherlands for the purpose of residence with his Dutch wife but subsequently divorced from her, who successfully claimed that he could not be deported because of his right to family life with his daughter from the marriage. Discussed in Van Walsum (2008), p. 7-8 and 184-186.
\textsuperscript{132} ECHR \textit{Abdulaziz et al. v. United Kingdom} (28 May 1985)
\textsuperscript{133} \textit{Cf. supra} in Ch. 6 after n. 120.
\textsuperscript{134} starting, arguably, from Nold: ECJ \textit{J.
Nold, Kohlen- und Baustoffgroßhandlung v
Commission of the European Communities} (14 May 1974)
\textsuperscript{135} ECJ \textit{Commission v Germany}, (18 May 1989), par. 10.
\textsuperscript{136} \textit{See Thym} (2008), p. 106.
The Maastricht Treaty introduces European Citizenship de jure

But when the Luxembourg Court once again read Art. 8 ECHR into the freedom of movement, and drew daring consequences from that, this made Art. 8 into a compelling expression of uniform equality that it never could be in the case law of the Strasbourg Court. The right to family and private life is circumscribed (as are, in similar ways, the other classic human rights of the Convention, such as freedom of expression [Art. 10], association [Art. 11], and conscience and religion [Art. 9]) by the permissibility of limitations on the part of public authorities in accordance with the law and [if] necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Thus in the context of a state being challenged before the Strasbourg Court, the right to family and private life is construed in opposition to public interests that may limit it.

Also, because those public interests vary among the states that are the signatories to the Convention, it is difficult to make out the positive implementation of the right to family and private life to be a highly uniform equality for all humans living within the territory covered by the Convention. (In this regard, the classic human rights of the Convention can be compared to the Privileges and Immunities of the United States Constitution, which—at least in one reading—states are free to “regulate” differently, as long as they do not essentially abridge them—and, as Justice Field stated in Slaughterhouse, as long as they do not regulate them in a discriminatory way with regard to United States citizens coming into their territories from other states.137)

But in the Luxembourg Court’s reading of Community law, the right to family life dovetails with, and even augments the public interest that the Community has in the freedom of movement of workers. The protection of family life is part of, not at odds with, the public interest at stake. What’s more: this entitlement to the right to family life could not vary from member state to member state, but has to apply equally to all beneficiaries of the Regulation, i.e. all Union citizens making use of their freedom of movement and their (ex-)family members. Notably, and by contrast to the Baumbast portion of the judgment, the Court does not at all draw directly on Union citizenship in the R. portion of the judgment. This portion represents a reinforcement of the de facto Community citizenship (i.e. a citizenship that could be deduced from the existence of a uniform equality) that had already existed prior to the Treaty of Maastricht. This was not an unimportant source for the equality that Union citizens and their family members could draw on. In fact, this points to the fact that that de facto citizenship was already in fact something more than the “market citizenship” that its critics138 made it out to be. After all, the freedom of movement of persons generally, by contrast to the freedom of movement of goods and capital, was

137 Cf. Smith (1997), supra in Ch. 3 at n. 53.
138 Cf. supra in Ch. 6 at n. 31.
always at least implicitly oriented toward the integration of those persons in a host member state and did not merely see them as economic objects.

Baumbast and R. can be viewed as a “layer cake” statement of citizenship. The “deductive” layer (Baumbast) draws on the formal category of Union citizenship in the Treaty, and here the Court cautiously, with some deferral to member state interests, expands the equal treatment that economically inactive Union citizens are entitled to. The “inductive” layer (R.), on the other hand, does not refer so much to the lofty ideals entailed in Union citizenship as it does to the goal of freedom of movement of workers, which is itself made out to be an interest of the Community, unbounded by member state interests. Yet both layers, or readings, benefit the exact same set of persons: a Union citizen in a host member state (since the member state national making use of the freedom of movement of workers in the “inductive” layer also happens to be a Union citizen) and his (ex-)family members. It will be important, in our analysis of the further decisions of the Court on Union citizens, to always keep an eye on whether the Court arrives at its conclusion using the inductive model, starting from the use of fundamental freedoms, or the deductive model, starting from Union citizenship.

Garcia Avello and the portability of rights

So far, in Community, then Union law, we have seen that two of our four forms of equality are most prominent for citizens: a horizontal equality in the form of non-discrimination for Union citizens living in a member state other than their own, and a vertical equality, in the form of certain rights uniformly guaranteed to all Union citizens in cross-border situations. Admittedly, these forms of equality apply almost exclusively to Union citizens who are mobile, i.e. who go to live in a member state other than the one they have the nationality of, or are returning from such movement. The only vertical, territorially uniform equality for Union citizens (regardless of mobility) is the right to vote for and stand for municipal council and the European Parliament wherever in the Union one lives (subject to slightly varying regulation by different member states, such as voting age).

Outside of Union law, there is also a vertical equality for all sedentary Union citizens, if less uniform, that is subject to shades of variation in all of the member states: the rights guaranteed by the European Convention on Human Rights, which has territorial validity overlapping the territory of the Union and extending beyond it. Moreover, it does not apply only to Union citizens, but to all humans on that territory.

The one form of equality that we have not yet seen is that of portability of rights from a home member state to another one. This area of the law typically relates to rights by private law and how they can be recognized and enforced outside of the state where the rights were established. Traditionally, as in the

United States, this is an area subject to sovereign comity, or a state’s voluntary recognition of the acts of other states and the rights established there. Comity is typically limited only by public policy exceptions, i.e. in the cases in which it would violate a state’s deeply held values to allow enforcement of a right from another state.140

Again, in processes outside the European Union project, some member states signed international treaties aiming to make the application of national comity according to the conflict of laws somewhat more uniform, for instance in matters of recognition of divorce. (Typically for instruments of international law, however, these almost invariably allow for public policy exceptions.) There were also processes overlapping the European Union and later incorporated into it, such as the Brussels Convention on recognition and enforcement of judgments in civil and commercial cases, signed by the original Six in 1968, and ultimately incorporated into European Union law (with Denmark enjoying an opt-out in the European Union Treaty, but substantively opting back in by signing a separate treaty with the Union) with the Brussels I Regulation (44/2001).

Still, none of the legal norms providing for portability of rights was technically attached to Union citizenship. That would change, however, with the ECJ’s decision in Garcia Avello,141 in which it would use Union citizenship to provide for portability of a private right to a member state of the Union citizen’s very own nationality, in violation of its public policy. We will discuss Garcia Avello and then—to take a brief excursion from our chronological history of Union citizenship—immediately go on to all of the other major cases up to the present in which Union citizens tried to employ Union citizenship as a vehicle for portability of rights.

The specific private right, in all of these cases, had to do with the right to have a certain name. And the law governing names, in the civil law tradition a branch of private law, varies considerably among the member states of the European Union. Mr. Garcia Avello, a Spanish national, resided in Belgium with his Belgian wife, Ms. Weber. They had two children who were dual nationals of Spain and Belgium. The children’s surname by Spanish law, as registered at the Spanish embassy in Belgium, was composed of the first surname of the father followed by that of the mother: “Garcia Weber”. By the Belgian Civil Code, on the other hand, the children’s surname was exclusively that of the father: “Garcia Avello”.

Mr. Garcia Avello and Ms. Weber applied to the Belgian authorities to have their children’s surnames changed to “Garcia Weber”, but the Belgian government denied the request.

When Mr. Garcia Avello appealed the denial to the Conseil d’État, the Conseil referred the preliminary question to the Court of Justice of whether Union citizenship (then-Art. 17 EC [Art. 20 TFEU]) and the right of movement and

140 See supra in Ch. 3 at n. 71.
141 ECJ Carlos Garcia Avello v. État belge (2 October 2003)
residence derived from it (then-Art. 18 EC [Art. 21 TFEU]) precluded the Belgian state from not allowing the children to use the surnames they had by Spanish law. The Belgian state based its position primarily on an established principle of customary international law, also codified in a treaty that Belgium was party to: if a person has multiple nationalities, then either of the states that she has the nationality of is entitled to regard her as solely a national of that state. The Belgian state also submitted, essentially, that the matter was a purely internal situation between Belgium and one of its nationals to which Community law did not apply—it was joined in this argument by the Netherlands and Denmark, which intervened in the case. Finally, and subsidiary to the two formal arguments, the Belgian state explained its substantive public policy interest in not allowing its nationals to use a surname based on any other name law: being able to identify children by their paternal filiation was a “founding principle of social order”; it additionally made a claim based on Community law (somewhat echoing the Netherlands’ argument in Knoors) that it only aided the integration into Belgian society of Union citizens with Belgian nationality to equally apply Belgian name law to all of them without discrimination.

The Court first repeated the Grzelczyk formula that “citizenship of the Union is destined to be the fundamental status of nationals of the Member States”. The Court then established that the children were, in fact, “nationals of one Member State lawfully resident in the territory of another Member State”, thus placing the situation within the ambit of Community law and outside of a purely internal situation between Belgium and one of its own nationals. The Court went on to cite the 1992 case Micheletti, in which Spain had tried to assert that by rules of customary international law, it only had to recognize the “effective” nationality, i.e. the Argentine nationality of a dual Italian-Argentine national who was moving to Spain from Argentina for the purpose of self-employment. (At that time, of course, the Court did not yet have the concept of Union citizenship to rely on, and so it had construed Spain’s refusal to recognize Micheletti’s Italian nationality teleologically, as a barrier to Micheletti’s freedom of establishment. We will explore Micheletti more in depth infra in Chapter 8.) The Court essentially applied the same teleological reasoning to the Garcia Weber children that it had in Micheletti: if they were to have one surname in Belgium, and another surname in the rest of the Community, it would be a barrier

142 ibid., par. 8.
143 ibid., par. 20.
144 supra in Ch. 6 at n. 163. .
145 ECJ Carlos Garcia Avello v. État belge, (2 October 2003), par. 40.
146 ibid., par. 22.
147 ibid., par. 27.
148 ibid., par. 28.
149 ECJ Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria (7 July 1992a)
to their freedom of movement in the future, causing them inconvenience with
diplomas and documents.\textsuperscript{150}

Furthermore, and perhaps crucially, the Court did not find the norm of
international law that Belgium cited, nor its public policy argument, to be
sufficiently compelling. The norm of international law that Belgium cited only
provided a state the option of only recognizing its own nationality. And as to the
public policy interest of Belgium in mandating paternal surnames: on the
substance, the Court did not think it to be all that confusing to allow a child to
have both parents’ surnames,\textsuperscript{151} and by Belgium’s own admission, its naming law
already allowed for derogations from the standard rule,\textsuperscript{152} meaning it could not be
such a compelling interest.

Essentially, in \textit{Garcia Avello} we see the Court applying the same teleological
reasoning that it had in in \textit{Konstantinidis},\textsuperscript{153} even though it did not cite that
decision, and thus perhaps only incorporating the “inductive” model of citizenship
into Union citizenship. The Court was asserting, in other words, that the
Community had a public-policy interest (freedom of movement) that trumped a
member state’s public-policy interest (a uniform system of surnames). Even
though the Court now had the formal category of Union citizenship at its disposal,
which it did not have in \textit{Konstantinidis}, the Court was still stopping short of
heeding Advocate-General Jacobs’ erstwhile call to allow the citizen to declare
“\textit{civis europaeus sum}”. Rather, one could say, it was allowing the Garcia Weber
children to declare “\textit{homo economicus sum}” (or at least: \ldots \textit{erō}) as a vehicle for
making their rights under Spanish law portable to Belgium: it served a need that
they would have in the future when making use of their freedom of movement
and residence in the Union. Arguably, the Court would have been treading on
thin ice if it had used the purely formal status of Union citizenship to allow a
citizen to subvert her member state nationality, and the claim that a member state
made on her because of it: such a reasoning would flatly subvert the hierarchy
established in Art. 17(1) of the post-“Amsterdam” EC Treaty [cf. Art. 20(1)
TFEU]: “Citizenship of the Union shall complement and not replace national
citizenship.”

The Court would inch a bit closer to crossing that line, however, in \textit{Grunkin-
Paul}.\textsuperscript{154} This case involved a Union citizen child, Leonhard Matthias Grunkin-
Paul, who only had a single nationality—that of Germany—but was able to use
his Union citizenship to successfully invoke a right to a name that that he had
gained under the law of Denmark, the member state where he was born and had

\textsuperscript{150} ECJ \textit{Carlos Garcia Avello v. État belge}, (2 October 2003), par. 36.
\textsuperscript{151} ibid., par. 42.
\textsuperscript{152} ibid., par. 44.
\textsuperscript{153} Supra at n. 78.
\textsuperscript{154} ECJ \textit{Stefan Grunkin, Dorothée Regina Paul, other parties: Leonhard Matthias Grunkin-
Paul, Standesamt Niebüll} (14 October 2008)
always lived with his parents. When Leonhard Matthias’ German father and mother, Mr. Grunkin and Dr. Paul, applied to register their son’s surname by Danish law—the “double-barreled” “Grunkin-Paul”—in Germany, the relevant authorities refused. They cited the conflict with German naming law and insisted, in accordance with the German Civil Code, that the parents give their son either the mother’s surname or the father’s surname. Before the Court of Justice, the German government argued that it was a purely internal situation, and moreover that the German naming law excluding double-barreled surnames had a practical purpose, preventing successive generations from having to give up part of their surname.

The Court essentially repeated its considerations in Garcia Avello, noting Leonhard Matthias’ interest in being able to identify himself with his German passport using the same name that he used on a daily basis in Denmark; and also his interest in being able to use his Danish diplomas in the future. The Court denied that Germany’s interest in disallowing double-barreled surnames was compelling, both substantively and formally (since German law did allow for exceptions). But perhaps most decisively: Germany had not, actually, asserted that it was contrary to German public policy to allow a double-barreled surname.

Nevertheless, this is something of a revolutionary development. Naming law is historically very intimately bound up with nationality: it was personally applicable, rather than territorially applicable. Yet in this particular situation, Union citizenship, or at least the practical use of it from birth, was used to declare the naming law of the member state of residence, rather than the member state of nationality, applicable to an individual. The most radical implication of this, if we declare the rights under naming law to be part of the bundle of equality that goes with member state citizenship, is something approaching the relationship between United States citizenship and state citizenship introduced by the Citizenship Clause of the Fourteenth Amendment. By that Clause, state citizenship had ceased to be a personally determined and largely immutable status of private law (like nationality) and had become a purely territorially determined status derived from United States citizenship. Of course, we see that if residence was decisive for activating this “local citizenship” in Grunkin-Paul, it certainly was not an immediate effect of changing residence, as in the constitutional system of the United States. Rather, it was the effect of a very long-term residence, or of birth in a host member state, perhaps hinting at a certain form of “local citizenship” being derived from Union citizenship jure soli.

I will close this excursion on portability of rights under naming law with two cases in which the European Court of Justice did in fact find that it was acceptable for a member state to declare an exception to having to recognize that right. In the first one, Sayn-Wittgenstein,155 Austrian national Ilonka Sayn-Wittgenstein had moved to Germany, where she was adopted by a German prince, Lothar Fürst von Sayn-

155 ECJ Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien (22 December 2010)
Wittgenstein. Under German naming law, there are no titles of nobility as such, but existing titles of nobility, including the particle “von”, are seen as part of the surname and are also inflected for gender. Thus the surname of Ilonka’s adoptive father is “Fürst von Sayn-Wittgenstein” and Ilonka’s surname by German law had become “Fürstin von Sayn-Wittgenstein”. Ilonka petitioned the authorities of her country of nationality to change her surname to that, and in fact she was issued an Austrian passport with that surname in 2001.

However, subsequent to a court judgment by the Austrian Constitutional Court in 2003 confirming that under the republican constitution of Austria, Austrian nationals were not permitted to carry titles of nobility or the particle “von” in their names, the Austrian authorities notified Ilonka in 2007 that her surname by Austrian law would henceforth be simply “Sayn-Wittgenstein”. The court in her appeal, in which she had cited Grunkin-Paul, ultimately referred preliminary questions to the European Court of Justice. The Court ruled that (by then) Art. 21 of the Treaty on the Functioning of the European Union, the provision providing for the right of movement and residence for Union citizens, did not preclude a member state from refusing to recognize the elements of the surname of one of its own nationals where that refusal was based on the constitutional identity of that member state and proportional to the aims of that identity. In other words, a mere “public policy” exception, i.e. one based on the ordinary statute law of the member state, was not enough: it had to be a “constitutional identity” exception based on the constitution or statutes of constitutional importance.

The Court ruled similarly in Runevič-Vardyn. The first applicant, a Lithuanian national belonging to the ethnic Polish minority in Lithuania, had the official name “Malgozata Runевич”, which was a Lithuanianized spelling of the Polish name “Małgorzata Runiewicz”. After living and working in Poland, where her name was spelled by the authorities according to the Polish spelling rules, she married the Polish national Łukasz Paweł Wardyn, and her married name by Polish law became “Małgorzata Runiewicz-Wardyn”. However, on her Lithuanian marriage certificate, her name was still rendered with the Lithuanian spelling, with “Wardyn” changed to “Vardyn”, and her husband’s name was rendered with the Polish spelling, but without diacritical marks: “Łukasz Paweł Wardyn”.

Both applicants claimed that this registration of their names, which had been done in accordance with Lithuanian laws that provided that Lithuanian was the national language and that all government administrations were to be kept in Lithuanian and using Lithuanian orthography, had caused them inconvenience as Union citizens. The Court found (citing Art. 4(2) of the Treaty on European

156 ECJ Malgożata Runевич-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others (12 May 2011)
157 ibid., par. 86.
Union, which provides that Union law must respect the national identity of the member states) that the objectives of the Lithuanian laws in question, bound up as they were with Lithuanian national identity, were legitimate, as was their application to the Vardyn/Wardyns.

I hereby conclude this brief excursion into any equality inherent in Union citizenship in terms of horizontal portability of rights, in particular rights under naming law. It must be noted that certain other issues of portability of rights are not, strictly speaking, horizontal, but vertical, particularly where the entitlement to those rights has been harmonized by Union law. One striking example is the ability to trade a driver’s license issued in one member state for a driver’s license in another member state. In the European Union, this right is not tied to citizenship, nor is it based on comity, but it is based on the fact that by Union law (currently Directive 2006/126), the requirements for obtaining a driver’s license are harmonized. Thus if a driver’s license in one member state was obtained in compliance with the Directive, including with its requirement that the holder was genuinely resident in that member state at the time, then another member state cannot refuse to allow the holder to trade in that license. This differs from the situation in the United States, where the ability to trade a license from one state for a license in another is still largely “horizontal”, based on agreements between the states and not based on federal law. 158

158 See, generally, Bierbach (2011)
Chapter 8: The Union legislature elaborates on Union citizenship; the Court responds

In this chapter, we will see how the legislature of the Union, now the Council, the Commission, and the European Parliament actively working together, would consolidate and codify the rights of movement and residence enjoyed by mobile Union citizens. The Court, in turn, would accept some of the restraints on Union citizenship that this new legislation provided for, but would also continue to “color outside the lines” laid down by the legislature of the Union. Furthermore, now that Union citizenship was increasingly well defined \textit{de jure}, it would start to become more apparent that some Union citizens were being denied the rights that ought to accompany that citizenship, some \textit{de jure}, and some \textit{de facto}. We will explore what such a “second-class citizenship” looks like in the context of the European Union.

Directive 2004/38: the consolidation in the secondary legislation of the rights of residence based on Union citizenship

The substance of the Directive

The first piece of secondary legislation “on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States” to be adopted in the co-decision procedure by qualified majority in the Council was adopted on 29 April 2004: Directive 2004/38. We can already compare and contrast the events that marked the passage of this legislative instrument with the ones that marked the passage of the 1990 Directives on freedom of movement for economically inactive citizens. Then, and now, the legislative procedure was preceded by a decision by the Court that confirmed that an economically inactive student was entitled to equality, an equality that implied significant financial consequences for host member states. Then, and now, the secondary legislature may have wanted to seize the moment to legislate a clear limit to that equality.

But now, the secondary legislature was no longer the Council speaking unanimously, representing the interests and fears of the member states, but a qualified majority of the Council together with Parliament, which represented the Union citizens who had elected it. Thus the any ambition that the Council may have had to use the Directive to limit the rights of Union citizens would be moderated by Parliament. At the same time, as we will see, Parliament’s ambitions to significantly expand the rights of Union citizens in at least one area was to be moderated by the Council.
First of all, the Directive adopted the Court’s Grzelczyk formula in Recital 3:

Union citizenship should be the fundamental status of nationals of the Member States …

But notably, it then went on to immediately add a qualification in order to attempt to temper the effect of the Court’s decision:

… when they exercise their right of free movement and residence.

It also went on to espouse the more cautious, ‘consolidation’ reading of the same decision:

It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

And indeed, this Directive was largely a consolidation of all of the previous directives on freedom of movement of workers, the self-employed, and the economically inactive, which were all now repealed. The “grand old lady” of legislation on freedom of movement of workers, Regulation 1612/68, was also largely supplanted by the Directive.

Furthermore, the Directive incorporated the Baumbast and R. case law on the right of residence of the child of a Union citizen and her primary carer after the departure of the Union citizen, if the child was enrolled in an educational establishment (Article 12(3)). Notably, this effectively consolidated the teleology of this right, which the Court had derived from the freedom of movement of workers, into Union citizenship, meaning that it also applied to the family members of an economically inactive Union citizen who had departed.

The Directive also had provisions concerning the circumstances under which a Union citizen could be deported for reasons of public policy or public security, one of the most important historical concerns of member states with regard to the admission of aliens. This matter was already provided for in Community legislation: the new Directive echoed the provisions of Directive 64/221/EEC on this matter, which had said (in Art. 3(1)) that “[m]easures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned” and also (in Art. 3(2)) that “[p]revious criminal convictions shall not in themselves constitute grounds for the taking of such measures.” The new Directive went a step further (in Art. 27(2)), incorporating case law of the Court that said that “[t]he personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”, and also adding (in

1 to use Herwig Verscheuren’s affectionate name for it (presentation at a conference on freedom of movement of workers at the German Federal Ministry of Labor and Social Affairs in Berlin, 20 June 2011)

2 ECJ R v. Pierre Bouchereau (27 Oct 1977) and ECJ Georgios Orfanopoulos, Natascha Orfanopoulou, Melina Orfanopoulou, Sofia Orfanopoulos v. Land Baden-Württemberg (C-482/01) and Raffaele Oliveri v. Land Baden-Württemberg (C-493/01) (29 April 2004)
Art. 27(1)) that deportation measures had to comply with the principle of proportionality.

Finally, significantly, the Directive introduced rights of residence for former spouses and registered partners of Union citizens after divorce or dissolution of a registered partnership (Article 13): if the marriage or registered partnership had lasted at least three years, of which one year had been spent in the host member state, the ex-spouse or ex-partner would retain the right of residence on the condition that he or she continued to satisfy the same conditions for legal residence (economic activity or being self-supporting with health insurance) that apply to Union citizens.

The most significant legislatively added feature for the Union citizen was the introduction of a right of permanent residence (Chapter IV of the Directive), to be acquired automatically by Union citizens and their family members after five years of any kind of legal residence in a host member state. In the provisions on equal treatment (Chapter V of the Directive), the secondary legislature made clear (albeit in a rather convoluted way) that a Union citizen with the right of permanent residence has an absolute right to any kind of social assistance or student financing on the same terms as nationals of the host member state.

As to Union citizens who do not yet have the right of permanent residence, the Directive preserves an implicit hierarchy: only workers, self-employed persons and persons retaining one of those statuses, and their family members are guaranteed equality to nationals of the host member state in the area of social assistance or student financing. Economically inactive Union citizens and their family members, implicitly but clearly, are not, unless they have gained the right of permanent residence. The specific mention of student financing may be seen as a pointed response on the part of the secondary legislature to that specific aspect of *Grzelczyk*; and indeed, the Court subsequently confirmed a somewhat more restricted right to student financing in *Förster*, which appeared to heed the secondary legislature’s new, more restrictive norm. (In *Bidar*, a judgment on a question that had been referred just before the Directive entered into force, the Court had ruled that a Union citizen who had established a “genuine link” with the host member state had a right to full equal treatment in the area of student financing, regardless of economic activity. With *Förster*, it could be said, the Court recognized that with the condition of five years of residence to obtain permanent residence, the secondary legislature had established an objective norm for what constituted such a “genuine link”.)

Furthermore, the Directive provided (as the Court had noted in *Grzelczyk*) that expulsion of Union citizens for reliance on social assistance could

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3  ECJ Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep (18 November 2008)
4  ECJ The Queen (on the application of Dany Bidar) v London Borough of Ealing, Secretary of State for Education and Skills (15 March 2005)
5  ECJ Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep, (18 November 2008), par. 55
never take place without taking all of their circumstances into account, thereby also implementing the principle of proportionality that the Court had cited in Baumbast. Nevertheless, as recital 16 provided:

In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security.

Clearly, then, the secondary legislature was continuing to express a preference for economically active Union citizens, who could never be expelled for relying on social assistance.

Nevertheless, at the end of the day, the Directive did not place any new limits on Union citizens; in fact, as we will see later, it was most significant that the third recital of the Directive stated that the purpose of the Directive was to “strengthen the right of free movement and residence of all Union citizens” (italics added).

The legislative process behind the Directive

At the same time, if we examine the legislative process behind the Directive, we will see that Parliament tried to use it to expand the rights of Union citizens even more, specifically by widening the circle of family members whom Union citizens could bring with them to a host country, in accordance with evolving social norms. However, any attempt to legislate, and not merely recognize new social norms that had already been implemented in national family law, was to be rebuffed by the member states in the Council. We will start with the original draft of the Directive, as proposed by the Commission on 29 June 2001 (and published in September, only days after the Court issued its decision in Grzelczyk), which did moderately expand the circle of family members entitled to residence with a Union citizen as well as the rights of those family members. Then we will examine the Parliament’s expansion on this proposal, and finally the compromise that the Council proposed in light of the member states’ concerns.

The original secondary legislation had only expressly benefited the traditional nuclear family relative to the Community national making use of rights of movement and residence: in any case, the spouse and dependent descendants (which was understood to also include stepchildren). Nevertheless, the non-discrimination principle of Community law had already been applied as early as 1986 in at least one member state with more progressive social norms to discover a right of residence for non-traditional family members, outside the literal

provisions of that secondary legislation. In the case Reed,\(^7\) the Netherlands had denied that Ms. Reed—the unmarried partner of a British national working in the Netherlands—could have legal residence, since she was not the “spouse” of a worker in the sense of Regulation 1612/68. Ms. Reed successfully argued before the Court that because Dutch immigration policy provided facilities\(^8\) for the unmarried partners of Dutch citizens (regardless of sex, incidentally) to immigrate to the Netherlands, it constituted discrimination based on nationality to deny the same social benefit to Community workers living in the Netherlands who had unmarried partners.

Notably, however, another argument of Ms. Reed’s—that social standards were evolving and that the definition of “spouse” in the Regulation should simply be understood to include unmarried partners everywhere in the Community—failed before the Court. The equality that Ms. Reed benefited from was therefore not “vertical” in nature—i.e. a cross-border equality for all Community workers with unmarried partners—but was “horizontal” in nature, entailing that the political choices that a given member state made in making its own laws\(^9\) had to be applied in a non-discriminatory fashion to its own citizens and beneficiaries of Community law alike within that member state’s territory.

In 2001, the Commission aimed to expressly implement Reed in the new secondary legislation, following failed proposals in the previous decade to add provisions benefiting unmarried partners to the 1990 Directives and Regulation 1612/68.\(^10\) In Article 2(2) of its draft of the Directive, the Commission proposed a definition of “family member” that, first and foremost, was to determine which family members of all mobile Union citizens would be automatically entitled to legal residence in a host member state, without the divergences in the lists of entitled family members of workers, self-sufficient persons, pensioners and students that had characterized the previous instruments of secondary legislation. One of the types of family members to benefit (in the proposed Art. 2(2)(b)) was “the unmarried partner, if the legislation of the host Member State treats unmarried couples as equivalent to married couples and in accordance with the conditions laid down in any such legislation”. This provision thus expressly referred to the political choices made by a given member state and really only confirmed the horizontal equality based on non-discrimination established in Reed.

However, in the Commission’s explanatory memorandum, it appeared to base its proposal at least partly on a claim that social norms were evolving across the Union (italics added):

> First, this definition includes not only spouses, but also unmarried partners. Subparagraph (b), which is new, deals with the issue of the right of residence for unmarried

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\(^{7}\) ECJ *State of the Netherlands v Ann Florence Reed* (<br>17 April 1986)

\(^{8}\) Staatssecretaris van Justitie (2 September 1982), par. 2(e)(2)

\(^{9}\) See the comments of Lenaerts (1991) on Reed, p. 26.

\(^{10}\) Toner (2004), p. 53-59.
partners of Union citizens. The "family group" has been recently undergoing rapid change and more and more people, often with children, are forming de facto couples. Furthermore, several Member States have introduced a special status, with a set of rights and obligations, which cohabiting unmarried couples can register for. In the context of the right of residence, Community law cannot ignore this development, so the proposal is to treat unmarried partners as equivalent to spouses for residence purposes, where the legislation of the host Member State provides for unmarried partner status and on the terms of any such legislation.\(^\text{11}\)

On 6 February 2003, the Commission informed the Parliament that due to the entry into force of the Nice Treaty, the draft Directive would no longer require a unanimous decision on the part of the Council, but would be decided on based on qualified-majority voting\(^\text{12}\) (and as noted before,\(^\text{13}\) this also meant that the Parliament would have a real say in the legislative process). The Parliament apparently had not needed to be reminded of the fact that its suggested amendments would carry real weight in the legislative process once “Nice” entered into force, however, because less than two weeks later, on 19 February 2003, it released the amendment proposal it had been working on for some time.\(^\text{14}\)

With regard to the definition of “family members”, the Parliament was even more strongly of the opinion than the Commission that social norms were evolving. The Parliament’s proposed change to the second sentence of Recital 6 (in bold italics) was:

The definition of family member should be widened and standardised for all persons entitled to the right of residence so that the diversity of family relationships that exist in today’s society, whether in the form of marriage, registered partnerships or unmarried partnerships, is recognised and respected. On the grounds of equality and fair treatment, the

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\(^{11}\) European Commission (25 September 2001), Art. 2(2) [Explanatory Memorandum available online at <eur-lex.europa.eu>, not in the Official Journal]

\(^{12}\) Communication from the Commission to the European Parliament and the Council - Effects of the entry into force of the Nice Treaty on current legislative procedures, (European Commission 6 February 2003)

\(^{13}\) Supra in Ch. 7 after n. 103.

fundamental right to family life should not be made dependent on individuals choosing to enter into marriage.

And the Parliament made extensive additions to Article 2(2) as well:

2. ‘Family member’ means:
   (a) the spouse, irrespective of sex, according to the relevant national legislation;
   (b) the registered partner, irrespective of sex, according to the relevant national legislation;
   (c) the unmarried partner, irrespective of sex, with whom the Union citizen has a durable relationship, if the legislation or practice of the host and/or home Member State treats unmarried couples and married couples in a corresponding manner and in accordance with the conditions laid down in any such legislation;
   In assessing whether a durable relationship exists, Member States shall consider as evidence the length of the relationship, previous cohabitation, shared parental responsibilities and any other relevant factors;
   (d) the direct descendants and those of the spouse, registered partner or unmarried partner as defined in points (a), (b) and (c);
   (e) the direct relatives in the ascending line and those of the spouse, registered partner or unmarried partner as defined in points (a), (b) and (c);

The Parliament also added to the Commission’s definition of “host member state” in Article 2(3):

3. ‘Host Member State’ means the Member State to which a Union citizen goes in order to exercise his right of free movement and residence;

4. ‘Home Member State’ means the Member State in which a Union citizen was residing prior to exercising his/her right of free movement to, and residence in, another Member State.

The insertion of the phrase “irrespective of sex” with regard to spouses and registered partners might have sounded daring, but then the immediately following phrase “according to the relevant national legislation” showed this proposed change, at first glance, to maintain a certain degree of caution and deference to the legislation of the member states that did not have same-sex marriage (which at that point in time was all of the member states except one: the
Netherlands, with Belgium to follow in just a few months). The addition of registered partners as family members might have been seen to have even less potential for controversy, since a somewhat greater number of member states (five at the time) had already introduced registered partnerships or civil unions for same-sex and (sometimes) opposite-sex couples.

But the text inserted into Art. 2(2)(c) with regard to unmarried couples, together with the insertion of the proposed Art. 2(4), revealed that the Parliament may have had something a bit more radical in mind than the introduction of an equality based purely on non-discrimination within the territories of the member states that already had same-sex marriage or registered partnerships or that recognized de facto relationships as a form of family life. The proposed Art. 2(2)(c), in conjunction with the proposed Art. 2(4), would have meant that if a Union citizen had been living with an unmarried partner in a member state which recognized de facto relationships as a form of family life, and the Union citizen were then to move to another member state which did not recognize de facto relationships, the host member state would be obliged to recognize the unmarried partner’s right to entry and residence as a “family member” in the sense of the Directive. Given the fact that the Parliament so expressly formulated this for the case of unmarried partners, it seems likely that the Parliament also meant for that to be the case for same-sex spouses and registered partners moving to a host member state that did not have same-sex marriage or registered partnership. In other words, the clause “according to the relevant national legislation” was meant to refer to the national legislation of the host member state or the home member state.

Thus the Parliament aimed to introduce equality not in the form of non-discrimination (by reference to the laws of the host member state), but in the form of portability of rights from a “home” member state. Most strikingly, and by contrast to the Garcia Avello\textsuperscript{15} form of portability of private legal rights that could derogate the laws on private legal rights of a Union citizen’s own (second) member state of nationality, “home member state” was defined in this case not as the member state of nationality of the Union citizen, but the member state of last residence of the Union citizen. Effectively, for a Union citizen in a same-sex marriage, the private legal status of being married (or at least certain rights by public law attaching to that status) would not be determined by the legal system of the host member state, even if this was the member state of the Union citizen’s own nationality, but by the legal system of the member state where the Union citizen had last lived. (To give an example: an Austrian woman, A, legally residing as a Union citizen in the Netherlands could marry a Ukrainian woman, U, who would then also have legal residence in the Netherlands. Upon A’s return to Austria with U, once U had made a claim to legal residence in Austria based on Surinder Singh, the Austrian authorities would be obliged to recognize U’s right of

\textsuperscript{15} Supra in Ch. 7 at n. 141.
residence based on Union law as A’s wife, in derogation of Austrian law’s definition of marriage as being between a man and a woman.)

If we view these rights derived from mere residence in a member state as being somehow traditionally associated with citizenship (as I did with Grunkin–Paul\(^{16}\)), then we can draw an even more striking conclusion. Such a relationship (in which “home state citizenship” would ultimately be derived from Union citizenship rather than vice versa) would resemble the relationship between United States citizenship and state citizenship introduced by the Citizenship Clause of the Fourteenth Amendment. By that Clause, state citizenship had ceased to be a personally determined and largely immutable status of private law (like nationality) and had become a purely territorially determined status derived from United States citizenship.

(Admittedly, however, as we saw in Saenz v. Roe\(^{17}\), the US Supreme Court is even now hesitant to encourage the portability of rights based on a too-facile acquisition of citizenship of a destination state. What’s more, relative to this specific subject matter: a same-sex marriage validly concluded in any state is now recognized in the federal legal order thanks to United States v. Windsor\(^{18}\), which also means that foreign same-sex spouses so married can benefit from, in particular, provisions of immigration law, a federal competence. Nonetheless, it is still a very contentious issue whether a state’s recognition by its own family law of a marriage concluded in another state is ultimately dependent on its own sovereign standards of comity, such as when New York Governor David A. Paterson decided by New York law to recognize such marriages,\(^{19}\) or whether such recognition is out of states’ hands and is mandated by the Equal Protection Clause as interpreted in Windsor, as a federal judge recently ruled with regard to Kentucky’s attempt to deny such recognition.\(^{20}\) We can see that any attempt to take the right to marriage, or the right to enjoy the rights that go with marriage, out of the competence of the [member] state, the traditional repository of family law, and make a federal competence out of it, is equally controversial in the EU and the US.)

The Council, for its part, clearly recognized the full implications of the Parliament’s proposed amendments and was not having them. In its Common

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\(^{16}\) Supra in Ch. 7 at n. 154.
\(^{17}\) Supra in Ch. 4 at n. 151.
\(^{18}\) Supra in Ch. 4 at n. 147.
\(^{19}\) Peters (2008).
\(^{20}\) Barnes (2014)
Position of 5 December 2003,\(^{21}\) it said, in the list of the Parliament’s amendments that it was rejecting:

> Amendments 4, 14, 15 and 16: the text of these amendments recognises as family members the spouse and registered partner, irrespective of sex, on the basis of the relevant national legislation, and the unmarried partner, irrespective of sex, with whom the Union citizen has a durable relationship, if the legislation or practice of the host and/home Member States treats unmarried couples and married couples in a corresponding manner and in accordance with the conditions laid down in any such legislation. These amendments have not been accepted for the following reasons:

With regard to marriage, the Council has been reluctant to opt for a definition of the term "spouse" which makes a specific reference to spouses of the same sex. For the moment only two Member States have legal provisions for marriages between partners of the same sex. Moreover, in its case-law the Court of Justice has made it clear that, according to the definition generally accepted by the Member States, the term "marriage" means a union between two persons of the opposite sex.

With regard to partners, whether they are registered partners or unmarried partners, the Council is of the opinion that recognition of such situations must be based exclusively on the legislation of the host Member State. Recognition for purposes of residence of non-married couples in accordance with the legislation of other Member States could pose problems for the host Member State if its family law does not recognise this possibility. To confer rights which are not recognised for its own nationals on couples from other Member States could in fact create reverse discrimination, which must be avoided.

Nevertheless, the Council did accept the automatic recognition of registered partners as family members in Article 2(2)(b), “if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State.” De facto partners were not to be automatically recognized as family members in Art. 2, rather, member states were to “facilitate the entry and residence” of “the partner with whom the Union citizen has a durable relationship, duly attested” based on the Council’s proposed Art. 3(2)(b). (This concept of “facilitation”, which implied a certain discretion on the part of member states, was nothing new at all: it was previously provided for in Art. 17(2) of Regulation 1612/68,\(^{22}\) which, as we will recall, had been introduced after Italy had been


\(^{22}\) See supra in Ch. 5 at n. 125.
rebuffed in its desire to have all dependent blood relatives in the ascending or
descending line automatically recognized as family members of Community
workers. Clearly, as well, this provision with regard to de facto partners (crucially,
not “unmarried” partners!) was also meant to allow more conservative member
states to grant a right of residence (through “facilitation”) to same-sex spouses and
registered partners of Union citizens without having to lose face by recognizing
(automatic legal consequences to) the marriage or partnership as such.

Finally, the Council introduced a new recital in its common position
(italics added):

(6) In order to maintain the unity of the family in a broader sense and
without prejudice to the prohibition of discrimination on grounds of nationality,
the situation of those persons who are not included in the definition of
family members under this Directive, and who therefore do not enjoy an
automatic right of entry and residence in the host Member State, should
be examined by the host Member State on the basis of its own national
legislation, in order to decide whether entry and residence could be
granted to such persons, taking into consideration their relationship with
the Union citizen or any other circumstances, such as their financial or
physical dependence on the Union citizen.

The Council’s full explanation was shorter than the text itself: “[T]his Recital was
added in order to clarify the notion of facilitation provided for in Article 3.” But
the text italicized here was also significant in that it can be seen as the ultimate
codification of the Reed doctrine of non-discrimination, which the Commission
had originally tried to codify with its more express provisions on unmarried
partners. In other words, in member states that granted rights to unmarried,
cohabiting partners, such partners could still be effectively read into the Directive
as “family members” entitled to an automatic right of residence, provided they
satisfied the evidence requirements of the host member state’s national law.

Whether or not Parliament was truly satisfied with the Council’s compromise
proposal,23 on 10 March 2004, it resolved to accept the common position,24 which
became Directive 2004/38. Thus, the Parliament’s attempt to introduce a new
form of horizontal equality for Union citizens in terms of portability of rights
from one member state to another had failed. But the traditional horizontal
equality, based on non-discrimination within the territory of a given member state,

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23 Toner notes just how tenuous this compromise was, since it had been hard enough to
reach as it was, and the accession of ten new member states on 1 May 2004 would have
meant that the Parliament would be sending the proposal back to a very different (and
certainly more conservative) Council if it had rejected it. Toner (2004), p. 62

24 Legislative resolution on the Council common position with a view to the adoption of a
directive of the European Parliament and of the Council on the right of citizens of the
Union and their family members to move and reside freely within the territory of the
Member States, amending Regulation (EEC) No 1612/68 and repealing Directives
2001/0111(COD)), (European Parliament 28 April 2004)
had been reinforced, and the member states were additionally given a nudge to use their discretion to recognize non-traditional partnerships.
Interlude from the Court: *Zhu and Chen*

To briefly return to the legal developments from the Court before going on to larger constitutional developments: the Court went on to derive rights of residence even more directly from Union citizenship in *Zhu and Chen*.

In this case, the Union citizen involved, Catherine Zhu, was only an infant. Her mother, the Chinese national Man Chen, had given birth to her in Northern Ireland; this led to Catherine automatically obtaining the citizenship of the Republic of Ireland due to a quirk of Irish constitutional law providing for automatic acquisition of that nationality by anyone born on the island of Ireland. Catherine and her mother resided in the United Kingdom. The questions were: did Catherine have a legal right to stay in the UK as a Union citizen? And her mother?

The Court established, first of all, that Catherine certainly fell within the scope of Community law despite the fact that she had never actually crossed a border and had never been outside the UK, since she was in fact an Irish citizen in a host member state (par. 19). Moreover, the right to freedom of movement and residence was not exclusive to those Union citizens who were old enough to decide to make use of them (par. 20). And clearly, Catherine would qualify for legal residence as an economically inactive Union citizen based on Directive 90/364 if she could satisfy the requirements of having sufficient resources to not be an unreasonably burden on the social assistance system and having health insurance (par. 27). Catherine did not have to possess these resources herself: it was sufficient for her mother to possess them, since the Directive referred merely to ‘having’ sufficient resources (paras. 30-33). Finally, the fact that her mother had admittedly taken advantage of a loophole in Irish nationality law to obtain Irish nationality for Catherine could not be used by the United Kingdom to see her as something “less than a real” Union citizen (paras. 34-40).

None of the Court’s considerations about Catherine’s right of residence was particularly novel or daring, or made any special use of Union citizenship. But then the court moved on to the right of residence of Catherine’s mother. Catherine’s mother could not rely on the secondary legislation: the Directive did make a right of residence possible for the “dependent blood relative in the ascending line” of a member state national, but Catherine’s mother could not be made out to be a dependent of Catherine. The Court went on to consider, however:

> On the other hand, a refusal to allow the parent, whether a national of a Member State or a national of a non-member country, who is the carer of a child to whom Article 18 EC and Directive 90/364 grant a right of residence, to reside with that child in the host Member State would deprive the child’s right of residence of any useful effect.

25  *ECJ Kunqian Catherine Zhu, Man Lavette Chen, v Secretary of State for the Home Department* (19 October 2004)
26  *ibid.*
27  *ibid.*, par. 45
Therefore, if the child has a right of residence, the parent must also have a right of residence. This right was derived more or less directly from the child's right of residence based on Union citizenship (which by now was provided by Art. 18 of the EC Treaty [Art. 21 TFEU]). The Court acknowledged the secondary legislation, but simultaneously implied that the secondary legislature had clearly left a lacuna in that Directive that could only be filled with Union citizenship. In that regard, this decision confirms the comment of yet another commentator, in the context of comparing Union citizenship to United States citizenship, who sees the function of Union citizenship as ultimately largely “gap-filling” with regard to the secondary legislation. 28

Yet if we look back to my analysis of Baumbast and R., in which I discerned two layers of that decision—one grounded on the formal status of Union citizenship and one grounded on the teleology of the freedom of movement of workers—we see that the Court here has taken a significant step to resolve their somewhat uneasy parallel existence. In the Baumbast part of that decision, the Court had used an interpretation of the text of Art. 18(1) of the Treaty [Art. 21(1) TFEU] to confirm the existence of a right of residence, outside of the literal provisions of the secondary legislation, for the economically inactive Mr. Baumbast. In the R. part of the decision, the Court had derived the continued right to stay for R., the third-country national parent of the children of a member state national who had come as a worker, from the fact that her children, who were enrolled in education, were beneficiaries of the specific goals of the secondary legislation regarding freedom of movement of workers (as well as from the right to family life in the European Convention on Human Rights). (For that matter, if they had not benefited from Mr. Baumbast’s Union citizenship, Baumbast’s children would have also derived a right to stay as children of an ex-worker on the teleological basis, i.e. for the purpose of continuing their education.) Whether or not the children were themselves Union citizens was irrelevant to this analysis of the Court.

Yet in Chen, the Court employed Union citizenship directly, but without making any use of purely formal-systemic or ideal grounds to justify its decision (i.e., “because the text of the Treaty says so”, or “because Union citizenship is destined to be the fundamental status”). Rather, the Court used the doctrine of “useful effect” to incorporate the teleological and human-rights reasoning of the R. part of Baumbast and R. into the rights of residence based purely on Union citizenship that it had used in the Baumbast part of that judgment. It did so without blushing in the above-cited paragraph 45 of Chen, when it went on to explain the “useful effect”: “(see, mutatis mutandis, in relation to Article 12 of Regulation No 1612/68, Baumbast and R. paragraphs 71 to 75)”. In other words, an economically inactive mobile Union citizen (provided, of course, that she would not become an unreasonable burden on the public finances

of the host member state) was to have rights of residence every bit as strong as the economically active mobile Union citizen, and including rights of residence for the family members who could be made out to be necessary to her stay.

The doctrine of “useful effect” (effet utile) has a long history in the case law of the Court, among other things as a later justification of the doctrine of “direct effect” of Community law that the Court originally pronounced in Costa/ENEL. As Mayr argues, it is not entirely fair to the Court to say that effet utile is invariably an aspect of teleological interpretation; it can better be seen as a flexible concept, albeit one that “emphasises the teleological aspects” in the choice among alternative solutions.

In Chen, we see how effet utile is employed as a convenient placeholder for the Court’s previous teleological and human-rights considerations in the R. part of Baumbast and R. With its parenthetical aside in Chen to explain by analogy what exactly the “useful effect” of Catherine’s right of residence based on Union citizenship is, the Court is essentially equating it to the policy goals of the secondary legislation on freedom of movement of workers, and the right to family life as guaranteed by Art. 8 ECHR, that played a role in R. So for Catherine, the fact alone of her being a self-supporting Union citizen in a host member state was enough to activate the same rights that the secondary legislature previously only thought important enough to grant to workers.

Thus we cannot say that the Court is already employing a purely deductive model of Union citizenship in Chen. The two “layers” in Baumbast and R, one using the deductive model of Union citizenship, and one using the “old” inductive model of Community citizenship, had still existed independently of each other, the deductive one solely for economically inactive Union citizens (activating equalities slightly outside the lines of the secondary legislation that was specifically written for them) and the inductive one solely for economically active Union citizens (idem). In Chen, however, the Court has firmly glued the two layers together, at least for economically inactive Union citizens: the mere formality of possessing Union citizenship, in the right circumstances, activates the entire package of equalities available within and just outside of the secondary legislation.

Without a doubt, the Court was emboldened to take this step by the fact that the secondary legislature had already largely merged the rights of residence enjoyed by economically active and economically inactive Union citizens in Directive 2004/38. The Directive, after all, had been adopted mere months before Chen, even though the Court (and the Attorney General in his Opinion, also written subsequent to the adoption of the Directive) never specifically mentioned it, since it did not itself apply to the case.

29 Mayr (2012/2013), p. 11–12; 18 et seq.
30 Supra in Ch. 6 at n. 19.
32 ibid., p. 17.
Second-class Union citizenship?

In our previous exploration of United States citizenship, we saw that one of the core values of citizenship there was held to be the avoidance of the creation of any kind of classes within that formal category; all citizens were to equally enjoy the same equalities.33 By contrast, the legal category of Union citizenship has been unable to resist the emergence of two forms of “second-class Union citizenship”. The first form is expressly and formally created with regard to mobile Union citizens from accession states, for whom the freedom of movement of workers can be restricted. The second form of “second-class Union citizenship” affects sedentary Union citizens from states with highly restrictive laws on family reunification: their lesser equality is not directly created by Union law, but by the fact that they are effectively subject to “reverse discrimination”.

Formally second-class Union citizens: Citizens of accession states

When the first round of new member states including states from the former communist bloc (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia; and Cyprus and Malta, which had never been communist) acceded on 1 May 2004, their citizens became Union citizens (to whom, in theory, Directive 2004/38 applied, since the Directive had entered into force only two days prior). Yet the accession treaties, as with the previous accession treaties for Spain, Portugal and Greece, allowed the pre-existing member states to restrict the access of Union citizens from the formerly communist new member states to the employment market for a number of years (the new member states whose citizens were notably exempted from the possibility of this restriction were Cyprus and Malta). And most of the old member states did in fact decide to enact these controls, with the exception of the UK, Ireland and Sweden. In this section, I will explore why member states favored this restriction of Union citizenship, and whether it even served a real purpose.

Despite the restriction on employing Union citizens from the new member states, these same citizens, if self-employed, still had largely unrestricted freedom of establishment, and businesses established in the new member states had largely unrestricted freedom to provide services into the old member states with posted workers. (For that matter, Union citizens from the new member states were also free to reside in old member states as economically inactive Union citizens.) In practice, the ban exerted pressure on Union citizens from accession member states desirous of freedom of movement to establish themselves as self-employed.

33 We first saw this idea reflected in Madison’s contributions to the debate on the Naturalization Act of 1790, supra in Ch. 2 at n. 79; and most recently saw it reflected in the Supreme Court decision Saenz v. Roe, supra in Ch. 4 at n. 151.
individuals in old member states; or for companies in new member states to make a profit by posting teams of workers to provide services in old member states.  

These restrictions—which perhaps were especially striking now that they affected not just a single accession state or pair of accession states, but almost an entire half of Europe—represented a curious reversal on two fronts. First of all, it was now clear that if once upon a time, the nation-state (and the member state) had welcomed employees and put up barriers against self-employed persons, the tide had now turned. Employees from poorer states were now feared and self-employed persons were welcomed, or at least tolerated. Implicitly, perhaps, employment was now being presented as a privilege, one that brought access to all kinds of other state-sponsored protection instituted during the post-WW2 buildup of the welfare state in Western Europe, such as protection from termination and employer contributions to health insurance and pension programs. Oddly, national political discourse defending restrictions on the new Union citizens depicted their participation in the national employment market as potentially undercutting nationals of the state or driving wages down; yet enticing Union citizens from poorer states to come into the market as self-employed persons and service-providers may have had that very effect.

Second of all, this stood in stark contrast to the system of European law, both enacted law and case law, which could be read as mildly discouraging Union citizens from moving to another member state for any other purpose than employment. In that situation, which still applied to Union citizens from the old member states, employment was perhaps presented not as a civic privilege, but a civic duty. Union citizens from the accession member states were thus between a rock and a hard place: excluded from the very activity that they were expected to engage in. Essentially, the message was that they were simply not welcome in the first place.

In the case of the expulsion from France of Roma and Sinti Romanian nationals in 2010, in fact, they were deprived of even the procedural rights that they should have been guaranteed as economically inactive Union citizens. Their expulsion was justified on the mere suggestion on the part of French president

34 In the Netherlands, for instance, countless examples can be found in the case law of Dutch companies and individuals being fined for violating the Act on Migrant Labor simply because accession member state nationals were found present on their premises doing work. The published court cases, in which the persons or companies affected appeal to overturn the fines, inevitably deal with the question of whether the work was done in an employment relationship with the affected party, and therefore was prohibited, or whether the accession member state nationals were bona fide self-employed persons or employees posted by their home state employer to provide services. See, generally, De Lange (2008)

35 See supra in Ch. 5 at n. 63.

36 As the Dutch foreign minister Bot stated in 2006 in order to justify extending restrictions on workers from accession member states, “The Netherlands must not become the storm drain of Europe”, thereby implicitly expressing fears of destabilization of the labor market by a “flood” of accession member state nationals. Doorduyn (2006)

37 See, in this regard, the hierarchy of rights that are established in Directive 2004/38 to benefit, in particular, economically active Union citizens. Supra on p. 337.
Sarkozy that as economically inactive Union citizens, they did not have enough resources to avoid becoming an unreasonable burden on the state. 38 Yet this was by no means evaluated on a case-by-case basis, as the European Commission noted; 39 for that matter, a case-by-case evaluation would also have revealed whether any of the Union citizens involved, despite having insufficient resources, was in fact engaged in self-employment or looking for work, and were thereby even more protected from expulsion.

By the time of writing of this thesis, the transitional measures applying to the 2004 accession states have lapsed; and much more recently (on 1 January 2014), the transitional measures applying to the two member states that acceded in 2007, Romania and Bulgaria, have also lapsed, leaving only the transitional measures for citizens of the most recently acceded member state, Croatia, in place. In the Netherlands, at least, the prospect of Romanians and Bulgarians being allowed to freely participate in the employment market, paraphrased as “the arrival of Romanian and Bulgarian employees”, was greeted with great alarm in Dutch political discourse. 40 A half-year prior to the expiration of the restrictions, the Dutch minister of social affairs and employment Lodewijk Asscher assured the public that he was working within the Council and with the governments of Romania and Bulgaria to establish means to combat the exploitation of Romanian and Bulgarian workers, including combating “fake” self-employment and the practices of agencies in other member states posting their Romanian and Bulgarian employees to the Netherlands to provide services. 41

This was a rather curious statement for anyone familiar with the terminology of EU law, in which “worker” or “employee” specifically refers to an employee being paid wages by an employer in the host member state. If there had indeed been problems with the exploitation of accession state nationals, then these had been exacerbated by the fact that they were denied the right to work in employment in old member states. Any political action to reduce exploitation of employees from accession member states would have to be directed not at the states of origin, but at employers in a host member state. Asscher was without a doubt making use of the ambiguity in everyday language, in which “worker” or “employee” might not have such a specific meaning, compared to the exact terminology of EU law, in order to be able to play off his role as a member of the Council against his role as a national politician in a member state (which is a phenomenon we have seen before 42). (And as it happened, in the end: after 1

38  ‘EUobserver.com / Social Affairs / Parliament demands France immediately stop Roma expulsions’,
39 Tran (2010)
40 Kamerman and De Koning (2013)
41 NOS (21 Jun 2013), ANP (21 Jun 2013)
42 Supra in Ch. 6 at n. 168.
January 2014, the expected flood or “tsunami” of Union citizens from Romania and Bulgaria never came to the Netherlands. 43)

**Substantively second-class Union citizens: Sedentary Union citizens**

As was already revealed in our discussion of Morson and Jhanjan, 44 sedentary Union citizens are subject to an almost paradoxical “reverse discrimination” due to the fact that mobile Union citizens in their own country obtain more favorable treatment with regard to the right to be joined by their third-country national family members. I will first analyze how and why “reverse discrimination” occurs; then we can discern which sedentary Union citizens are most subject to it; and finally we can determine what is happening when sedentary Union citizens make use of mobility to remove the effect of reverse discrimination.

First of all, the “paradox” can be accounted for by the fact that the prohibition of discrimination based on nationality (Art. 7 of the original EEC Treaty, Art. 12 of the “Nice” version of the EC Treaty, before it was supplanted by the Lisbon Treaty, and Art. 18 of the currently valid Treaty on the Functioning of the European Union), one of the founding principles of the Community, only applies to situations that fall within the ambit of Community/Union law. Union citizens within a situation “purely internal” to their member state of nationality, on the other hand, cannot equally (i.e. without discrimination) benefit from the vertically determined cross-border equalities of Union law (and needless to say, sedentary Union citizens have no need for horizontal equality in the form of non-discrimination, i.e. the equal applicability to them of the laws of their own member state).

The cross-border equality for mobile Union citizens (originally mobile Community workers) to be able to bring their family members with them, regardless of nationality, was conceived in a spirit of granting Community workers substantive equality with sedentary member state nationals. By making this right more or less automatic, the idea was that Community workers would be substantively equal to nationals of the host member state whose family members were also nationals of the host member state. 45 But this grant of substantive equality only works in one direction, and is also grounded on the presupposition that all of a sedentary member state national’s family members share the same nationality and thus have no problem legally residing in that member state.

Third-country national family members of sedentary member state nationals, on the other hand, are guaranteed a right of residence neither by national law nor by Community law. They do enjoy some protection of the right to family life as guaranteed by Art. 8 of the European Convention on Human Rights, but not in the muscular, uniform form that plays a role in the freedom of

43 Kamerman and De Koning (2014)
44 Supra in Ch. 6 at n. 159.
45 Supra in Ch. 5 at n. 127.
movement of workers, later incorporated into the freedom of movement and residence of Union citizens. Instead, the level of protection of the right to family life varies from member state to member state; and where the requirements of member state immigration law on family reunification make it practically impossible for the family member to obtain legal residence, Art. 8 ECHR only offers the safety net of “positively obliging” the member state to grant the family member legal residence in derogation from national law in relatively extreme circumstances.

Thus it should not be surprising that the one tactic that sedentary Union citizens have available to them, when confronted with this “reverse discrimination”, is to no longer be sedentary Union citizens, i.e. to intentionally place themselves in a cross-border situation in order to obtain the benefits of Community law in a host member state. They can then, after a time, return to their home member state, and their third-country national family members can claim a right of residence based on Surinder Singh. Of course on one account, this makes the effect of “reverse discrimination” even more blatant: for then a national of one member state who has used mobility within the Community gains rights compared to her neighbor with the same nationality, who remained sedentary.

Barnard cites a rationale, possibly implicit in the case law of the Court of Justice, that can be used to justify the first type of “reverse discrimination” in terms of political rights. Mobile Union citizens living in a member state of which they do not possess the nationality are denied rights of political representation in the national parliament of the member state; thus Union law must intervene to “virtually represent” them and make sure that laws of the member state (such as immigration law) cannot place them at a disadvantage. Union citizens in their own member state, on the other hand, do enjoy rights of political representation in parliament, and so can work to change the laws to their advantage.

Barnard is, of course, referring indirectly to Ely’s doctrine of “representation reinforcement” that we reviewed in the conclusion of Chapter 4 supra.

I will seize on this rationale, however, by first briefly investigating whether disadvantaged sedentary Union citizens really can make use of the national political process in their respective member states to change the laws in their favor. It already stands to reason that in just about any given member state, nationals of that member state with family members who are third-country nationals will almost invariably make up a statistical minority of the politically represented population and will be less able to make a difference in the political process. However, many of those persons will tend not only to belong to a merely statistical minority of the population, but to ethnic minorities of the population that emerged through immigration or through the member state’s colonial past.

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46 Supra in Ch. 7 at n. 126.
47 Supra on p. 348.
48 Supra in Ch. 7 at n. 136.
In fact, the restrictive immigration laws on family reunification in a member state will more often than not have arisen not through mere indifference on the part of the democratic majority to the interests of the democratic minority, but rather will have been deliberately imposed by the democratic (and ethnic) majority in order to limit the immigration of family members of ethnic minorities. While of course, directly racial restrictions and quotas cannot be imposed, as such racial discrimination could be considered to be equally and uniformly banned by the ECHR in all member states of the Union, certain requirements could be introduced to indirectly target members of ethnic minorities. I will use the Netherlands as a case in point for a member state that has introduced restrictive requirements for family reunification.

One type of restriction, income requirements for a citizen wishing to bring a family member in, may be expected to be more limiting for members of ethnic minorities, due to the fact that they may enjoy a lower average income level. (Ironically, this will partly be to due to de facto discrimination on the employment market; indeed, a recent article in the Dutch newspaper NRC Handelsblad confirms that Dutch citizens of non-indigenous origin, given equal qualifications, are disproportionately less likely than Dutch citizens of indigenous origin to be able to find steady employment.) A more recent innovation in restricting family reunification is the introduction of “integration” requirements, i.e. tests on language and culture that the foreign partner is expected to pass as a condition for a visa.

Van Walsum finds, in a policy document published by three members of the Dutch government in 2009, a striking example of the “liberal” justifications provided for these restrictive laws by their drafters. Dutch citizens and third-country national residents of “non-Western” origin [assumed to be heterosexual men], the policy document claims, will be more inclined to bring in wives [likewise, a gender-specific assumption] from their respective countries of ethnic origin who will be poorly educated and submissive, thus perpetuating patriarchal values in the family and future generations of citizens poorly prepared for Dutch society. To be fair, not only ethnic minorities, but the purely statistical minority of Dutch citizens of indigenous origin [again, assumed to be heterosexual men] with foreign partners also bear the brunt of the policy document: they are presumed to want to bring in foreign wives because they will be sexually subservient and do housework.

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50 See supra in Ch. 6 at n. 154.
51 König (2014)
53 Van Walsum (2011), p. 66. De Hart (2014), p. 42-51, explores the deep roots of restrictions on mixed-nationality relationships in Dutch immigration law, which are typically born of a political discourse that qualifies the partners in such “unlikely couples” as undoubtedly having dishonest or sinister motives.
Schinkel analyzes the Dutch political discourse on citizenship as it relates to Dutch citizens from ethnic minorities, and in order to do so first distinguishes between the “formal citizen” and the “moral citizen”. The “moral citizen” overlaps with classical definitions of citizenship as a virtue, which held that only the active citizen was a “real” citizen. The “formal” citizen is a mere factual description (i.e., the legal status of citizenship entailing rights and obligations that I am largely concerned with in this thesis), while the “moral” citizen is a norm, a way of being that the citizen is expected to live up to.

Curiously, however, in the Dutch discourse the “moral” citizen was increasingly presented not in classical terms of being an active participant in the republic; rather, “participation in society” was construed to mean adherence to the values of the indigenous Dutch culture. And in particular, Islam is problematized as being antithetical to those values. Formal citizens of the Netherlands, i.e. those who have Dutch nationality, are made out to be lacking in the department of moral citizenship if they are of “non-Western” origin, and thus to be something less than “real” citizens.

We see that through a political discourse in member states that already describes member state nationals from ethnic minorities as something less than full citizens (in the sense of their “moral citizenship”), legislation is passed that actually treats them as something less than full citizens (i.e. reduces the content of their “formal citizenship”) with regard to their right to family life. Thus to a large extent, the sedentary Union citizens who have the experience of being “second-class Union citizens” in the area of family life, both due to their greater probability of having foreign family members and due to their greater inability to satisfy the restrictive requirements of national immigration law, will frequently also be members of ethnic minorities in their respective member states who are already starting at a substantive disadvantage relative to their co-nationals. Unlike the formal second-class Union citizenship held by nationals of accession member states, this substantive second-class Union citizenship is not itself a product of Union law; rather, it is the product of the national law of a member state in a “purely internal” situation that Union law simply does not cover. In my conclusions, I will revisit the phenomena of the formal and substantive second-class Union citizens in order to compare them to the ways that black citizens of U.S. states were formally and

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54 Riesenber (1992), p. 32
56 ibid., p. 270-272.
57 Upon leaving politics for a full-time career as an academic, Ernst Hirsch Ballin, who had been one of the authors, in his then-function of minister of justice, of the policy document discussed supra at n. 52, criticized the way in which the discourse of citizenship had been made subservient to the ideal of a monocultural society. He went on to firmly qualify the right to marry the partner of one’s choice—regardless of national origin—as an equality essential to a citizenship defined by movement and long-distance contacts. Hirsch Ballin (2011), p. 10-14.
substantively made out to be second-class U.S. citizens and how that gradation can be resolved.

We will go on to see (in the case *Eind*) how disadvantaged sedentary Union citizens make use of mobility in order to be able to equally enjoy their cross-border rights. We will also see, in another case (*Metock et al.*), how those cross-border rights for mobile Union citizens are clarified. I will review the reverberations of these developments in Union law (and the ways in which Union citizens use it) in the national politics of member states. And finally, I will touch on a decision of the Court of Justice (*Chakroun*) that did not itself benefit sedentary Union citizens, but ended up benefiting them due to the imperatives of the national politics of a member state.

**Carpenter**

However, we will first very briefly review a somewhat anomalous 2002 case\(^58\) in which the family member of a seemingly sedentary Union citizen succeeded in having the cross-border situation of Union law brought to the Union citizen, as it were, while the Union citizen remained resident in the member state of his nationality. Mary Carpenter was a national of the Philippines living in the United Kingdom; she had originally entered as a visitor and overstayed her visa. She met and married a British citizen, Peter Carpenter, and applied for leave to remain in the UK as the spouse of a British citizen. The Secretary of State for the Home Department not only denied her request, but issued a deportation order for her, citing the fact that she had resided illegally in the UK prior to her application. She would have to depart and have the deportation order rescinded before applying for leave to enter the UK as the spouse of a British citizen.

Mrs. Carpenter correctly recognized that persons who fell within the equalities granted by Community law were exempt from these requirements of British immigration law. She claimed that her husband did in fact make use of Community law, specifically the freedom to provide services (provided for by then-Art. 49 of the EC Treaty [Art. 56 TFEU] and Directive 73/148 on the freedom of establishment and the provision of services), since his business consisted for a considerable part of traveling to other member states to provide services. She also claimed that her presence was instrumental to him being able to make use of that freedom, since she took care of Mr. Carpenter’s children from a previous marriage while he traveled.

The Court accepted Mrs. Carpenter’s claim (which had been disputed by both the United Kingdom and the Commission) that she derived a right of stay as the family member of a member state national who provided services. On one, teleological level, the Court declared the *Surinder Singh* doctrine of “deterrent effect” to be applicable by analogy,\(^59\) considering that the services provided by Mr.

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\(^{58}\) [ECJ *Mary Carpenter v Secretary of State for the Home Department* (11 July 2002)]

\(^{59}\) Ibid., par. 39.
Carpenter in other member states made up a significant portion of his business.\(^{60}\)

But on another, more striking level, the Court based a large part of its decision on the right to family life as protected by Art. 8 ECHR. Of course, we already discussed the Court’s deployment of Art. 8 ECHR in *Baumbast and R.*,\(^{61}\) which was to follow *Carpenter* in a few months; but in that case, there was already a fairly well-delineated and undisputed right granted by the secondary legislation that the Court was only slightly extending, past the point in time that that right of residence had already been enjoyed, by interpreting it in light of the right to family life.

In *Carpenter*, on the other hand, the Court had to rather significantly expand on the relevant norm granted in the secondary legislation, which had only ever been intended to apply to the right of residence of the family member of a member state national in the member state, of which the member state national did not have the nationality, where the member state national was established or was providing services. Thus, the Court had some more explaining to do in this case. It established, using language more typical for the European Court of Human Rights, that the use of British law to deport Mrs. Carpenter did not strike a “fair balance” with the right to family life that she and Mr. Carpenter enjoyed, considering that her presence did not obviously pose a threat to public security. (Strikingly, however, this result of the “fair balance” test was not in line with the case law of the Strasbourg Court, which has repeatedly ruled that not only threats to public order, but also the fact that “the immigration status of one of them was such that the persistence of the marriage within the host state would from the outset be precarious” strongly tip the balance against Art. 8 ECHR protecting the foreign family member from deportation.\(^{62}\)

It was most ambiguous what the role was of the specific type of family life that Mrs. and Mr. Carpenter enjoyed, i.e. not just being married, but also having (step)children whom Mrs. Carpenter cared for. The Court only cited this fact in the context of explaining the applicability of Art. 8 ECHR: as evidence that the family life between them was genuine.\(^{63}\) Mrs. Carpenter had argued that it was this specific fact, i.e. her presence as the care provider for the children, that would prevent Mr. Carpenter from being able to provide services in other member states if she were to be deported; but the Court never made clear what role that specific argument played in its decision. The Court would only clarify that many years later, in a decision of the Court that we will review in the last chapter of this thesis.

\(^{60}\) ibid., par. 29.

\(^{61}\) *Supra* in Ch. 7 at n. 127.


\(^{63}\) ECJ Carpenter (11 July 2002), par. 41-44.
To return to our main line of chronology, we will see that it will become ever more common for sedentary Union citizens to escape the disadvantages placed upon him by the national law of their own member state by intentionally becoming mobile Union citizens. Their right to do so would be further clarified in a 2007 case brought by the Dutch government against a court judgment favoring the Surinamese daughter, Rachel Eind, of a Dutch national, Mr. Eind. Mr. Eind had moved to the United Kingdom, where he found employment; on that basis, Miss Eind obtained a right to stay in the United Kingdom.

When Mr. Eind returned to the Netherlands and Miss Eind claimed a right of residence based on the Surinder Singh doctrine, however, the Dutch immigration authority denied on two grounds that Miss Eind had legal residence based on Community law. The first ground was that Mr. Eind, upon his return to the Netherlands, did not continue to engage in economic activity as a worker, in fact he was receiving social assistance and was not looking for a job. (The Dutch government’s position was based on a reasonable reading of Singh: it might have seemed likely that Mr. Singh’s right to stay in Britain based on Community law, as the family member of a British citizen who was returning there after working in another member state, had everything to do with the fact that his British citizen wife had been returning to Britain specifically for the purpose of being a worker there. She could thus be described as not simply returning to the member state of which she had the nationality, but of making use of the freedom of movement of workers to cross a border within the Community.)

The second ground of rejection was based on an attempt on the part of the Dutch government to read a 2003 decision of the Court, Akrich, to its own advantage. In that decision, the Court had clarified Singh on at least one point and muddied the waters on another. Its point of clarification had been to say that it could not be qualified as “abuse” of Community law if a Union citizen and her family member—as long as the family relationship was genuine—moved to another member state with the intention of returning to her home member state and thereby circumventing the immigration law of that state. On that point, it had cited its consideration in Levin that it was only a member state national’s actual activities as a worker that counted, not her intentions or aims in engaging in those activities.

However, the Court had also muddied the waters in Akrich by implying that if the third-country family member had never enjoyed lawful residence in a member state under the law of that member state, that family member could not derive a right of residence under Community law in the member state to which the member state national was migrating; and the provisions of the member state’s

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64 ECJ Minister voor Vreemdelingenzaken en Integratie v R. N. G. Eind (11 December 2007); see also my previously published note on this case, Bierbach (2008)
65 ECJ Secretary of State for the Home Department v Hacene Akrich (23 September 2003)
66 ibid., par. 55; See supra in Ch. 6 at n. 152.
own immigration law would prevail. Two readings of Akrich were possible: the narrow reading allowed the home country of the Union citizen to deny residence under national immigration law only when, as in the case of Mr Akrich, the third-country national not only had no prior lawful residence in a member state, but had been unlawfully resident in, engaged in criminal activity in and expelled from the home country. The broad reading held that if the third-country national had had no prior lawful residence (i.e., under member state law, according to this reading) in a member state, the national immigration law of the home country could assess its own national’s right to family reunification as a purely internal affair, i.e. without reference to Community law.

In a 2007 decision, Jia, the Court declined to issue an unambiguous pronouncement on Akrich. Ultimately, the Court ruled only on the applicability of Community law to the situation of the family member’s first admittance to Union territory via the second country, which in that case was permitted by (Swedish) law anyway.

To return to the case of Rachel Eind: the Dutch government apparently availed itself of the broad reading of Akrich in rejecting her claim to a right to stay based on Community law. Miss Eind had never had a right to stay in any member state based on the law of that member state (i.e. she had only had a right to stay based on Community law there), therefore it could not be considered to exert a deterrent effect on Mr. Eind’s movement to deny her residence upon his return.

One final question of the referring court arose from a subsidiary claim on the part of Miss Eind: she claimed that since the residence permit that she had been issued by the British authorities had not yet expired, it should be considered to be valid for her residence based on Community law in the Netherlands as well.

To start with the Court’s ruling on the last claim: it ruled that the mere possession, on the part of a third-country national family member, of a residence permit issued on the basis of Community law in one member state did not by any means oblige any other member state to grant her a right of residence. It pointed out that Community law does not grant third-country national family members any autonomous rights of free movement, since their rights of residence are intended to benefit the member state national making use of freedom of movement. The Opinion of Advocate-General Mengozzi also provides some more essential background on this statement. He notes the nature of rights of residence based on Community law: just as the Court ruled in Royer, it is not the possession of a residence permit (or really: residence document) itself that gives rise to rights. It is the facts of having a family relationship (and being able to demonstrate it) with a member state national who is residing as a worker in a member state (and is able

67 ECJ Yunjing Jia v. Migrationsverket (9 January 2007)
68 See the extensive discussion of Jia in Olivier and Reestman (2007).
69 ECJ Eind (11 December 2007), par. 23.
70 ibid., Opinion, par. 37.
71 Supra in Ch. 6 at n. 136.
to demonstrate it) that give rise to rights of residence. Nor—to illuminate the flip side of the coin for that doctrine—should the fact that another member state had issued such a document be considered to itself deliver proof of those facts: Mengozzi stated that it was up to every member state in which a claim was being made to independently evaluate the facts concerning the family relationship and the (past) use of rights of free movement.\(^{72}\)

As to the reading of Akrich that the Netherlands would have liked to have seen confirmed, i.e. that Rachel Eind would first have had to have a right of residence in the Netherlands based on Dutch law for Mr. Eind to have been deterred from moving to Britain in the first place: the Court flatly rejected it, asserting that the secondary legislation offered no support for that view and that the deterrent effect would have been exerted on Mr. Eind even if the family relationship that he wished to continue in his home member state had only started in the host member state.\(^{73}\) The Court thus tacitly overturned Akrich to the extent that it could be read to require a legal right of residence for the family member in the home member state in the first place, and implicitly clarified Singh to apply not only to circumstances where the third-country national family member had been together with the member state national prior to the latter’s use of free movement.\(^{74}\)

Finally, and perhaps most strikingly: the Court ruled that the Singh doctrine did not only apply when the member state national was specifically making use of the freedom of movement of workers to return to his home member state. The member state national’s right to reside in a host member state, to start with, was indeed conditional on him being engaged in “effective and genuine activities” (the Levin formula) while there, or otherwise on him satisfying the requirements of Directive 90/364 with regard to economically self-supporting member state nationals. But because Mr. Eind was a national of the Netherlands, and his right to reside in the Netherlands could not be made conditional in such a way, his right of return to the Netherlands, together with his family member, could not be made conditional on him engaging in economic activity or being self-supporting either.\(^{75}\) (The fact that the rights that Mr. Eind obtained by Community law thus augmented the rights that he already had as a Dutch citizen in the Netherlands thus neatly dovetailed with the phrasing of then-Art. 17(1) EC Treaty [Art. 20(1) TFEU], that “[c]itizenship of the Union shall be additional to … national citizenship”.). The “deterrent effect” that is to be avoided, therefore, has everything to do avoiding deterrence of the member state national’s use of the freedom of movement at the moment at which he enters the host member state, not the moment that he crosses a border to return to his home member state.

\(^{72}\) ECJ Eind (11 December 2007), Opinion, par. 39.
\(^{73}\) ibid., par. 41-43.
\(^{75}\) ECJ Eind (11 December 2007), par. 27-31.
There is a possible teleological explanation for this if one views the aim of Community law as being not only to enable the use of the freedom of movement, but to encourage it as well. For a member state national making use of the freedom of movement, the nationality of his own member state functions as a safety net. If things don’t work out in the host member state, i.e. if the member state national does not succeed in finding work or becomes disabled, the member state national’s right to social assistance in the host member state is generally limited. But he can always return to his home member state where, it is to be assumed, his entitlement to social assistance is unconditional.

Thus the Court had kept the door open, or even opened it wider, on the intentional use of the “Europe route” (also called the “U-turn”) on the part of member state nationals who wished to circumvent the restrictions of their own member states’ immigration law. The one question that the court did not answer in Eind, however, was whether Community law only guaranteed a right of residence in a host member state to third-country national family members who had not had prior legal residence in that member state; in other words, whether Community law also meant that the family member also had a right of entry and first residence based on Community law.\footnote{Peers (2009), p. 185.}

\textit{Metock et al.}

The Court would do so in 2008, at the same time as it got its first opportunity to rule on a situation that was governed by the new Directive 2004/38, with its express basis on Union citizenship, instead of the patchwork of previously valid secondary legislation that referred to member state nationals in various situations. (Even if that circumstance does not turn out to create any different legal consequences, we will see that it saves us a good number of mouthfuls, and add to the clarity of this thesis, to henceforth be able to speak consistently of “Union citizens” rather than have to use the old terminology of “member state nationals”).

\textit{Metock et al.}\footnote{ECJ Blaise Babeten Metock and Others v Minister for Justice, Equality and Law Reform (25 July 2008)} was a merger of preliminary questions in four cases referred to the Court by the Irish High Court, all involving third-country nationals married to Union citizens who were not Irish citizens. The first-named party, a national of Cameroon, was married to a naturalized British citizen, Ms. Ngo Ikeng who was also of Cameroonian origin, and who had moved to Ireland to start working in 2006. (The two of them had been in a relationship since 1994 and already had two children together before getting married in Ireland in 2006. This would lead one to suspect that Ms. Ngo Ikeng had moved to Ireland with the specific intention of making use of Community law to ultimately gain a right of residence...
for her husband in the United Kingdom, although that specific circumstance was not at all material to the case. This case was purely about the rights of the family member of a Union citizen in a host member state, i.e. of which the Union citizen did not have the nationality, although of course it would have an impact on the use of the “Europe route”.

The Irish regulations implementing Directive 2004/38 attempted also to implement the aforementioned broad reading of Akrich by maintaining a requirement of “prior lawful residence” in another member state. The applications on the part of the third country national family members involved in this case had all been rejected on that ground. Furthermore, all of them were considered to be “joining spouses” whose marriages (and thus their family life, from the perspective of Irish family law) had begun in Ireland, after the respective Union citizens had moved there.78 Thus the heart of the matter, as was also reflected in the first two questions posed by the Irish High Court, was first, whether the part of Akrich that had not been overturned by the Court still stood, and second, whether it made a difference at what point the family life started for a family member to derive rights of residence based on Community law.

The Court first reviewed its own case law, including Carpenter and Eind, and noted that the Community legislature had always read the protection of family life into rights of freedom of movement. It then went on to expressly overturn the contentious part of Akrich, rather than to interpret it restrictively, saying that “that conclusion must be reconsidered”. The enjoyment of rights of residence on the part of a third-country national cannot be made dependent on the family member having had prior lawful residence, as such a requirement cannot be found in the secondary legislation. Moreover, the Court ruled, all of its rulings on the previous secondary legislation were to be considered to apply a fortiori to Directive 2004/38, considering that Recital 3 of the Directive aimed to “strengthen the right of free movement and residence of all Union citizens”. Thus, “Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals.”79

The Court made sure to clearly state that the rights of family members of Union citizens were only valid in cases where the family link was genuine, and that member states remained free to deny entry and revoke the residence in case of fraud and abuse, such as in the case of a marriage of convenience.80 As to the protest of Ireland and other intervening member states that this interpretation of the Directive would lead to unjustified reverse discrimination against sedentary member state nationals, the Court repeated the mantra that Community law could not be applied to persons and situations in purely internal situations, and

78 Fahey (2009), p. 86.
thus that Community law had nothing to say about reverse discrimination; moreover, the Court recalled that all member states are signatories to the ECHR and obliged to protect all of their nationals’ right to family life as guaranteed by Art. 8 of that Convention.81

The Court went on to answer the second question: the literal provisions of Directive 2004/38, Articles 6 and 7, apply to the family members who “accompany” or “join” a Union citizen in a host member state. The word “join” implies that family life can be started after the Union citizen moves to a host member state.82 As to whether this also applies to persons who were already in the host member state and did not have legal residence at the time they became family members of the Union citizen: in light of the effet utile of Directive 2004/38, its provision in Art. 3(1) that it applies to family members who “accompany” the Union citizens cannot be interpreted restrictively. Moreover, none of the definitions of family members in the Directive, nor any other provisions of it, stipulate when or where a marriage must have been solemnized or when other family relationships must have begun. Therefore, a family member must be able to benefit from the Directive, “irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.”83

The Court had thereby convincingly overturned Akrich and confirmed without any room for doubt that as long as the family relationship was genuine (and as long as none of the other valid reasons for denying residence that the Directive provided for were present), a third-country national family member of a Union citizen could benefit from a right of residence together with the Union citizen. We have skipped over some of the more abstract constitutional elements of this decision,84 but we will go on to examine how this decision, and how the use of Union law to secure rights of residence for third-country national family members would reverberate in the national politics of member states.

Non-retrogressiveness

First, however, I would like to pause to touch on just one abstract statement of the Court: the statement that the Directive, in light of its stated objective of “strengthening” the rights of Union citizens,85 can only ever be interpreted as adding to the rights that Union citizens had by virtue of the previous secondary legislation. We might recognize a core value of citizenship in this statement, both on the part of the legislature and the Court: that new rights can only ever be

81 ibid., paras. 76-79. Although as we noted supra before n. 48, that fact is a cold comfort in some member states.
82 ibid., par. 85-90.
83 ibid., par. 91-99.
84 which are exhaustively reviewed in Peers (2009)
85 See supra on p. 338
added for the citizen, but not taken away. This interest of the citizen, that her citizenship be “non-retrogressive” in terms of rights, can be seen as another manifestation of the principle of legal certainty.

We recognize this value in a doctrine of U.S. constitutional law (related, in fact, to “representation reinforcement”), according to one reading of which (as in the Ninth Circuit Court’s decision preceding *Hollingsworth v. Perry,* in which it cited *Romer v. Evans*) the Equal Protection Clause of the Fourteenth Amendment prohibits a state, even the constitutional legislature of a state, from granting rights to a group of citizens, and then voting to rescind those rights again with no rational basis. We even more certainly recognized it at the beginning of the development of freedom of movement of workers in the European Economic Community: the very first piece of secondary legislation provided, first and foremost, that there would be a “standstill” on any new restrictions on the immigration of workers from other member states.

(And in fact, the first prelude to accession for a potential new member state is typically the signing of a treaty between the potential member state and the Community that contains a “standstill” obligation for the existing member states. The accession process for Turkey started in the 1960s, and although it still has not yet led to actual accession, the process started with the EEC-Turkey Association Agreement of 1963. This agreement envisages eventual freedom of movement of workers between Turkey and the Community and is therefore concerned with, according to Decision 1/80 of the Association Council, “the integration of Turkish workers in the host Member State.” But in this context, I find the most interesting aspect of the “incipient form of citizenship” between Turkey and the Union to be the various “standstill” clauses, also in other legal instruments of Association law, on new restrictions on immigration of Turkish citizens into member states of the Union.)

The secondary legislation of the Union, by its own account and that of the Court, contains an interpretive “standstill” as to its own provisions: it can never be interpreted more restrictively. This leads us to the question, however, of whether Union citizenship itself must be seen as non-retrogressive, i.e. if it stands in the way of the repeal of the Directive and its replacement with more restrictive secondary legislation, or with more restrictive interpretation on the part of member states. I am of the opinion that it does, and that several textual bases can be found for this position.

The admittedly programmatic Article B of the (un consolidated) Treaty of Maastricht provided that the Union shall set itself the objective “to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union.” Article 8e of the same

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86 Supra in Ch. 4 at n. 148.
88 Supra in Ch. 5 at n. 76.
Treaty provided for a legislative procedure by which the member states “acting unanimously on a proposal from the Commission and after consulting the European Parliament, may adopt provisions to strengthen or to add to the rights” that go with Union citizenship. The substance of this provision survives unchanged in Article 25 of today’s Treaty of the Functioning of the European Union. Thus if even the member states in the Council can only act unanimously to strengthen the rights of Union citizens, it implies (at least if we can read an “implied limitation”91 into the Treaty) that they cannot, as least not from the constitutional perspective of Union law and acting as an institution of the Union, unanimously decide to weaken or subtract from the rights of Union citizens, and certainly not by the ordinary legislative procedure prescribed in Art. 21(2) TFEU (involving qualified majority). If the legislative process cannot be used to weaken the rights of Union citizens, it seems even less likely that those rights can be more restrictively interpreted judicially. We can keep this in mind when we explore the fulminating reactions of national politicians of the member states to the rights of movement and residence enjoyed by Union citizens.

Reverberations in the member states on the use of mobility by “second-class Union citizens”

We will briefly review the way in which *Eind* and *Metock* et al., and the exercise of rights on the part of Union citizens that the Court made even easier with those decisions, reverberated in the national politics of, in particular, the Netherlands and Ireland. This was nothing new. In Ireland, the mere expectation of what the Court’s ruling would be in *Chen*,92 and the immigration consequences of it, had already arguably contributed to the decision of the Irish people on 11 June 2004 to change the Irish constitution by referendum in order to limit the previously almost unconditional *jus soli* grant of Irish citizenship to anyone born on the island of Ireland.93

In the Netherlands, the use of the “Europe route” (originally known there as the “Belgium route”, due to the fact that most Dutch citizens following it went to [the Dutch-speaking part of] Belgium to live with their family members) had already been a particularly sore spot in the political discourse on immigration. Indeed, it was the Dutch minister of alien affairs and integration, Rita Verdonk, who had filed higher appeal against the district court judgment that originally granted Rachel Eind’s claim to legal residence, thereby giving rise to the preliminary questions in *Eind*. And doing so was a consciously political decision on the part of

91 Cf. for the doctrine of “implied limitations” in US constitutional law, *supra* in Ch. 2 at n. 127.
92 *Supra* at n. 25.
93 See, for a general overview of the constitutional issues related to birthright citizenship in Ireland written just before *Chen* was handed down, Ryan (2004)
the minister. At almost exactly the same time, in 2005, she had promised Parliament, in response to written questions submitted by MPs, to keep tabs on the use and “abuse” of the “Belgium route”.94

By 2008, the restriction of immigration had become an even hotter topic in Dutch politics: this was evidenced by the rise (and election to nine seats in the parliamentary election at the end of 2006) of the right-populist Freedom Party (PVV) of Geert Wilders, whose main platform planks are limiting immigration and criticizing Islam. Only months after the Court’s decision in Metock et al. had been handed down, PVV MP Sietse Fritsma submitted written questions95 to the Deputy Minister of Justice (the person holding the immigration portfolio in that particular government) Nebahat Albayrak. These questions concerning the “Europe route” were primarily concerned with the use of the “U-turn” via another member state on the part of Dutch nationals (and not just any Dutch nationals, but Dutch nationals of “non-Western” origin in particular). But Fritsma’s questions also problematized the ease with which previously illegally resident third-country nationals could gain legal residence by becoming family members of Union citizens from other member states who were living in the Netherlands, and placed this phenomenon under the header of the “Europe route” as well.

Fritsma’s formulation of these legal phenomena in his written questions was fairly accurate (even if it only problematized the use of the “U-turn” on the part of Dutch citizens of foreign origin, typically referred to as allochtonen, or persons of “allochthonous” origin, in Dutch political discourse). At the same time, however, the coverage in the press of this matter (which Fritsma was capitalizing on in order to place his questions on the Deputy Minister’s agenda) was less cautious about the legal details. One particularly glaring example is presented by the first two paragraphs of an article published on 28 December 2008 in the newspaper De Telegraaf:96

Asylum U-Turn

A number of the rejected asylum seekers, who are also ineligible for the general amnesty, manage to come into our country legally after all via a back door.

They register themselves as the partner of a Dutch allochtoon, who for that reason then temporarily moves to one of our neighboring countries. As soon as this “reunion” is complete, the couple than travels back to the Netherlands, where they may freely establish themselves based on European legislation on the freedom of movement of persons.

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94 *See*, for the entire Dutch political background of *Eind*, Bierbach (2008)
96 *My translation of* Koolhoven (2008)
The article conflates the “problem” of rejected asylum seekers with that of allochtoon Dutch citizens in a rather curious way, while equally curiously restricting its depiction of the “problem” (what of asylum seekers who become partners of indigenous-origin Dutch nationals and follow the Europe route? or of asylum seekers who become partners of non-Dutch Union citizens in the Netherlands?). It is hard to tell whether the journalist writing the article intentionally or unintentionally misrepresented the issue: the end of the article reveals what may simply be unfamiliarity with the terminology, as revealed by the scare quotes surrounding the legal term “alien”:

This year, the Netherlands will grant a fiercely coveted residence permit to a small army of 20 000 allochtonen coming to the Netherlands for family reunification or family formation.

But a large number of the “aliens” now turn out to be a good deal less unfamiliar with our welfare state than one might at first suspect. They frequently stayed here for years, illegally, when they didn’t have a chance anymore to be admitted to the Netherlands after years of legal proceedings. The Netherlands is estimated to have about 175 000 illegal immigrants. Deputy Minister Albayrak (Justice) is currently working on the European level to fix this immigration leak.

On 20 January 2009 the Deputy Minister responded to this article in Parliament, referring to her answers of the previous autumn to Fritsma’s questions. And an urgent Parliamentary debate Fritsma had requested was scheduled for 27 January. The issue had now graduated to the larger public agenda. Two of the so-called “quality newspapers” of the Netherlands (a term generally understood to exclude the populist Telegraaf), the left-leaning Volkskrant and the liberal NRC Handelsblad, published articles97 about the issue immediately prior to the debate. The Volkskrant reporter took a somewhat critical stance, asking Fritsma if he wasn’t exaggerating the problem, since the reported number of third-country family members of Union citizens in the Netherlands would also include “Americans, Japanese, and so forth”; Fritsma granted this (i.e., implicitly, that “desirable” third-country nationals from “Western” countries also benefited), but responded that the overall statistics were probably not reliable.

The NRC, on the other hand, rather uncritically repeated De Telegraaf’s curiously bounded description of the “Europe route”, saying that it works as follows. Allochtonen with a Dutch passport temporarily move to another European member state, for instance Belgium or Germany. They have a family member or partner come in there and then return to the Netherlands on the basis of the European directive on the freedom of movement of persons.98

97 Meerhof (2009)
In the parliamentary debate that followed, the deputy minister’s repeated assertions that the freedom of movement was something that the Netherlands had always wanted and fought for were countered by Fritsma’s protest that the freedom of movement was never intended for “persons from Iraq, Japan, Afghanistan, Morocco and Turkey”.

We can see evidence, at least in the political discourse of this one member state, that when nationals of the member state who are already seen as second-class citizens at home make use of their rights of mobility as Union citizens, aspersions will be cast on the genuineness of their Union citizenship. Just as they are not seen as “real” Dutch citizens, but rather “allochtonen with a Dutch passport”, they are not seen, at least from the national level, as “real” Europeans entitled to freedom of movement either, particularly if they have non-European family members.

We can also briefly touch on the political reverberations of Metock et al. in Ireland and what they have to say about the other kind of “second-class Union citizens”, i.e. nationals of accession member states. Numerous reports can be found in the Irish media concerning the “discovery” on the part of the Irish government of “sham marriages” between Latvians and persons from South Asia. One of them from 2008 implies that the Court’s decision Metock et al. blocked the government’s attempts to stop the recognition of rights of residence based on such marriages. Another one from 2010 quotes a government agency that blames the “increase” in sham marriages on Metock et al. According to a report written in 2010 by a team of Irish sociologists, Eastern European women and Pakistani men were the target, in Irish political discourse, of a “moral panic” profiling them as being more likely to engage in bogus marriages than others. We can see in this political discourse, as well, a discrediting of the “genuineness” of the Union citizenship and the use thereof by Union citizens from accession member states.

Chakroun

To conclude the section on “second class Union citizens”, finally, we will briefly touch on one decision of the Court that did have the potential to benefit

100 RTÉ (26 Sept 2008)
101 RTÉ (18 Aug 2010)
103 ECJ Rhimou Chakroun v Minister van Buitenlandse Zaken (4 March 2010). See, generally, Wiesbrock (2010).
sedentary Union citizens, although not by any directly binding effect of Union law or the Court’s judgment.

Mr. Chakroun was a national of Morocco who lived legally in the Netherlands with a permanent residence permit, and whose sole income was derived from his receipt of unemployment benefit. His Moroccan wife, Rimou Chakroun, who had not lived with Mr. Chakroun for a great number of years, applied for a preliminary visa for the purpose of family reunification with him at the Dutch embassy in Rabat. Her application was rejected on the grounds that Mr. Chakroun’s monthly income was only €1322.73 per month, and not the €1441.44 stipulated by Dutch immigration law as the minimum income required for “family formation”. Dutch immigration law made a distinction between “family reunification”, or bringing in family members with whom one had very recently lived together for a period of time in a foreign country, and “family formation”, or bringing in family members with whom one had not recently (or never) lived together. If a third-country national family member was applying for “family formation” with a Dutch citizen or a third-country national living in the Netherlands, the resident of the Netherlands was required to earn 120% of the minimum wage as an income requirement; for “family reunification”, on the other hand, only 100% of the minimum wage was required.

Mrs. Chakroun filed appeal against the rejection of her application, based on the fact that the distinction between “family formation” and “family reunification”, without which her application would have been approved, violated the Family Reunification Directive (Directive 2003/86) of Union law. The Directive was based on then-Article 63(3)(a) of the EC Treaty (by this point in time, now that the Treaty of Lisbon had entered into effect on 1 December 2009, Art. 79(2)(a) TFEU), which allowed for harmonization of immigration rules for third-country nationals. Notably, thus, the Family Reunification Directive only applied to third-country national family members of third-country nationals living in a member state. It did not, on the other hand, apply to third-country national family members of Union citizens; Directive 2004/38 applied to third-country national family members of mobile Union citizens, but as already noted above104 Union law had no competence whatsoever as to the third-country national family members of sedentary Union citizens.

Without going into too much detail on Chakroun, since it involves an area of Union law that we are not directly concerned with: the Court ruled (drawing on Metock et al. and applying it by analogy) that Directive 2003/86 precluded the introduction of member state legislation that treated different family relationships differently depending on when they had started. The effect of Chakroun that is most interesting for us, however, is what happened when the government of the Netherlands implemented this decision of the Court. Recall that Directive 2003/86 only covers the family members of third-country nationals residing in a member state. The member of the Dutch government holding the

104 Supra before n. 46.
immigration portfolio at the time, Minister of Justice Hirsch Ballin, changed the applicable policy rules and regulations to abolish the distinction between family formation and family reunification. But he did so across the board, thus for family members of Dutch citizens as well. The change was at least implicitly presented as a mandate from the Luxembourg Court, even though it was a purely discretionary decision of the Dutch government.\textsuperscript{105}

We can see, thus, that sedentary Union citizens in the Netherlands indirectly profited from Union law, but only through the channel of a political will not to allow them to be treated at a disadvantage to third-country nationals living in the Netherlands. Implicitly, it was acceptable for Dutch citizens to be the subject of “reverse discrimination” relative to mobile Union citizens in the Netherlands. Not only did mobile Union citizens not have to satisfy stringent income requirements, or their family members have to satisfy integration requirements, but according to the Court in \textit{Metock} et al., their family members were not to be treated any differently depending on when the family relationship started. Yet that had apparently not put any pressure on the Dutch government to abolish the discriminatory treatment of Dutch citizens. But when Union law mandated that \textit{third-country nationals}, who had no rights of citizenship at all in the Netherlands, were to be treated the same as mobile Union citizens, at least in this one area, the Dutch government apparently found the “reverse discrimination” that that mandate created to be politically unacceptable.

\textsuperscript{105} Wiesbrock (2010), p. 479.
Rottmann and Ruiz Zambrano: Union citizenship gains an additional vertical dimension and starts to breach the “purely internal” situation

Two days before clarifying the rights of non-Union citizens in Chakroun, as it happened, the Court had handed down a decision, Rottmann, that possibly heralded the next quantum leap in Union citizenship after Grzelczyk. If previously, Union citizenship and its predecessors had increasingly reduced the amount of discretion that member states had in matters of immigration and social security, this decision implied that Union citizenship also reduced their discretion in the matter of their own nationality laws. This decision also set the stage for the possibility that sedentary Union citizens could also increasingly derive rights from Union law. But we will first explore the background of Rottmann, in the two previous cases in which the Court had made a pronouncement about the relationship between Community law and member state nationality.

Background: Micheletti and Kaur

Micheletti

It had always been accepted doctrine in international law that it was up to States, and States alone to determine who their own nationals were (as was confirmed in the 1955 Nottebohm judgment of the International Court of Justice). Transposed to the Community: it was for the member states to determine who their nationals were and thus who could benefit from the rights granted by Community law. In Micheletti, however, the Court added a Community dimension to the Nottebohm doctrine of international law. The Court made two key statements with regard to the relationship between Community law and member state nationality law: one relating to the terms under which member states were to recognize the nationality of other member states, and one relating to the terms under which Community law constrained the acquisition and loss of member state nationality. We will analyze them in their relationship to the historical interests of the Community and of the member states. We have seen throughout this thesis, guided by Van Middelaar’s scheme for viewing the “spheres” of orbit of the member states in the Community, that the member states, from their own interests as States, always preferred norms of international law. These were inevitably premised on their undivided sovereignty and their ability to determine on their own terms what legal norms they would be bound to.

If one does not read Micheletti carefully, one might at first think that the Court is genuflecting before the sovereignty of the member states to determine who their nationals are. Aside from Spain, the defendant, the only

106 ECJ Janko Rottmann v Freistaat Bayern (2 March 2010)
107 Nottebohm (Liechtenstein v. Guatemala) (second phase) (6 Apr 1955)
108 Supra in Ch. 7 at n. 149.
member state that had intervened in *Micheletti* was Italy, the member state whose nationality Micheletti possessed. Thus one might have mistaken the Court’s judgment for arbitration between Spain and Italy, admonishing Spain to respect Italy’s definition of who its own nationals were.

But actually, the Court was not at all uncritically adopting the *Nottebohm* doctrine. In fact, it inserted a crucial phrase into it (italicized here): “Under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality.” At least one commentator, D’Oliveira, correctly recognized that this phrase meant that the Court was “sticking a Community foot in the door” of the principles of international law on nationality. It was a largely unnecessary *obiter dictum* in Micheletti’s own case, and yet the Court, in the later words of the same commentator, was “firing a warning shot across the bow” of the member states. The member states, who at the time had only just signed the Maastricht Treaty and settled the ticklish matter of deciding what Union citizenship was supposed to be and that it would not replace the nationality of the member states, were suitably alarmed by the Court’s statement. They immediately tacked a Declaration onto the new European Union treaty stating:

> The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any such declaration when necessary.

We will return shortly to the matter of whether Community law could in fact set conditions on acquisition and loss of member state nationality. The second of the Court’s assertions in *Micheletti*, relating to recognition was more teleological: if member states were free to impose additional conditions for the recognition of each other’s nationalities, the Court went on, then “the class of persons to whom the Community rules on freedom of establishment were applied might vary from one Member State to another.” In this, the Court was clearly echoing its reasoning in *Unger*, in which it had determined that “worker” could only have a single, vertically determined meaning—otherwise, if the member states could each determine independently what a “worker” was, the freedom of movement of workers would be frustrated.

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109 ECJ *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria*, (7 July 1992a), par. 10.

110 Jessurun d’Oliveira (2001), p. 475 (par. 5)


112 Declaration No 2 on nationality of a Member State, annexed to the Final Act of the Treaty on European Union, (1992)

113 ECJ *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria*, (7 July 1992a), par. 12.

114 Supra in Ch. 6 at n. 21.
It was the establishment of this vertical definition that already led us to call Unger “the first Community citizen” and for Plender to confirm the previously mooted existence of an “incipient form” of European citizenship. In 1989, De Groot elaborated further on the implications of this “European citizenship”, and wondered if it did not already exert an at least marginal influence on the nationality laws of the member states.\footnote{De Groot (1989), p. 25.} In Micheletti, we see the Court asserting that at the very least, the terms under which member states were to recognize each other’s nationalities had to be invariable in order to safeguard the uniformity of the group of persons entitled to that incipient European citizenship. This was a “vertical horizontal” norm, as it were, by which Community law invariably referred to the nationality law of the state granting nationality in order to determine who could benefit from the freedom of movement of workers.

The member states clearly had no difficulty with this principle, as we could see in their 1992 declaration. For that matter, we already saw\footnote{Obbema (2006)} that they had previously attempted to institute, as a purely vertical norm of Community law (Art. 43(3) of Regulation 1612/68), an indirectly racial condition for attaching the right of freedom of movement to member state nationality. Despite the fact that that condition (which excluded member state nationals from non-European territories or associated countries) was practically unenforceable if all nationals of a member state, regardless of race or origin, possessed otherwise indistinguishable passports or identity cards, the Community legislature (i.e. the member states acting as the Council) certainly thought that the Treaty offered the necessary basis for legislating the conditions under which member state nationality would be recognized as entailing the right to freedom of movement.

But De Groot went on to note in 1988 that the freedom of movement of workers already implied that no member state had complete autonomy in determining the conditions for acquisition and loss of its own nationality. If one member state were to explosively expand its set of nationals—De Groot gives the theoretical example of the Netherlands granting all citizens of Indonesia the right to opt for Dutch nationality—then other member states would almost certainly be upset about the potential influx of these new Dutch citizens making use of the freedom of movement of workers into their own territories.\footnote{De Groot (1989), p. 25-26.}

The member states do in fact pick political fights with each other about this matter. In light of Spain regularizing the immigration status of 600,000, mainly Latin American immigrants without status in 2005—which implied that most of them would eventually become Spanish citizens—Nicolas Sarkozy, then still minister for home affairs and a candidate for the presidency of France, declared in 2006 that the EU should require member states to at least centrally report any plans for mass amnesties.\footnote{Rita Verdonk, minister of integration and}
alien affairs of the Netherlands, had already let similar sounds be heard.\textsuperscript{119} By July 2008, this outrage resulted in a common statement on the part of the Council of Ministers of Justice and Home Affairs, declaring at least their intention to ban mass amnesties on the part of member states in the future.\textsuperscript{120} But do these political tensions between the member states in the “outer sphere”, or their common positions within the “intermediate sphere”, i.e. acting jointly in a Union context, mean that Community or Union law constrains the nationality laws of the member states?

Viewed from a perspective of at least the unwritten constitutional law of the Union, I would say that it does. The law of freedom of movement alone and the practical consequences that flow from it mean that the member states, having due regard to Community law, are not free to make the conditions for acquisition of their nationality all too easy; otherwise it could unleash tensions that would threaten the stability of the Union. Madison implied in Federalist 42\textsuperscript{121} that in light of the existence of freedom of movement in the United States, if those states did not establish a uniform rule of naturalization, then too-easy naturalization of foreigners in one state could be noxious to others. (A single norm for acquisition of United States citizenship was duly established subsequent to the ratification of the Constitution; but as we saw in our exploration of slavery, it was divergent norms of recognition of United States citizenship that may ultimately have been even more corrosive to that Union.) The member states of the European Union, on the other hand, have not seen the need to set a uniform rule of naturalization by law, yet they are constrained by an unwritten constitutional reality. (There is, of course, also an express written provision of the Treaty that a member state could be said to violate if it carried out a huge mass naturalization of foreigners: the principle of sincere cooperation, laid down in then-Art. 10 of the post-“Amsterdam” EC Treaty [Art. 4(3) TEU].\textsuperscript{122} And indeed, recent news that Malta was planning to effectively sell access to Maltese citizenship to rich investors sparked an outcry from the Union institutions that such a grant of Union citizenship would violate that very principle.\textsuperscript{123})

Finally: one member state had already defined its “nationality” exclusively for the purpose of Community law. As we saw, at the time of accession of the United Kingdom, the unitary concept of the “British national” did not even

\textsuperscript{119} “Legaliseren illegalen EU afstemmer”, (2005)
\textsuperscript{120} Verlaan (2008). This was subsequently adopted by the European Council, in the “European Pact on Immigration and Asylum”, as the agreement “to use only case-by-case regularisation, rather than general regularization” of irregular immigrants, thereby bringing this agreement into the “intermediate sphere” of European politics: European Pact on Immigration and Asylum (draft), (European Council 24 Sept 2008), Presidency Conclusions, Brussels European Council 15 and 16 October 2008, (European Council 16 Oct 2008)
\textsuperscript{121} Supra in Ch. 2 at n. 48.
\textsuperscript{123} Carrera (April 2014)
exist at all internally to British law, but exclusively as a concept of Community law. This was what led Evans to speculate in 1984 that “national of a member state” was already a concept of Community law. We will explore this phenomenon in much greater detail in Kaur, the next case that I will analyze.

To conclude our discussion of Micheletti: the Court could declare, rather uncontroversially (and acceptably to an “outer sphere” perspective of the member states), that Community law commanded member states’ recognition of each other’s definitions of their nationals, and the Court could do that using nothing more than the teleology of the freedom of movement of workers. But the Court’s statement that Community law constrained member states in setting the rules for acquisition of their own nationalities was declaratory of a somewhat more sensitive political and legal reality in both the “inner sphere” and the “intermediate sphere”. (That Community law might have something to say about loss of member state nationality, finally, was arguably the Court’s most daring and controversial statement, since that matter did not seem to correspond to any prominent interest of the states in the “outer sphere” or the “intermediate sphere”—to once more use Van Middelaar’s scheme—aside from, possibly, the interest of a host member state that was economically dependent on workers from other member states.)

I might note, as something of an afterthought, that there was at least one institution of the Community aside from the Court that was of the opinion that Community law might have something to say about the conditions for acquisition and loss of member state nationality. De Groot cites a resolution of the European Parliament of 20 January 1984 with regard to discrimination in the passing on of nationality. This resolution called on the Commission to draft a recommendation, on the basis of Art. 235 of the EEC Treaty [cf. Art. 352 TFEU], that the member states abolish discriminatory provisions of their respective nationality laws that meant that fathers and mothers, or unmarried parents, could not equally pass on their nationality to their children. The Parliament grounded its resolution on several considerations, including that “such discrimination constitutes an obstacle to the freedom of movement of the individual in the Community”.

Thus for the Parliament, freedom of movement was an important enough matter to justify Community intervention in the nationality laws of the member states. However, in citing this resolution as evidence for a Community competence in this area, De Groot did not appear to recognize the significance of the fact that a Community legislative instrument based on Art. 235 nevertheless would have required unanimity in the Council on the part of the member states. If Community legislation on the matter could only be made on that basis, then that

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124 Supra in Ch. 6 after n. 133.
127 Resolution on discrimination in the matter of passing on nationality, (European Parliament 20 Jan 1984)
would somewhat undermine any claim that the Community, to the extent that it was an autonomous political order based on majority rule, had anything to say about the nationality law of the member states. But the Parliament’s resolution was significant, in that the Parliament showed itself to be the only Community institution at the time that was concerned with the interests of the citizen.

We will go on to explore the Court’s next decision relating to member state nationality, which dealt specifically with the moment of birth of the “British national” and what that meant in Community law.

**Kaur**

The patent injustice of the way in which the East African Asians were cut adrift from British citizenship had already spawned two cases at the European Court of Human Rights: one concerning how deprivation of nationality could constitute “degrading treatment” and one, at least partially relating to East African Asians, concerning “positive obligations” on the part of a state to respect the right to family life. Now the case of Manjit Kaur, another of the disadvantaged East African Asians, would be referred to the Luxembourg Court, and she would attempt to mobilize the new category of Union citizenship within the Court’s previous *Micheletti* case law.

Subsequent to the British Nationality Act of 1981 that established British citizenship as such, “non-patrial” CUKCs like Ms. Kaur were restyled “British overseas citizens”, and the United Kingdom filed a new declaration with the Community in 1982 redefining its own “member state nationals” in terms of its new terminology. But nothing changed for BOCs like Kaur, who had repeatedly been denied leave to remain in Britain. Kaur now claimed the applicability of Community law due to the fact that she intended to make use of the freedom of movement of workers and due to the fact that Union citizenship had now been instituted.

Kaur argued before the Court, citing *Micheletti*, that Britain’s nationality law was constrained by Community law—and more specifically, by the fundamental rights protection that had been incorporated in Community law. Essentially, she was arguing that since Britain had deprived its nationals of Asian origin of the right to enter its territory, it was subjecting them to “degrading treatment” in the sense of Art. 3 of the European Convention on Human Rights, as the ECmHR had once found in its non-binding decision. Thus, due to the incorporation of Community law of the ECHR, Community law made this limitation on Britain’s part invalid. She also argued that Britain’s 1972 and 1982

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128 Supra in Ch. 6 at n. 127.
129 Supra in Ch. 7 at n. 132.
130 ECJ *The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur, intervener: Justice* (20 February 2001)
131 Supra in Ch. 6 at n. 132.
132 Supra in Ch. 6 at n. 127.
Declarations were not part of Community law, since they were merely unilateral declarations on the part of the British government that the other member states had not assented to.\(^{133}\)

The Court, to start with, repeated and confirmed its finding in *Micheletti* that “it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality”.\(^{134}\) But it did not accept either of Kaur’s arguments. The Court did not deal with Union citizenship at all, appeared to evade Kaur’s argument about fundamental rights protection and directly addressed her second argument relating to the nature of, in particular, the 1972 British Declaration. The Court said that, “[a]lthough unilateral”, the Declaration was an instrument essential to clarifying the Accession Treaty by which the United Kingdom had become a member state; the other member states had been “fully aware of its content and the conditions of accession were determined on that basis.”\(^{135}\) Moreover, the Court found it significant that when Britain filed its 1982 Declaration, which did not essentially change any of the beneficiaries of the 1972 Declaration, it was never “challenged by the other Member States”.\(^{136}\)

D’Oliveira fiercely criticized the way in which the Court hereby “multilateralized” unilateral declarations on the part of a member state. The Court, he claimed, was making a unilateral statement out to be a contract between the member states. Yet if it was a contract, D’Oliveira wondered, how could the Court then apparently maintain that a member state also had the discretion to unilaterally change such a statement?\(^{137}\) Moreover, if according to the *Micheletti* doctrine, Community law in fact constrained the nationality laws of the member states, why did the Court pass up the opportunity to review obviously racist provisions of British nationality law against norms of Community law (such as Art. 13 of the post-“Amsterdam” EC Treaty [Art. 19 TFEU], which gave the Council the competence to take action to combat discrimination based on, among other things, racial or ethnic origin) or norms binding some of the member states that could be considered to be of interpretive value in Community law (such as Art. 5 of the European Convention on Nationality, which banned distinctions in the signatories’ nationality laws based on, among other things, race, color or national or ethnic origin)?\(^{138}\)

As it happened, it is likely that the Court did not grasp its assertion—that the British Declaration of 1972 was really multilateral in nature—out of thin air after all. I speculated *supra*\(^{139}\) that Britain’s attempts to accede to the EEC may

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133 ECJ *The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur, intervener: Justice* (20 February 2001), par. 17.
134 ibid., par. 19.
135 ibid., par. 23.
136 ibid., par. 26.
138 Jessurun d’Oliveira (2003), p. 476 (par. 8).
139 In Ch. 6, starting at n. 115.
not have been merely coincidental to Britain’s moves to cut off its overseas subjects in its domestic immigration and nationality law. Böhning, writing in 1972, confirms that it was no coincidence: it was in fact direct pressure from the Six and the Commission during the accession talks that led the British government to, in November 1971, first propose linking the definition of “British nationality” in Community law to the right of abode in Britain. The Netherlands, in particular, feared a flood of Commonwealth immigrants. In a 1971 article in the Daily Mirror that Böhning cites, a Dutch foreign ministry spokesman expresses the fear that Commonwealth citizens would come to the Netherlands “because of our good social services”, and because it was so close to Britain and many Dutch people speak English. According to the article, the Dutch had proposed that only people born in member states should have access to the freedom of movement of workers.

Just over a month later, the Times reported that “[a]greement was reached in Brussels today between Britain’s negotiators and the Six on the delicate subject of British nationality”. (This report repeated that it was the Dutch—possibly joined by the Germans—who were most afraid that “British immigrants would take advantage of freedom of movement”. That statement—about “British” immigrants and not “Commonwealth” immigrants—does not reveal as much of a racial edge on the fear of the Dutch as the Daily Mirror had. Yet the Times did note that the Dutch “had been worried that Britain’s definition of a national might give its immigrants a better deal than immigrants into Holland,” which showed that the Netherlands was primarily concerned about British nationals who were “immigrants”—i.e., who were of non-European origin.)

Even if one could still try to maintain that the British Declaration was technically unilateral in nature, one must view it, as Böhning does, in conjunction with another declaration that was added to the “Final Act” of the Accession Treaty signed on 22 January 1972. The “Joint Declaration on the Free Movement of Workers”, a most certainly multilateral statement, said:

> The enlargement of the Community could give rise to certain difficulties for the social situation in one or more Member States as regards the application of the provisions relating to the free movement of workers.

> The Member States declare that they reserve the right, should difficulties of that nature arise, to bring the matter before the institutions of the Community in order to obtain a solution to this problem in accordance with the provisions of the Treaties establishing the European Communities and the provisions adopted in application thereof.

We can view this vague, but unmistakably menacing statement as declaratory of the constitutional reality of the Community that we identified in our analysis of

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141 Newsom (1971)
142 ‘Agreement with Six on defining nationality’, (1972a)
Micheletti. In particular, the reference to “certain difficulties for the social situation” was clearly a coded reference to “racial tensions”. Any member state that would think to define its set of nationals too broadly was now warned that it might thereby blow up the freedom of movement of workers.

I must note that I assert the existence of a “constitutional reality” while remaining critical of it: it is a constitutional reality that exists only due to an implied threat from the member states (or certain of them), speaking from their ultimate sovereign power under international law to withdraw from the Treaties and their formal power under Community law to ask the Commission to propose a revision to the secondary legislation on the freedom of movement of workers. The “reality” of Kaur was that the recognition of too many people of non-European origin as member state nationals entitled to freedom of movement was perceived by some member states, if not by all, as threatening the stability of the Union. This is really not much different from the “constitutional reality”, assisted by the doctrine of “historical necessity”,144 that Chief Justice Taney based the majority decision in Dred Scott on, i.e. that rights of free movement and expression for black U.S. citizens would threaten the stability of society in Southern states,145 and therefore of that Union.

Certainly, the European Court of Justice could have tried to pass judgment on British nationality law using the norms of fundamental rights that it had at its disposal, but it would have thereby been contradicting the unanimous wishes of the member states and the Commission more directly than it ever had and jeopardizing its own position. Anyhow, the legal norms that it had at its disposal might not have provided such an effective basis for such a ruling. In my view, D’Oliveira, in suggesting that the Court mobilize Art. 13 of the post-“Amsterdam” EC Treaty [Art. 19 TFEU], makes the same mistake that De Groot made in seeing Art. 235 of the pre-“Maastricht” EEC Treaty [cf. Art. 352 TFEU] as providing a basis for Community law to influence member state nationality law (to the advantage of the citizen). The former provision, like the latter provision, required a unanimous vote on the part of the Council for the passage of legislative instruments, thus it was not evidence of a truly autonomous or “inner sphere” competence of Community law on which the Court could rule.

To conclude my analysis of Kaur, I must underscore once more that the racially exclusive “British national” was a creature of Community law all along. And not just formally, by the circumstances of its emergence, but substantively as well. Enacted Community law already had a provision, Art. 42(3) of Regulation 1612/68, which was originally designed to exclude non-European Dutch and French nationals, but become something of a dead letter due to the negotiating efforts of the French and the Dutch.146 But now, the original intention of this

144 Supra in Ch. 3 at n. 100.
145 Supra in Ch. 3 at n. 129.
146 Supra in Ch. 5 before n. 121.
provision suddenly came back to life with the British accession: at least, the definition of the “British national” perfectly tracked it. After all, if we rephrase the 1972 Declaration in terms of Art. 43(3) of the Regulation, the Declaration likewise excluded nationals from “non-European countries or territories” (non-patrial CUKCs and Commonwealth citizens, as well as patrial Commonwealth citizens who possessed the citizenship of a country other than Britain) who were already settled in Britain thanks to “institutional ties” that had existed in 1968 between them and Britain, from being able to make use of the freedom of movement.

There had most certainly been developments in domestic British politics that led Britain to independently restrict the immigration of Commonwealth citizens. But it seems that the British government (even the Conservative government at the time) might not have established such a restrictive definition of “British nationals” for the purpose of joining the Community if it had not been pressured to do so by the Six and the Commission; it may have preferred to entitle all Commonwealth citizens not subject to immigration controls to freedom of movement (thus including those who were citizens of other Commonwealth countries, such as Australians with a UK-born grandparent). Böhning, writing in 1972, believes that if the British government had really put its foot down on the matter, it would have placed the Community in the difficult position of “questioning seriously the right of a prospective member state to define its own nationality” (!), whereupon the Community would have given in.147 As we have seen, however, no member state is really fully free to define its own set of nationals, despite the member states’ protest to the contrary with their 1992 Declaration.

I will make one last point about Kaur before we move on to Rottmann: although the Court declined to review British nationality law against fundamental rights banning racial discrimination, and indeed seemed to be more concerned with the interests of the member states than anything else, it did at least suggest that it was reviewing the contentious provision of the 1972 Declaration against one other norm of protection for the individual. The Court was able to establish, by making the 1972 Declaration out to be a clear part of the accession deal for the United Kingdom, that Kaur had never had the rights in the Community that she claimed she had had. Thus, the Court ruled, she had not been deprived of any rights.148 This might have been seen to be a rather airy dismissal of Kaur’s legitimate grievance. But it did raise the question: what would the Court make of it if someone had in fact been deprived of rights that he had legitimately counted on, i.e. if his legal certainty had been violated?

148 ECJ The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur, intervenor: Justice. (20 February 2001), p. 25.
Rottmann

In both Micheletti and Kaur, the Court mainly ruled on legal norms that dealt with the interests of the Community and the member states. The interests of the individual, indeed the incipient citizen of the Community, were not terribly prominent in those cases, in which the Court was operating exclusively within the realm of Community law as it existed before the introduction of Union citizenship. But just over six months after Kaur, the Court handed down Grzelczyk and began to show more evidence of a concern for the interests of the individual, indeed the interests of the Union citizen. (It must be noted, now that we have explored the history of nationality law in the decisions of the Court, that the Court cited Micheletti not only in Garcia Avello, but in Chen as well: in both of those cases, however, it was only dealing with recognition of member state nationality, citing the “vertical horizontal” norm, so it was not saying anything innovative there.) In its 2010 decision Rottmann, the Court was to build on Micheletti and Kaur, and add its new concern for the position of the Union citizen as such, to make a pronouncement on the way in which Union citizenship could possibly constrain member state nationality law. But significantly, as well, it took a leap into the “purely internal” situation that had previously been out of bounds to Union law.

Dr. Janko Rottmann was from Austria and had Austrian nationality. In 1995, possibly fleeing criminal prosecution in Graz for an accusation of fraud, he moved to Munich. In 1997, the court of Graz issued a warrant for his arrest. In 1998, Rottmann applied to the state of Bavaria for German nationality, but failed to mention the criminal proceedings pending against him in Austria. In February 1999, he was granted German nationality, and thereby (by Austrian nationality law), automatically lost his Austrian nationality.

In August and September 1999, the city of Munich found out about the criminal proceedings against Rottmann and the outstanding warrant for his arrest. In July 2000, the state of Bavaria rescinded Rottmann’s German nationality retroactively for his having concealed this information that would have led to rejection of his original application, meaning that by German nationality law, he was considered never to have had German nationality. But it appeared that Rottmann would not automatically regain his Austrian nationality, and he was therefore stateless.

Rottmann appealed the decision to revoke his German nationality, and the court in third instance, the Bundesverwaltungsgericht (Federal Administrative Court of Germany, dealing with Rottmann’s appeal against the decision of the

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149 Supra in Ch. 7 at n. 93.
150 Supra at n. 25, par. 37.
151 ECJ Janko Rottmann v Freistaat Bayern, (2 March 2010)
highest Bavarian administrative court on a point of law), referred preliminary questions to the European Court of Justice with regard to Rottmann’s loss of Union citizenship. The German court asked whether, in light of Micheletti, it was contrary to Union law for a member state to withdraw its own nationality from a person who had originally been a national of another member state but could no longer recover that nationality; in other words (put more concretely) if Germany should refrain from revoking its nationality if that would cause the bearer to lose the Union citizenship he had always had. The German court went on to ask if the original member state of nationality was obliged to adjust its own nationality law to avoid the consequence of loss of Union citizenship in such a case, i.e. if Austria was obliged to change its laws so that a person such as Rottmann could not lose his Union citizenship.

Somewhat predictably, the governments of Germany, Austria, and the six other member states that intervened, joined by the Commission, argued unanimously that the acquisition and loss of nationality was purely a matter of the law of the member states, citing the 1992 Declaration No. 2. Germany, Austria and the Commission went on to argue that anyhow, Rottmann’s case was a situation purely internal to Germany with no cross-border element, thus Union law did not apply at all.

Advocate-General Maduro, in his Opinion, dismissed the latter argument up front, while at the same time making clear that he considered Union citizenship to be a cross-border equality first and foremost. He said that there was in fact a cross-border element in Rottmann’s case, since Rottmann had made use of the freedom of movement and residence as an Austrian citizen, and thus a Union citizen, before becoming a German citizen.

The Court, however, felt confident to plunge right into declaring Union law to be applicable to Rottmann’s case due to the mere fact that Union citizenship was at stake.

It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC [Art. 20 TFEU] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.

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152 ibid., par. 37.
153 Supra at n. 112.
154 ibid., par. 38.
155 Maduro called Union citizenship an “interstate citizenship” in par. 16, referring generally to Schönberger (2007) and Schönberger (2005). We can thus read this as the “horizontal citizenship”, “Indigenat”, or “intercitoyenneté” dimension of Union citizenship in Schönberger’s discussion, cf. supra in Ch. 5 at n. 11 and n. 28.
156 ECJ Janko Rottmann v Freistaat Bayern, (2 March 2010), Opinion, par. 8-13.
157 ibid., par. 42.
The Court then went on to support this assertion with the magic formula from Grzelczyk: “citizenship of the Union is intended to be the fundamental status of nationals of the Member States”.

Now that Union law was applicable to the case, the Court could go on to the merits of the case: does Union law constrain the nationality law of member states? And what did the Court’s pronouncement in Micheletti about member states having “due regard to Community law” in determining the conditions for acquisition and loss of their nationality mean, anyway?

The proviso that due regard must be had to European Union law does not compromise the principle of international law previously recognised by the Court, and mentioned in paragraph 39 above, that the Member States have the power to lay down the conditions for the acquisition and loss of nationality, but rather enshrines the principle that, in respect of citizens of the Union, the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law.

The Court immediately went on to distinguish Rottmann’s case from that of Kaur’s: Kaur, it said, had never been a Union citizen and thus could not be deprived of the rights attaching to Union citizenship.

Finally, having established that Union law applied to the situation, the Court ruled as to whether the withdrawal of Rottmann’s German nationality was compatible with Union law. The Court drew on other instruments of international law that Germany and Austria were both party to: the Convention on the reduction of statelessness and the European Nationality Convention, as well as the Universal Declaration of Human Rights. The first two instruments provided that it was permissible to deprive someone of his nationality if he had obtained it by fraud, and the Declaration only prohibited arbitrary deprivation of nationality. Thus the withdrawal of nationality obtained by deception, even if the consequence was loss of Union citizenship, was valid, in theory. Nevertheless, even if a member state was not bound by Union law to refrain from withdrawing its nationality in such a case, it was bound to observe the principle of proportionality, for instance by possibly affording the person in question the opportunity to recover his original nationality. In general, then, the constraint of Union law on the withdrawal of a nationality obtained by fraud was that the principle of proportionality had to be obeyed; and it is up the courts of the member states to decide whether such a withdrawal is proportional.

I will now comment on the Court’s statement concerning the applicability of Union law, the Court’s statement concerning what Union law has to say about

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158 ibid., par. 43.
159 ibid., par. 48.
160 ibid., par. 49.
161 ibid., par. 52-54.
162 ibid., par. 55-59.
member state nationality law, and what kind of equality this implies for Union citizens. In so doing, I will apply the instruments that I have been working with: the four forms of equality, on the one hand, and the relationship of the member states to the Union and to their common citizens, on the other.

I will start with the Court’s statement concerning the applicability of Union law. It is notable here that, by contrast to all of the previous decisions involving Union citizenship I have reviewed so far, the Court uses as a basis then-Art. 17 EC (post-“Nice”) [Art. 20 TFEU], which was the provision of the Treaty on Union citizenship itself, and not then-Art. 18 [Art. 21 TFEU], which was the provision on rights of movement and residence for Union citizens. Thus (at least in theory) it was the uniform equality for all Union citizens of the possession of Union citizenship that was at stake, not the cross-border equalities and equalities of non-discrimination and portability that Union citizens are entitled to when they make use of their freedom of movement. The Court did not see the need, as Maduro had, to base the applicability of Union law on the fact that Rottmann had moved from Austria to Germany. De Groot and Seling applaud this approach for avoiding any distinction between sedentary Union citizens or those who moved to a third country on the one hand, and Union citizens wearing a “halo of European stars” due to their mobility within the Union, on the other. Thus there can be no “second-class Union citizens” in this area. (Admittedly, in the case of the retroactive withdrawal of member state nationality, and therefore Union citizenship, due to fraud, only a person such as Rottmann who had previously had the nationality of another member state can benefit from the protection of Union law on a basis of uniform equality. Because someone who had previously had the nationality of a third country, acquired the nationality of a member state, and then had the latter nationality retroactively withdrawn for fraud would be seen, like Kaur, as someone who had never had Union citizenship in the first place. Nevertheless, De Groot and Seling see indications, particularly in Metock et al., that if such a person had had her Union citizenship retroactively withdrawn while she was making use of her rights of movement and residence in another member state, then the cross-border equality she was entitled to could activate the applicability of Union law.)

We will then go on to the substantive considerations of the Court concerning the constraints placed by Union law on the nationality laws of the member states. D’Oliveira is of the opinion that the “Court is persisting in [the] judicial error” that it originally made in Micheletti. By making member state citizenship dependent on Union citizenship, rather than the other way around, it is directly contradicting the relationship clearly laid down in the Treaty, as well

161 De Groot and Seling (2011), p. 154. I am hereby more directly translating from Dutch this metaphor, which was also employed in De Groot (2010), p. 296.
162 Supra at n. 77.
165 ibid., p. 141.
as the 1992 Declaration No. 2.\(^{168}\) Let us first touch on what the Court had to say about the meaning of that Declaration in *Rottmann* when it restated the *Micheletti* doctrine in light of it. That Declaration, as well as the decision made within the Council to assuage the fears of Denmark after its population rejected the Maastricht Treaty,\(^{169}\) “have to be taken into consideration as being instruments for the interpretation of the EC Treaty, especially for the purpose of determining the ambit *ratione personae* of that Treaty.”\(^{170}\) Thus Union law, stated otherwise, has to have “due regard” to the competence of the member states in defining their nationals. For their part, the member states still have to have due regard to Union law.\(^{171}\)

If *Micheletti* was a statement about the bilateral relationship between Community law and member state law on the subject of nationality, the Court was clarifying here that it is a two-way street: each has to have due regard for the other, but neither is ultimately authoritative. This does admittedly have potential to upset the hierarchy, as established in the Treaty, that derives Union citizenship from member state nationality. But any assertion that the member state’s definition of its nationals must always be the absolute and unwavering reference point in the matter is untenable in light of the rights granted by Union citizenship: Poiares Maduro uses a *reductio ad absurdum* as a hypothetical example, in which a member state’s nationality law provides for automatic loss of that nationality in the event of transfer of residence to another member state. Any such provision of member state nationality law would obviously infringe the most uncontroversial cross-border equality guaranteed by Union law.\(^{172}\)

In *Micheletti*, the Court was citing the interest of Community law (at least as to the terms of recognition of member state nationality) in preserving the functioning of the freedom of movement of workers (as an abstract political goal of the Community). We could only read the “incipient”, *de facto* Community citizenship into that statement. But in par. 48 of *Rottmann*, the Court goes on to restate the “due regard” doctrine, in light of the introduction of Union citizenship, as reflecting a *trilateral* relationship: between the Union, the member state, and the citizen. Finally, the citizen gets his day in court, and his interest in the matter is addressed, by way of “the rights conferred and protected by the legal order of the Union”. The assertion that Union law constrains the nationality law of the member states can no longer be invoked only to protect the interest of member states (in, *e.g.*, not being confronted with a flood of freshly minted Union citizens from other member states) or the abstract interest of the Union in preserving the freedom of movement of workers.

If the Court has hereby confirmed the existence of a uniform equality enjoyed by all Union citizens, both sedentary and mobile, with regard to loss and

\(^{168}\) ibid., p. 145-146.

\(^{169}\) *Supra* in Ch. 7 after n. 67.

\(^{170}\) ECJ *Janko Rottmann v Freistaat Bayern*, (2 March 2010), par. 40.

\(^{171}\) ibid., par. 41.

\(^{172}\) ibid., Opinion, par. 32.
(possibly) acquisition of member state nationality: what, then, does this package of equality entail? One component, as the Court expressly pronounced, is the principle of proportionality: no member state’s action to withdraw nationality, and therefore Union citizenship, shall go farther than is strictly necessary to achieve its political goals. Another, cited by the Advocate-General, is equivalence, or the equal and fair application of the provisions of a member state’s nationality law to all of the member state’s nationals.\footnote{ibid., Opinion, par. 34.} (The Advocate-General was commenting on the question of whether Austria was bound by Union law to re-admit Rottmann to its nationality—a question which the Court itself declined\footnote{ibid., par. 63.} to answer, since it was not directly relevant to the immediate case and the Austrian government had not yet made a decision on whether Rottmann should be re-admitted to Austrian nationality. The Advocate-General was of the opinion that Union law only bound Austria to re-admit Rottmann to Austrian nationality if it re-admitted others in comparable cases while refusing to re-admit Rottmann.) Finally, all Union citizens are entitled to legal certainty, which we see as one of the core equalities of citizenship. In any case, this is true if a Union citizen based his legitimate expectations of having rights of Union citizenship on uncontroversially possessing the nationality of a member state, as the Court implicitly, but clearly stated in the way that it contrasted Rottmann to Kaur.

Finally, however, we must determine whether this uniform equality is absolutely defined in vertical terms, or if it is subject to variations among the member states. We see that with regard to implementation, the Court softens the blow of Union law to the member states’ sovereignty on the matter. (Kochenov and Plender describe this tactic on the part of the Court as “assuming doctrinal control over the supranational status without alienating the member states”\footnote{Kochenov and Plender (2012), p. 386.}) To apply the principle of proportionality to the withdrawal of nationality, the Court clearly leaves it up to the court of a member state to determine what precisely that entails.\footnote{Supra at n. 162.} Moreover, we see the Court\footnote{In ECJ Janko Rottmann v Freistaat Bayern, (2 March 2010), par. 51.} applying a mode of reasoning more typical of a traditional tribunal of international law like the European Court of Human Rights in weighing the “legitimate public interest” of a member state withdrawing nationality against the interest of the citizen (perhaps not surprisingly, since the Court is applying the two aforementioned Conventions, both traditional instruments of international law). Although the withdrawal of nationality due to deception is a more unvarying public interest, the Court is clearly sensitive to the varying public interests embodied in the various nationality laws of the different member states.

We therefore see the member states enjoying a certain “margin of appreciation” in applying the uniform equality pronounced in Rottmann, and can qualify this as a vertically guaranteed uniform equality that is, nonetheless,
“regulated” differently from member state to member state, something like the uniform equalities guaranteed by the European Convention on Human Rights. De Groot and Seling wonder if the equivalence principle in Union citizenship could mean an intervention of Union law in member state nationality laws entailing discrimination by sex with regard to acquisition by descent from a mother who is a national, or from unmarried parents; they also wonder if the legal certainty principle could mean that purely legitimate expectations based on a technically erroneous, but bona fide assumption that one has the nationality of a member state are to be protected as well. While such cases are sure to arise before the Court, I expect that the Court will show a large degree of deference to member states if such democratically established provisions of their nationality laws can be shown to serve a legitimate interest.

**Ruiz Zambrano**

The decision *Ruiz Zambrano,* which appeared to build on *Rottmann,* was heralded as yet another quantum leap in the development of Union citizenship when the Court handed it down. There were two aspects in which this decision represented a significant advance: one in which it seemed to break through the “purely internal” situation, this time on rights of residence for Union citizens, and one in which it further augmented the rights of residence as an economically inactive Union citizen. However, I would like to first warn the reader that the full constitutional significance of *Ruiz Zambrano,* and indeed *Rottmann,* would only become clearer in light of subsequent decisions of the Court. So in this subsection, I will provide a contemporary analysis of *Ruiz Zambrano,* but it will not be an exhaustive analysis.

(I must also note the not-insignificant fact that the Lisbon Treaty had entered into force by this point in time, representing the most significant change in the Treaties since “Maastricht”. The Lisbon Treaty was the toned-down version of the Constitutional Treaty that had been rejected by referendum by the populations of France and the Netherlands. While “Lisbon” did not lend the Union the trappings of statehood that had been originally foreseen by the Constitutional Treaty, it did, at last, abolish the somewhat confusing continued existence of the “European Community”, the area of Union law that we are primarily concerned with in this thesis, as one of the “pillars”, next to the Common Foreign and Security Policy and what was originally called Justice and Home Affairs within the European Union. The EC Treaty was renamed the

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178 Cf. supra in Ch. 7 at n. 137.
180 ECJ Gerardo Ruiz Zambrano v. Office National d’Emploi (8 March 2011)
“Treaty on the Functioning of the European Union”. Most of the changes were merely cosmetic. But Schrauwen, at the time of its signing, did note that Article 9 of the European Union Treaty was modified to say that “Union citizenship shall be additional to national citizenship and shall not replace it”, rather than the “Amsterdam” formulation [Art. 17(1) there] “Union citizenship shall complement national citizenship...”. She wondered at the time if this indicated the possibility that Union citizenship could someday exist without national citizenship. And she pointed out, as we are already seeing, that Union citizens would increasingly appeal directly to their Union citizenship in court cases, rather than to the fact that they held the nationality of a member state.\(^{181}\)

To summarize: Jessica and Diego Ruiz Zambrano were born in Belgium of two Colombian parents, rejected asylum seekers who had continued to stay in Belgium. At the time Jessica and Diego were each born, Belgian nationality law provided that any child who was born stateless in Belgium had a right to Belgian nationality. The children’s parents took advantage of this provision together with a loophole in Colombian nationality law: children born abroad of Colombian nationals were not automatically Colombian nationals, but rather only acquired Colombian nationality when their birth was duly reported to a Colombian embassy or consulate. Jessica’s and Diego’s parents did not report the births, and so they became Belgian nationals.

The case at hand arose when the children’s father, Gerardo, was denied an unemployment benefit on the basis of the fact that he did not have the right to work in Belgium. He asserted his right to work based on being the parent of a Union citizen, and the labor court referred preliminary questions to the Court.

Essentially, Gerardo was asserting that the children, as minor Union citizens, had just as much of a right of residence as Catherine Zhu did, meaning that their third-country national parent had to have a right to stay in order to take care of them. Nevertheless, according to Union law doctrine up until that point,\(^{182}\) the children were in a “purely internal situation”. A Belgian who had never left Belgium to live in another member state did not fall within the scope of Union law as to her rights of residence. In fact, the secondary legislature had been careful to clarify in Art. 3(1) of Directive 2004/38 that it applied “to all Union citizens who move to or reside in a Member State other than that of which they are a national” (making it even more unambiguous than e.g. Art 1(1) Regulation 1612/68, which declared its applicability to member state nationals taking up employment in “another” member state).

Advocate-General Sharpston, in her Opinion, did touch on the aspect of economic activity: she noted that the fact that the children’s father had worked for five years, legally and paying taxes and social contributions, should be taken

\(^{181}\) Schrauwen (2008), p. 60 and generally.

\(^{182}\) ECJ Morson and Jhanjan v. The State of the Netherlands, (27 October 1982), supra in Ch. 6 at n. 159.
into consideration in assessing the proportionality of denial of legal residence.\textsuperscript{183} However, Sharpston also pointed to the absurdity of defining the point at which a Union citizen could be said to have left her own member state for long enough to exercise treaty rights—would it have been enough for the children to have been taken on a trip to Parc Astérix in Paris?\textsuperscript{184} Furthermore, Sharpston pointed to the increasing lack of tenability of this sort of “reverse discrimination”, by which Union citizens living outside their home member states could benefit from Union law, while their fellow Union citizens who had never left their home member states could not. Sharpston proposed abolishing reverse discrimination by allowing Union citizens to benefit from Union law whenever national law did not provide an equivalent level of protection of family life.\textsuperscript{185} Sharpston proposed making Art. 18 TFEU, the prohibition of discrimination based on nationality, the basis for such a ruling,\textsuperscript{186} thus essentially proposing a return to the erstwhile project of constructing an equality for citizens of the European Community by way of that provision (only now for the sedentary citizens).\textsuperscript{187}

The Court did not go that far. Nor did it, in its relatively brief decision, devote any attention to the protection of family life, which as Art. 8 of the European Convention on Human Rights had already been considered to be part of the Union legal order,\textsuperscript{188} and now was integrated fully in it (after the entry into force of the Lisbon Treaty) as Art. 7 of the Union Charter of Fundamental Rights. However, it did nevertheless at least appear (and this was the first significant aspect) to allow the Union citizen’s rights of residence to break through the wall of the “purely internal situation” for the first time. While Directive 2004/38 was by its very design only applicable to mobile Union citizens,\textsuperscript{189} the primary legislation, Article 20 of the Treaty on the Functioning of the European Union (formerly Art. 18 EC) precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. Therefore, the children’s parents had to be granted a right of residence, since otherwise the children would be forced to leave the territory of the European Union in order to be with their parents and be cared for by them.\textsuperscript{190}

The Court went on to state, in effect, that Jessica’s and Diego’s right of residence meant that their parents also had to be given the right to work, since otherwise they could not satisfy the requirements of sufficient resources to have a right of residence as economically inactive Union citizens and they could be forced

\textsuperscript{183} ECJ Ruiz Zambrano (8 March 2011), Opinion, par. 120
\textsuperscript{184} ibid., Opinion, par. 86.
\textsuperscript{185} ibid., Opinion, par. 144. Cf., for the problem of varying protection of the right to family life based on Art. 8 ECHR, supra at n. 48.
\textsuperscript{186} ECJ Ruiz Zambrano (8 March 2011), par. 148.
\textsuperscript{187} See supra in Ch. 7 at n. 27 et seq.
\textsuperscript{188} See supra in Ch. 7 at n. 135.
\textsuperscript{189}ECJ Ruiz Zambrano (8 March 2011), par. 39.
\textsuperscript{190} ibid., paras. 42-44.
to leave the territory of the Union.\textsuperscript{191} This is the second, more subtle aspect in which the Court’s decision made for an unprecedented development in Union law.

Both aspects can be highlighted by comparison to \textit{Chen}.\textsuperscript{192} In the first aspect of \textit{Ruiz Zambrano}, the Court essentially extended \textit{Chen} to the situation in which a minor Union citizen was not outside of her home member state and there were no other apparent cross-border aspects. The second extension of \textit{Chen} is harder to spot, however. It was an established fact that Catherine Zhu’s mother already had sufficient resources and the health insurance required to satisfy Catherine’s right of residence as an economically inactive Union citizen. However, in the case of Jessica and Diego Ruiz Zambrano’s parents, that was not necessarily the case: their parents had to be given the right to work \textit{in order to} be able to help Jessica and Diego satisfy the requirement. Thus, as Lansbergen and Miller write, this could be interpreted as meaning that “denial of an opportunity to acquire such resources in itself constitutes an infringement of an anterior and independent claim to residence possessed by the family member.”\textsuperscript{193} In other words, the Court was placing the rights of residence based on Union citizenship even more clearly up front, with even less reference to the limitations and conditions placed on it by secondary legislation.

It might not have been entirely unreasonable for one to expect that \textit{Ruiz Zambrano} heralded the possible disappearance of “reverse discrimination” and the final establishment of a consistent right of residence for Union citizens everywhere in the Union. But it remained a bit cryptic what the “the genuine enjoyment of the substance of the rights conferred by virtue of” Union citizenship really meant. And less than two months later, the court handed down another decision\textsuperscript{194} that threw \textit{Ruiz Zambrano}, and indeed \textit{Rottmann}, into sharp relief.

\textit{Shirley McCarthy}

Shirley McCarthy was a dual national: born in the United Kingdom of an Irish mother, she possessed both British and Irish nationality. She had never lived outside the UK, however. Her husband, a Jamaican national, applied for a residence card as the family member of a Union citizen in the UK, appealing to her Irish nationality. His application was rejected, and when he appealed that decision, the English court referred questions to the Court of Justice.

The Court of Justice rejected the claim of McCarthy’s husband. It ruled first that Directive 2004/38, whatever the case, could not apply to McCarthy’s situation, since it literally and teleologically applied only to Union citizens living in a member state other than their own who had made use of the freedom of...
movement. In one sense, this was nothing new: after all, the Directive did not apply to Jessica and Diego Ruiz Zambrano either, as they derived rights directly from the primary legislation (Art. 20 TFEU). In its answer to the second question, however, the court declared that McCarthy did not have a right of residence in the United Kingdom based on the primary legislation (Article 21 TFEU) either. A member state, repeated the Court, cannot adopt measures that “have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status, or of impeding the exercise of the right to move and reside freely within the territory of the Member States”. However, in McCarthy’s case, the Court ruled, nothing that the United Kingdom was doing was impeding her rights as a Union citizen.

To the extent that it was the “same” Court that was ruling on Ruiz Zambrano and Shirley McCarthy (in fact, the former was handed down by the Grand Chamber; while the latter was handed down by the Third Chamber, a smaller subset of the judges of the Court), one could draw the following implicit contrast between them. A Union citizen who was a child dependent on her parents could not help herself, the Court seemed to be saying; while there was no excuse for a grown woman to claim that she would have to leave the territory of the Union because her husband was not allowed to join her. While the Court did not say so in so many words, it is clear that McCarthy is still free to move to another member state and that her husband can join her there under Union law. The crucial difference for Jessica and Diego Ruiz Zambrano, on the other hand, seems to be that as children, they are utterly dependent on their parents to be able to live anywhere in the Union.

Moreover, it had been revealed in this case that McCarthy lived off of social assistance in the United Kingdom, and one of the preliminary questions had asked: if McCarthy were considered to be eligible for a right of residence in the United Kingdom under Union law, could she be considered to have legal residence as an economically inactive Union citizen? The Court never answered this question, since it had already concluded that her situation did not fall within the scope of Union law. However, the foregoing implicit conclusion of the court can also be rephrased in light of the duty that a Union citizen has to work: for if McCarthy were to move to another member state, she would no longer enjoy her British social assistance, and therefore clearly would not have sufficient means to be able to stay in another member state unless she found employment there.

We should note, finally, that Shirley McCarthy made clear that it was not the mere possession of the nationality of two member states that activated

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195 ibid., par. 31–43.

196 But see the critical comments of Kochenov and Plender, who noted the aspects of the case that had not made the cut into the Court’s considerations: one of McCarthy’s three children was severely disabled and required constant care; thus viewed realistically, McCarthy could not make use of her freedom of movement, nor could she be blamed for not making use of it. Her interest in having her husband with her, in fact, was in having someone to contribute support to the household. Kochenov and Plender (2012), p. 389–390.

rights under Union law, if anyone had been under the impression that that was what Garcia Avello meant. A person with two member state nationalities was not destined to be a super-Union citizen, ever entitled to the cross-border equalities by virtue of ever residing in a member state other than the one of her (other) nationality. Rather, it was only when that Union citizen’s (potential) use of the freedom of movement was at stake that the cross-border equalities of Union law applied. In this regard, how many nationalities the Union citizen possessed was irrelevant; indeed, as we already saw in Grunkin-Paul, which involved a child with only a single nationality, merely a strong de facto tie to a host member state could mean that the rights obtained through the use of Union citizenship extended back into the country of nationality. Thus it was still the primary teleology of Union citizenship—enabling freedom of movement—that mattered most.

Shirley McCarthy necessitated a reassessment not only of what Ruiz Zambrano meant, but possibly what Rottmann meant as well. Lansbergen and Miller had already predicted this possibility based on their analysis of Ruiz Zambrano (in which the Court, admittedly, did not provide much insight into its deeper considerations) and Sharpston’s Opinion in that case, in which she had revisited Rottmann. Lansbergen and Miller saw Sharpston’s reasoning as being based not on Union citizenship as a status, but on the potential for future exercise of the rights attaching thereto. Thus, they wrote, it was possible that “the internal situation principle remains intact” with regard to rights of residence for a sedentary Union citizen.

An article by Lenaerts (speaking personally, not as a judge in the European Court of Justice) published immediately subsequent to Shirley McCarthy confirmed this reading. In Rottmann and Ruiz Zambrano, Art. 20 TFEU, the very status of citizen of the Union, intervenes when a member state is going to deprive one of its own nationals of (the genuine enjoyment of the substance of the rights attached to the status of) Union citizenship, which include the rights of freedom of movement and residence. In Shirley McCarthy, on the other hand, the United Kingdom was doing nothing to deprive McCarthy of (the rights attached to) Union citizenship based on Art. 20 TFEU, nor was it doing anything to impede her use of Art. 21 TFEU, the right to move and reside freely within the territory of the Union.

The trick, of course, is to conflate the situation of the children Diego and Jessica Ruiz Zambrano with that of Rottmann. To use our terms: we previously said that the Court had established a uniform equality based on Art. 20 TFEU for all Union citizens, mobile and sedentary, providing certain protections
(the principles of proportionality and equal treatment) against deprivation of their Union citizenship. But of course, that equality is arguably only uniform (precluding the existence of a purely internal situation) when it involves the wholesale deprivation of Union citizenship, or the deprivation of rights attached to Union citizenship that were uniform equalities to start with, i.e. that sedentary Union citizens enjoy as well (such as the right to vote for and be elected to the European Parliament). When it comes to deprivation of rights of Union citizenship that are typically cross-border equalities, though, such as the rights of movement and residence (together with one’s family members), then there still has to be a cross-border element for Union law to intervene, even if that is only a potential cross-border element; otherwise it is a purely internal situation. Thus the only innovation of *Ruiz Zambrano*, and its only contribution toward reducing reverse discrimination against sedentary Union citizens (as “second-class Union citizens”) was in stretching the cross-border situation somewhat, i.e. making some sedentary Union citizens mobile by deducing their potential to make use of the rights of mobility from their Union citizenship.

But this possibility would remain limited. In all of the subsequent decisions we will briefly review, we see the Court finding that the Union citizen in question could not be found to be deprived of his or her rights of Union citizenship.

*Dereci, Iida, O and S and L, Alokpa*

The Court made the contrast between *Ruiz Zambrano* and *Shirley McCarthy* definitive in the decision *Dereci et al.* 203 In this case, all of the Union citizens involved, sedentary Austrian citizens living in Austria, were adults with third-country national family members who sought to derive a right of residence in Austria from Union law. The Court stated that rights of residence based on Union citizenship did not extend to a “purely internal” situation of a Union citizen in his home member state where denial of a right of residence for a third-country national family member did not lead to denial of the “most essential rights” of Union citizenship. The mere situation that a Union citizen might prefer to be together with his family on the territory of the Union does not lead to the conclusion that that Union citizen would be forced to leave the territory of the Union to be together with his family. 204 The Court went on to rule that the right to family life, as guaranteed by Art. 7 of the Charter of Fundamental Rights of the European Union, could not apply to a situation where the Union did not have a legislative competence. 205 (par. 71).

In two other cases, the Union citizens involved were children, but the presence of

203 ECJ *Dereci et al v. Bundesministerium für Innerei* (15 November 2011)
204 ibid., par. 68.
205 ibid., par. 71.
the third-country national family member was adjudged to be too tenuously linked to the citizenship rights enjoyed by the Union citizen. In the first of those cases, Iida206 was a national of Japan, married to a German national with whom he had had a child, who was also a German national. Iida was legally resident in Germany based on German immigration law, but then Iida's wife moved to Austria for work, taking their child with her. Iida remained in Germany and applied for a residence card as the family member of a Union citizen, based on being the father of a Union citizen. He claimed that because he regularly visited his daughter in Austria and was part of her life, he derived a right of residence from Union law. The Court denied, however, that Iida's wife or daughter were being inhibited in the rights they derived from Art. 20 or Art. 21 TFEU by Iida not having a right of residence in Germany. After all, they had already moved to Austria, apparently uninhibited by the fact that Iida did not have a right to stay in Germany based on Union law.207 The Court also rejected Iida's appeal to Art. 7 of the Charter (as well as Art. 23 of the Charter, protecting the interests of children) as a means to extend the applicability of Union law into a purely internal situation.208

The second case, O and S and L,209 really a fusion of two cases, involved two third-country national stepparents of sedentary Union citizens in Finland, Mr. O and Mr. M. In the first case, Ms. S was a national of Ghana who had married a Finnish national and had a child with him, who had Finnish nationality. They divorced and Ms. S retained sole custody of the child. Ms. S, who herself had a permanent right of residence in Finland, later married Mr. O, a national of Côte d'Ivoire, with whom she also had a child; this child was not a Union citizen.

In the second case, Ms. L was a national of Algeria who had also been married to a Finnish national and had a Finnish national child with him. She also retained sole custody of the child after divorcing her Finnish husband. Ms. L married an Algerian national, Mr. M, who was deported from Finland. Mr. L applied for Mr. M to be granted a residence permit as her husband; she subsequently gave birth to a child, which was Mr. M's and was an Algerian national, not a Union citizen. Both Mr. O and Mr. M claimed, essentially, that since their presence as stepfathers was necessary to the Finnish children of Ms. S and Ms. L, the Finnish children would be forced to leave the territory of the Union if their stepfathers would not be considered to have legal residence under Union law.

The Court rejected the assertion of the German and Italian governments that it was necessary for the third-country national family member involved to have a blood relationship with the Union citizen whose rights of

206 ECJ Yoshikazu Iida v Stadt Ulm (8 November 2012)
207 ibid., par. 74.
208 ibid., par. 78.
209 ECJ O, S v Maahanmuuttopäivitysto (C-356/11), and Maahanmuuttopäivitysto v L (C-357/11) (6 December 2012)
citizenship were at stake. However, it did rule that to establish whether that Union citizen’s rights of citizenship were under threat, it was necessary to determine whether the Union citizen was “legally, financially or emotionally” dependent on the third-country national. In this case, where both of the mothers of the two Union citizens involved had permanent rights of residence and did not appear to be financially dependent on their husbands, there was probably not such a relationship of dependence between the Union citizens and their stepfathers. 210

Moreover, although Messrs. O and M could not benefit from Union citizenship law, they could, as family members of third-country nationals, claim the applicability of another field of Union law, the Family Reunification Directive (2003/86). Interestingly, that Directive literally excludes family members of Union citizens from being able to benefit from its provisions; in Dereci et al. the Court had ruled that the applicants could not claim the applicability of that Directive. However, in this case, the Court ruled that in fact, O and M were family members of the third-country nationals, S and L, who were their primary sponsors. The fact that O and M were also family members of Union citizens, due to their relationship to their stepchildren, could not be used to deny the applicability of the Directive. 211 As to interpreting the substance of the Directive, the Court essentially repeated its considerations in Chakroun, 212 and also restated them in terms of the provisions of the Charter.

While we will again not go into depth on the Family Reunification Directive, O and S and L is the first decision of the Court in which both Union citizenship law and the Directive come up in one case. It therefore highlights the three levels of protection of family life that can exist in the Union, from most “vertical” and uniform (and arguably the strongest) to the most “horizontal” and least uniform (and possibly the weakest). The top level of protection is accorded to family members of Union citizens who are making active use of their rights of Union citizenship, or for whom the presence of the family member is considered to be essential to securing the (potential) use of those rights. In that case, Union law virtually guarantees the right of residence of the family member, with little or no difference in implementation permissible by the member state in which residence is sought (with a possible exception relating to varying definitions of who a “family member” is in the law of the member state in question).

The middle level of protection is accorded to family members of third-country nationals legally residing in a member state. The Family Reunification Directive does not guarantee the family member a right to stay, and it allows member states to require the sponsor to have “stable and regular resources that are

210 ibid., par. 56-57.
211 ibid., paras. 66-69. If one had imagined Micheletti to have established a sort of hierarchy, i.e. that Union citizenship always had priority over the nationality of a third country, then in the case of third-country national family members of both Union citizens and third-country nationals, the hierarchy was reversed.
212 Supra n. 103.
sufficient to maintain himself and the members of his family", which is up to the
given member state to define. Nevertheless, the Directive does provide for a
positive obligation for the member state in question to admit the family member
if the sponsor satisfies the requirements, and also constrains the margin that
member states have in defining the requirements; a member state cannot interpret
the Directive so as to undermine its \textit{effet utile}.\textsuperscript{213} Moreover, a member state is
obliged to take the fundamental rights guaranteed by the Charter into account
when applying the Directive.\textsuperscript{214}

The lowest level of protection, which was not directly addressed in \textit{O and S and L.}, is that provided to family members of sedentary Union citizens who
are unable to establish that they are in danger of being deprived of the rights
attached to Union citizenship. These persons are not protected by Union law at all,
but by Art. 8 of the European Convention of Human Rights. As we have seen
before,\textsuperscript{215} the "margin of appreciation" granted to signatory states to balance their
public interests against the protection of family rights is a wide one, and a positive
obligation of a signatory state to protect those rights is rarely assumed when the
third-country national family member has not previously had legal residence in
the state. However, as we have also seen in the case of the Netherlands after
\textit{Chakroun},\textsuperscript{216} a member state can decide that it is politically untenable for Union
law to accord more protection to third-country nationals under the Directive than
its own law accords to its own nationals.

Finally—and to conclude this section on the incursions so far of Union citizenship
law into the purely internal situation—we will touch on an at first glance only
tangentially related decision of the Court in which a third-country national family
member was unable to derive rights of residence from the Union citizenship of
her \textit{mobile} Union citizen child, i.e. in a situation which was not purely internal.
Adzo Domenyo Alokpa\textsuperscript{217} was a national of Togo living in Luxembourg, having
applied for asylum there and been rejected. In 2008 she gave birth to twin sons,
and a French national living in France, Mr. Moudoulou, legally acknowledged
paternity of the children, which meant that they were also French nationals.
Alokpa applied for a residence card as the family member of Union citizens, but
the Luxembourg authorities rejected her application on two grounds based on a
literal reading of the secondary legislation: Directive 2004/38 only grants
residence to \textit{dependent} relatives in the ascending line, which Alokpa was not, and
anyhow, her children were not legally resident as economically inactive Union
citizens, since they did not possess sufficient resources to support themselves. In

\textsuperscript{213} ECJ \textit{O, S v Maahanmuuttovirasto} (C-356/11), and \textit{Maahanmuuttovirasto v L} (C-357/11),
(6 December 2012), paras. 70-74.
\textsuperscript{214} ibid., paras. 75-80.
\textsuperscript{215} Supra n. 62.
\textsuperscript{216} Supra at n. 105.
\textsuperscript{217} ECJ \textit{Adzo Domenyo Alokpa and Others v Ministre du Travail, de l’Emploi et de
l’Immigration} (10 October 2013)
the appeal that Alokpa brought against the rejection, the Cour administrative of Luxembourg referred preliminary questions to the European Court of Justice concerning Alokpa’s potential right to stay based on Art. 20 and 21(1) TFEU: in other words, whether her children were being deprived of essential rights attaching to their Union citizenship if their caretaker was not allowed to stay in Luxembourg.

The Court first repeated its findings in Chen: that where an economically inactive Union citizen is required to “have” sufficient resources, it does not mean that he has to have them himself; and moreover that the effet utile of the Directive also meant that the non-dependent relative in the ascending line could be qualified as a family member if she was the primary carer of the Union citizen. Thus the fact that Alokpa was not literally one of the family members provided for by the Directive could not be held against her; but the Court went on to say that her sons did still have to have sufficient resources and health insurance as the Directive provided. It was therefore for the Luxembourg court to determine whether Alokpa (on behalf of her sons) had the sufficient resources and health insurance required. If those conditions were not satisfied, the Court ruled, Art. 21(1) TFEU did not preclude Luxembourg from denying Alokpa legal residence.

The Court went on to determine whether Alokpa’s French sons were being deprived of the enjoyment of their rights as Union citizens based on Art. 20 TFEU. The Luxembourg court, the Court ruled, would have to determine whether denying Alokpa legal residence in Luxembourg would force her sons to leave the territory of the Union altogether. Nonetheless, the Court hinted at a basis for the Luxembourg court to determine that such a refusal would not force her sons to leave the territory of the Union: it said that Alokpa could have a right of residence in France as the sole carer of her children, i.e., put otherwise, that she could appeal to the applicability of Art. 20 (as explained in Ruiz Zambrano) in France. (The Court referred herein to the Opinion of Advocate-General Mengozzi, who considered it to be inconceivable, considering the fact that the French father was out of the picture and Alopka was the only person that her sons had had family life with since permit, that the French authorities would be able to deny Alopka’s appeal to Art. 20.) Therefore, denying Alokpa residence in Luxembourg would not force her sons to leave the territory of the Union, and therefore would not deprive them of the most essential rights attaching to their Union citizenship.

218 ibid., paras. 27-30.
219 Supra n. 25.
220 Supra n. 27.
222 ibid., Opinion, paras. 55-56.
223 ibid., paras. 32-35.
While at first glance, this decision may appear to be a setback for the Union citizen, it provides even more insight into *Ruiz Zambrano* and the situations in which Union law covers previously “internal” situations. In *Ruiz Zambrano*, we saw the Court apparently extending *Chen* by saying that if a minor Union citizen did not have sufficient means of subsistence, his carer parent would have to be seen as having a right of residence and a right to work in order to enable that minor Union citizen to obtain those means.\(^{224}\) If one had subsequently thought that this extension had to apply *a fortiori* to Union citizens outside of their member state of nationality, then the Court has now clarified that that right was not derived from an extensive interpretation of the Directive based on Art. 21(1) TFEU, i.e. from the rights of movement and residence of Union citizens. Rather, that was an exceptional circumstance applying *only* to minor Union citizens whose rights based on Art. 20 TFEU, i.e. their rights of Union citizenship as such, would be threatened by the deportation of their caregiver.

Furthermore, while it is conceivable that a threat to the rights based on Art. 20 TFEU could arise at any place or any time, the Court implies here that it can only be definitely established that the rights based on Art. 20 TFEU are under threat if the Union citizen is not able to have them protected by his own member state. In other words, a *host member state* is primarily responsible for protecting a Union citizen’s rights under Art. 21(1) TFEU, when Union law applies to the situation that is immediately (and not just potentially) cross-border. But a Union citizen’s *own member state of nationality* is primarily responsible for protecting a Union citizen’s rights under Art. 20 TFEU: that is why that provision of Union law can apply there in what may otherwise be seen as an internal situation. This distinction will be of key importance to my conclusions about Union citizenship.

Finally, *Alokpa* can be seen as a possible clarification of the realm of applicability of Art. 20 as in *Ruiz Zambrano*: it does not solely apply when *both* parents are third-country nationals\(^{225}\) threatened with deportation, but also in the case that one parent is a third-country national and the other is a Union citizen, but the third-country national parent is the sole carer.\(^{226}\)

\(^{224}\) *Supra* at n. 191

\(^{225}\) If one considers the nationality laws of almost all the member states, by which acquisition of member state nationality by a child of illegally resident third-country national parents is extremely rare, if not impossible, the factual circumstances in *Ruiz Zambrano* are very exceptional. Thus a strict construction of *Ruiz Zambrano* to apply solely to the situation that both parents are not Union citizens, but the child is a Union citizen, would benefit almost no child. A much more common situation, on the other hand, is that one parent is a national of a member state, and the other is a third-country national, whereby the child obtains the nationality of a member state, and thus Union citizenship, *jure sanguinis*.

\(^{226}\) In the Dutch case law, this is accepted only under very strict conditions: that the third-country national is not only the sole carer, but it is also completely out of the question that the Dutch parent can care for the child. See, e.g., *Afdeling bestuursrechtspraak van de Raad van State*, ECLI:NL:RVS:2012:BY4039 (15 Nov 2012)
We have so far reviewed the development of Union citizenship, as well as the established case law of the Court on Union citizenship. In the final chapter of the corpus of this thesis, we will turn to a pair of decisions from the Court that have been recently handed down at the time of writing of this thesis. Since the full significance of these decisions has not yet become established, I will bring all of the theoretical discoveries of this thesis to bear on an extensive analysis of these decisions.
Chapter 9: *O & B* and *S & G*: the Court clarifies the relationship of freedom of movement to Union citizenship

To conclude this study, we can take a look at the most recent decisions from the European Court of Justice on citizenship to see what the theories I have developed have to say about them, and also to see how the meaning of some of the previous decisions of the Court is an ongoing subject of discussion. The Court was deciding on preliminary questions in four cases referred by the *Raad van State* in the Netherlands, each of which deals with the third-country national family member of a Dutch citizen claiming a right of residence based on an immediately cross-border equality of Union law.

In the first two cases (“*O.* and *B.*”), the referring court sought clarification on when third-country national family members could derive a right of residence, as in *Singh* and *Eind,* in the home country of the Union citizen after the Union citizen had returned from making use of the freedom of movement and residence. In the second two cases (“*S.* and *G.*”), the referring court sought clarification on when the third-country national family members could derive a right of residence when the Union citizen had not actually resided in a host member state, but was making use of a Treaty freedom from the comfort of his home member state, as in *Carpenter.*

By comparing the Court’s two decisions, we will be able to draw conclusions about not only the relationship between Union citizenship and its relationship to the originally economic teleology of the fundamental freedoms, but also about the place of the citizen in the legal order that had originally been created to serve the interests of the member states.

**Attempting to escape “reverse discrimination”**

Mr. *O.*, a national of Nigeria, in 2006 married a Dutch national, called “Sponsor *O.*” in the Court’s decision. In 2007 both of them moved to Spain, where (Ms.) Sponsor *O.* looked for work. The Spanish authorities apparently were satisfied that Sponsor *O.* was legally resident as a Union citizen in Spain, because they granted *O.* a residence card as the family member of a Union citizen. After two

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1  ECJ *O.* v *Minister voor Immigratie, Integratie en Asiel*, and *Minister voor Immigratie, Integratie en Asiel* v *B.* (12 March 2014)
2  *Supra* Ch. 6 n. 172.
3  *Supra* Ch. 8 n. 64.
4  ECJ *S.* v *Minister voor Immigratie, Integratie en Asiel* and *Minister voor Immigratie, Integratie en Asiel* v *G.* (12 March 2014)
5  *Supra* Ch. 8 n. 58.
months of looking for work in Spain, however, Sponsor O gave up and returned to the Netherlands. She did, however, regularly visit O. in Spain by going on vacation there. In April 2010, O. moved to the Netherlands to be with Sponsor O, and was registered in the Dutch population register as living at Sponsor O’s address since July 2010.

O. applied for a residence card as the family member of a Union citizen, but the Dutch immigration authority rejected the application, claiming that O. had not made plausible that he and Sponsor O had made “effective and genuine” use of the freedom of movement, since they had not provided sufficient evidence of their residence in Spain.6

Mr. B., a national of Morocco, lived in the Netherlands from December 2002 as the unmarried, cohabiting partner of Dutch national (Ms.) Sponsor B. In 2005, B. was declared undesirable in the Netherlands, a penalty imposed due to the fact that he was convicted of a serious crime (using a false passport) while residing illegally in the Netherlands. B. then moved to Belgium and resided there in an apartment rented by Sponsor B from October 2005 to May 2007. Sponsor B lived with B. there on weekends. B. was forced to leave Belgium due to the undesirability decision that the Netherlands had imposed on him, and returned to Morocco. B. and Sponsor B subsequently married in Morocco. In 2009, after B. had applied to the Dutch immigration authority for the undesirability decision to be lifted, it was lifted; B. subsequently moved to the Netherlands to be with Sponsor B, and applied for a residence card as the family member of a Union citizen.

The Dutch immigration authority rejected the application on the grounds that Sponsor B had also not made “effective and genuine use of the right of freedom of movement” in Belgium. During the higher appeal before the referring court, the Minister of Immigration, Integration and Asylum (the political head of the Dutch immigration authority) argued that a period of residence in a host member state could only be called “effective and genuine” if it lasted three months or more. The Minister supported this argument by referring to the system of Directive 2004/38, which distinguishes between the right of short-term residence that a Union citizen can have for up to three months (Art. 6) and the right of long-term residence that a Union citizen can have for longer than three months (Art. 7).7

Ms. S., a national of Ukraine, lived in the Netherlands with her son-in-law Sponsor S, who is a Dutch national. She took care of her grandson there, the son

6 In addition to citing the published decision of the ECJ generally, I am also making use (after the paragraph break in my review of the facts in each of the four cases) of the referral decision of the Raad van State for additional background facts in this case: Afdeling bestuursrechtspraak van de Raad van State: referral decision in O. and B. (5 October 2012), par. 9.
7 ibid., par. 4.
of Sponsor S. Sponsor S works for a Dutch employer, and in the context of his job, he spends 30% of his workweek preparing and making business trips to Belgium. Sponsor S travels to Belgium for work at least once a week. S. applied for a residence card as the family member of a Union citizen.

The Dutch immigration authority rejected her application on the grounds that Sponsor S was not making use of the freedom of movement of workers (Art. 45 TFEU), since he was working for a Dutch employer, nor was he making use of the freedom of services (Art. 56 TFEU). Since he was a salaried employee of a Dutch company, and therefore was providing services for his employer and not for the receivers of his services, the freedom of services was not at stake and Carpenter was not applicable. Moreover, the minister added, Sponsor S could not be said to be making use of the freedom of movement of workers in another member state and subsequently re-establishing himself in his home member state; therefore, Singh was not applicable.

Ms. G., a national of Peru, married a Dutch national, (Mr.) Sponsor G in 2009. She and Sponsor G had a daughter together, and she also had a son from a previous relationship who lived with her and Sponsor G as part of their family. Sponsor G lives in the Netherlands and is the employee of a company in Belgium. He commutes to Belgium daily for his work.

G.’s application for a residence card as the family member of a Union citizen was rejected by the Dutch immigration service on the grounds that G. does not come within the field of applicability of Directive 2004/38, considering that G-sponsor lives in the Netherlands, and not in Belgium. Nor, said the minister, was G.’s presence necessary to the effective use of G-sponsor’s use of the freedom of movement. According to the minister’s rejection decision, Carpenter was not applicable because that decision of the Court solely applied to providers of services, while Sponsor G was a worker. The minister apparently viewed Carpenter as being only narrowly applicable to situations exactly like that of Mrs. Carpenter, because the minister gave further arguments that G., unlike Mrs. Carpenter in the United Kingdom, had not lived in the country of the Union citizen’s nationality for a long time, nor had the wedding taken place in that country, nor was G taking care of any children (this last, rather curious standpoint can be accounted for by the fact that G had apparently not yet given birth to her and Sponsor G’s common daughter at the time of the rejection decision, and the minister may not have known about G’s own son or considered G’s care for her son—Sponsor G’s stepson—to provide a relevant basis of comparison to Carpenter).9

It must be noted, of course, what the elephant in the room is that all of these cases have in common: for all of the third-country national family members involved, it

8 Afdeling bestuursrechtspraak van de Raad van State: referral decision in S. and G. (5 October 2012), par. 4.
9 G referral, par. 8.
is apparent that applying for a right to stay based on the immigration law of the member state involved, i.e. the Netherlands, was not an option. In the cases of O., B., and G., all of them partners or spouses of Dutch nationals, such an application would have had to be filed at a Dutch embassy or consulate in their respective home countries so that they could obtain the preliminary visa required. As a requirement for that visa, each would have had to take in their home countries, and pass, the basic exam of civic and linguistic orientation\(^{10}\) required for partners and spouses of Dutch citizens and third-country national residents of the Netherlands. Each of the sponsors would have had to prove that he or she possesses stable income.\(^{11}\) And finally, the Dutch immigration agency has three months to decide on the application for a preliminary visa,\(^{12}\) which the third-country national family member has to wait out in his or her home country, separated from the Dutch sponsor (who in most cases will have to stay in the Netherlands in order to keep working and enjoying the income required for the application to be approved).

In the case of S., moreover, as the dependent parent-in-law of an adult Dutch citizen (or the dependent parent of a lawfully admitted third-country national, Sponsor S.’s wife) there is no guarantee at all that she would be admitted to the Netherlands, even if she could satisfy the aforementioned requirements, since the letter of Dutch immigration law does not provide for the admission of dependent ancestors. Only if S. could successfully appeal to a “positive obligation”\(^{13}\) on the part of the Netherlands to admit her based on Art. 8 ECHR, which would require establishing that there were elements of dependency involving “more than the normal emotional ties” between her and her adult daughter or her son-in-law,\(^{14}\) would she even have a chance, and not a good one at that.

Directive 2004/38, on the other hand, does provide for admission of dependent ancestors(-in-law) of Union citizens\(^{15}\) with absolutely no evaluation of emotional ties required, provided that the Union citizen is fully mobile (i.e., making use of the freedom of movement and residence in a member state other than that of which she or he is a national\(^{16}\)). Likewise, for fully mobile Union citizens, the Directive provides for the admission of spouses whereby no condition of a preliminary visa can be imposed (as the Court ruled in \textit{Metock}\(^{17}\)), which

\(^{10}\) Goodman (2010), p. 767.
\(^{11}\) See supra Ch. 6 at n. 158 with regard to the situation in 1982. Dutch migration law has not changed at all on this point, or perhaps has become even stricter: the requirement of independent, stable and sufficient means of subsistence is currently provided for in the \textit{Vreemdelingenbesluit [Aliens’ Decree]} Art. 3.22(1).
\(^{12}\) Art. 2u(1) \textit{Vreemdelingenwet [Aliens’ Act]}
\(^{13}\) See supra Ch. 7 n. 136.
\(^{14}\) See, e.g., ECHR \textit{Irshad Begum Javeed v. the Netherlands} (3 July 2001), where such a relationship was deemed not to exist between adult family members.
\(^{15}\) In Art. 7(2), read in conjunction with Art. 2(2)(d)
\(^{16}\) Art. 3(1)
\(^{17}\) Supra Ch. 8 n. 77: par. 52.
would therefore also mean that no requirement of a basic integration exam could be imposed. If Sponsors O, B, S, and G were fully mobile and the Directive applied, then no requirement of sufficient means of subsistence, as such, would be applicable: instead, if they were engaged in “genuine and effective activities” as workers or self-employed persons, or if they were resident as economically inactive Union citizens, a subsistence norm as strict as the one provided for by Dutch immigration law would be inadmissible.

In terms of equality, then, it was clear that all of the Union citizens involved, by appealing to Union law, wished to be treated equally to mobile Union citizens. For them, to be treated as sedentary Union citizens would mean being subjected to the strict laws of their own member state (with the ECHR exerting some degree of mitigating effect), i.e. being subjected to “reverse discrimination” relative to mobile Union citizens. The referring court, perhaps recognizing a common ground in all four of these cases (i.e. Union citizens whose mobility was made out to be defective, or whose mobility did not fit into the standard model), joined the cases of O. and B., and S. and G., respectively, and referred two sets of preliminary questions to the Court on the same day.

Advocate-General Sharpston also recognized a common ground in all four individual cases: Union law is only applicable, derogating the immigration law of a member state, if a Union citizen has crossed a border with another Member State or there is a real prospect of him doing so. … [In the present cases, each of the EU sponsors, although resident in the Netherlands, has indeed crossed such a border.]

Therefore, she wrote a joined Opinion on both referrals (calling them, together, “O. and S.”), in an attempt “to develop a coherent explanation of the parameters within which derived residence rights for third country national family members arise in the home Member State”.

Sharpston examines the phenomenon of “reverse discrimination”. She finds it to be an extremely odd phenomenon that member states would thereby expel their own nationals. If nationals of a member state feel compelled to move to another member state in order to secure a right of residence for their third-country national family members based on Directive 2004/38, this reeks of an imposition of free movement rather than a facilitation of movement. A national measure which thereby compels movement could be seen as being at odds with a Union citizen’s right to move and reside freely, and thus as a violation of Art. 21(1) TFEU.

Sharpston proposes the following answers to the questions in O & B:

18 Supra Ch. 6 n. 148.
19 ECJ European Commission v. the Netherlands (10 April 2008), Groenendijk (2008)
21 ibid., par. 44.
22 ibid., par. 85–89.
1. Directive 2004/38 does not apply in the home member state. However, it should be seen as indirectly setting the standard for derived rights of residence in the home member state, since the home member state cannot accord less favorable treatment to the Union citizen than the host member state had.

2. Union law does not require the Union citizen to have had any minimum period of residence in the host member state in order for the family member to be able to claim a derived right of residence in the home member state.

3. A Union citizen can, on the other hand, be seen as having exercised his right of residence in the host member state if he made that member state “the place where the habitual center of his interests lies”.

4. A gap in time between the return of the Union citizen to the home member state and the arrival of the family member does not cause the family member’s right to a derived right of residence to lapse, provided the decision to join the Union citizen is taken in the exercise of their right to a family life.

Finally, Sharpston proposes an answer to the question in S & G that draws on criteria she proposed in paras. 122–123—whether the family member of the Union citizen who remains resident in the home member state, but exercises free movement, can obtain a derived right of residence depends on the closeness of the family connection and the causal connection between the place of residence and the use of free movement. Moreover, once more suggesting that an imposition of movement is at odds with the freedom of movement: “the family member must enjoy a right of residence if denying that right would cause the EU citizen to seek alternative employment that would not involve the exercise of rights of free movement or would cause him to move to another Member State.”

The Court, for its part, largely refrained from handling the cases as two sides of the same coin, and handed down separate decisions in the cases of O. & B., on the one hand, and S. & G., on the other. These decisions correspond to two types of movement: O&b involves a Union citizen’s use of the right of freedom of movement and residence as granted by Art. 21(1) TFEU, and the citizen’s subsequent return to live in the member state of her nationality. Under what circumstances does the family member of such a “returning” Union citizen (who has made full use of mobility, so the first type of movement) derive a right of stay in the Union citizen’s home state from Art. 21(1) TFEU?

S&G, on the other hand, involves a Union citizen’s use of the right of freedom of movement (but not the freedom of residence) as granted by Art. 21(1) TFEU as well as one of the specifically economic fundamental freedoms involving personal movement: freedom of movement of workers (Art. 45 TFEU), of establishment (Art. 49 TFEU) or of services (Art. 56 TFEU). From which of these Treaty provisions does the third-country national family member of such a
“residentially sedentary” Union citizen (making use of the second type of movement here) derive a right of stay in the Union citizen’s home state? Is Art. 20 TFEU (the provision establishing that member state nationals shall be Union citizens and have rights as such) also relevant?

O&B: the Court rules on “returning” Union citizens

“Genuine residence” and intent

The Court first ruled on when a third-country national family member could be said to have a derived right of residence from the primary legislation, i.e. Art. 21(1) TFEU, after a Union citizen had returned from living in another member state. It reviewed its case law as established in Singh and Eind and the rationale behind it within the freedom of movement of workers, i.e. the need to avoid any “deterrent effect” (which Sharpston called the “chilling effect”) or obstacle to the use of the freedom of movement of workers.

One might have thought, in light of Singh and Eind, that the Court’s considerations about the “deterrent effect” were still limited to protecting the economic goals of the Union in terms of removing barriers to the freedom of movement. But in O&B, the Court now made clear that this equality of Union law was also to be extended to the freedom of movement and residence for economically inactive Union citizens. Nevertheless, this should not have come as a surprise in light of the Court’s incorporation of its previous case law on freedom of movement of workers into the rights of movement and residence for economically inactive Union citizens in Chen. This further extension of the Singh and Eind case law into the general freedom of movement and residence for Union citizens meant that the Court had to establish a new standard for determining when a Union citizen had made a sufficiently serious use of that freedom to warrant preventing the “deterrent effect”.

The Court passed over Sharpston’s suggestion of a test as to whether the Union citizen had moved his “center of interests” to a host member state in favor of a standard of “genuine residence” in a host state:

Accordingly, it is genuine residence in the host Member State of the Union citizen and of the family member who is a third-country national, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004/38 respectively, which creates, on the Union citizen’s return to his Member State of origin, a derived right of residence, on the basis of Article 21(1) TFEU, for the

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23 ibid., paras. 91-95.
25 See supra Ch. 8 after n. 28.
I must first pause at the Court’s use of this term “genuine residence”, because it has a notable legal-conceptual pedigree. A search of the Court’s online database of decisions will not turn up this particular combination of English words (at least not in this sense) in any previous decisions.

But we already saw, in our review of the referral decision and the court cases in the Netherlands leading up to it, a concern on the part of the Dutch courts and the Dutch minister of immigration for whether the Dutch citizens involved had had “effective and genuine” residence in the host member state, or had made “effective and genuine” use of the right of movement and residence. This is a formula directly and unmistakably derived from *Levin*.28 There, the Court had established a vertical standard for what defined a member state national as a “worker” entitled to the freedom of movement of workers: being engaged in “effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary”. In cases concerning the “Europe route” before the Dutch courts, the use of the phrase “effective and genuine residence” with regard to residence in a host member state had already been in use for some time, since at least 2010 or before.29

We thus see that the Court clearly allowed itself to be inspired by the referring court’s innovation on the Court’s own case-law on freedom of movement of workers, extending it to the general rights of movement and residence for Union citizens. As to why the Court reduced this formula to “genuine” from “effective and genuine”: it may have had something to do with the fact that the language of the case was Dutch, in which the standard rendition of the formula in *Levin* (which had also been a Dutch-language case)—“reëel en daadwerkelijk”—has a different literal meaning, more like “real and actual”. The Court chose the second word in Dutch, “daadwerkelijk”, for the new standard, and most of the Court’s translators, for their part, duly employed the second word of the English formula as well. In French, the choice fell to “effectif,” there as well preserving the *Levin* pedigree: “réelle et effective”. In Italian, the Court likewise spoke of “soggiorno effettivo” (*Levin*: “attività reali ed effective”). In German, however, the Court’s translators used a curiously restrictive formulation, speaking of residence “von einer gewissen Dauer”, i.e. “of a certain length of time”, which had no

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27 ECJ O. and B. (12 March 2014), par. 56.
28 Supra in Ch. 6 n. 148.
relationship to “tatsächlich und echt”.

The Court has therefore taken a standard of legal residence that it originally established for the freedom of movement of workers and declared it to be analogously applicable to the freedom of movement of economically inactive Union citizens. Thus we can also explain this standard of “genuine residence” for guaranteeing the effectiveness of Art. 21(1) analogously to the Levin standard for guaranteeing the effectiveness of the freedom of movement of workers. In Levin, the Court had asserted that Mrs. Levin’s subjective intent in making use of the freedom of movement of workers to work for a Dutch employer was irrelevant in determining when she could be called a worker;30 the fact that by working in the Netherlands, she primarily intended to secure a right of legal residence for her husband was not relevant.

In O&B, likewise, the Court tries to make the relevant criteria as objective as possible. According to the Court, “genuine residence”, such that it enables a Union citizen “to create or strengthen family life” in a host member state,31 is residence on the basis of Art. 7(1) of the Directive, i.e. on the basis of a right of residence for more than three months. So if the Union citizen actually resided for longer than three months in the host member state as a worker, a self-employed person, or a self-supporting economically inactive Union citizen, then it would be objectively established that she had had “genuine residence”. And in any case, even if it was her intent to follow this “Europe route” especially to circumvent national immigration law and obtain a right of residence for her family member, that particular intent must still be seen, pace Levin, as irrelevant. In O&B, the Court notes that the only circumstance in which Union law does not provide protection is in the case of “abuse”,32 by which we can understand a marriage of convenience between the Union citizen and the third-country national,33 or perhaps a fictional period of residence in the host member state attested by little more than a rental contract for an apartment there.

We thus see that “returning” Union citizens, regardless of whether or not they were economically active in a host member state, are entitled to equality with other mobile Union citizens in their own member state, as long as their residence in the host member state and their family relationship are genuine. With Singh, Union law had already made an inroad into the traditional territory of the member state with regard to the right of residence of family members of its own nationals, entitling returning Union citizens who were economically active in both the host state and the home state to the equal disapplication of member state law. With Eind, the requirement that the returning Union citizen be economically active in the home state was dropped. And now, the requirement of economic

30 Supra in Ch. 6 n. 152.
32 ibid., par. 58.
33 See Akrich, supra in Ch. 8 n. 65.
activity in the host state was dropped as well, further expanding the set of persons who could be entitled to the equal applicability of Union law in a given member state.

The “passporting” of family life

But even more intriguingly, the Court seems to hint at a portability of non-traditional forms of family life, from a host member state that recognizes those forms of family life, to a home member state that does not. Recall that in the legislative process for Directive 2004/38, the European Parliament wished to define “family member” in such a way that same-sex spouses and registered partners of mobile Union citizens would obtain legal residence if the legislation of the destination member state, or the last member state of residence, recognized their marriage or partnership. I concocted a case in which, had this provision been enacted, an Austrian woman would have been able to bring her Ukrainian wife back to Austria after making use of mobility in the Netherlands. If we paraphrase the Court’s judgment in O&B, it seems that that is now a real possibility, since an Austrian court would have to consider “whether, on account of living as a family during that period of genuine residence, [U.] enjoyed a derived right of residence in [the Netherlands] pursuant to and in conformity with Article 7(2) or Article 16(2) of Directive 2004/38”. 35

Thus the Ukrainian woman would, in this reading, have to obtain a right of residence in Austria based on Art. 21(1) TFEU, essentially “passporting” the right of residence that the Netherlands recognized. It is to be expected that culturally conservative member states will not accept that same-sex third country national spouses of their own returning nationals will have to get a right of residence based on Union law, and that they will cite a public policy or “national identity” exception. In any case, this will certainly give rise to more preliminary questions, giving the Court the opportunity to clarify the matter further.

Lenaerts (commenting generally on recognition of same-sex marriage in 2010, long before the handing down of O & B) notes that a member state would have to justify its objections (which Rijpma and Koffeman elaborate on extensively37) in compliance with the protection of family life.38 But it must be said that the specific situation of a returning national of the “host” member state makes the interest of Union law in preventing a “deterrent effect” on movement arguably overriding enough to overturn such an exception, as we can recall the Court’s consideration in Eind39 that a member state cannot possibly deny its own national entry and residence. Lenaerts does in fact refer specifically to Carpenter,

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34 Supra in Ch. 8 on p. 342.
35 ECJ O. and B. (12 March 2014), par. 54, applied to this hypothetical case
36 See Sharpston’s use of this term in Opinion in O. and S. (12 Dec 2013), Opinion, par. 95.
39 Supra Ch. 8 at n. 75.
which involved a Union citizen’s own member state, as providing support for his considerations on the rights engendered by the combination of freedom of movement and family life. 40

S&G: the Court rules on “residentially sedentary” Union citizens

In S&G, the Court turned to the matter of Union citizens who had made use of freedom of movement while remaining resident in their home member states. Are they to be viewed as “mobile” Union citizens, entitled to the application of Union law, or as “sedentary” Union citizens, subject only to the law of their member states?

Art. 45 TFEU

The Court first clarified that Carpenter, based as it was on the freedom to provide services from one’s home member state, is applicable by analogy to situations in which a Union citizen makes use of the freedom of movement of workers while remaining resident in his home member state. 41 The purpose of the Union citizen’s family member obtaining a derived right of residence in such a situation, the Court held, is to prevent any interference with the fundamental freedoms of the TFEU. 42

The Court went on to hold that [it] is therefore for the referring court to determine whether, in each of the situations at issue in the main proceedings, the grant of a derived right of residence to the third-country national in question who is a family member of a Union citizen is necessary to guarantee the citizen’s effective exercise of the fundamental freedom guaranteed by Article 45 TFEU. 43

The Court immediately went on, however, to establish limits for the referring court in making that determination, and also clarified Carpenter. In Carpenter, “the fact that the child in question was being taken care of by the third-country national who is a family member” was decisive; 44 all the more since the third-country national involved was the Union citizen’s spouse (as is the case for Ms. G). On the other hand, the Court went on, referring to Ms. S.,

[the mere fact that it might appear desirable that the child be cared for by the third-country national who is the direct relative in the ascending line of the Union citizen’s spouse is not therefore sufficient in itself to constitute such a dissuasive effect. 45

Thus if in the view of the referring court, the presence of Ms. S to provide

41 ECJ S. and G. (12 March 2014), par. 40
42 ibid., par. 41
43 ibid., par. 42
44 In this, the Court agreed with Sharpston that that was the decisive factor in Carpenter: Opinion in O. and S. (12 Dec 2013), par. 117.
45 ECJ S. and G. (12 March 2014), par. 43.

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childcare was not directly necessary to Sponsor S’s exercise of the freedom of movement, she would not be able to rely on Union law for a derived right of residence.

Finally, the Court said that it was unnecessary to rule on the applicability of Articles 20 (citizenship of the Union) and 21(1) TFEU (the rights of movement and residence attached to citizenship of the Union), since these rights “find specific expression in Article 45 TFEU in relation to freedom of movement of workers”.

What does the judgment in *S&G* tell us about the continued relationship of the fundamental freedoms (Art. 45, 49 and 56 TFEU) to Union citizenship and the rights of movement and residence derived from it (Art. 20 and 21(1) TFEU)? At first glance, the Court’s decision in *S&G*, by contrast to *O&B*, appears to have little to do at all with Union citizenship, instead perhaps heralding a return to the nakedly teleological reasoning of removing barriers to economic activity that the Court employed prior to more fully mobilizing Union citizenship in its case law. But I will conclude that Union citizenship, and the Court’s recent innovations in interpreting Union citizenship, are in fact very prominent in the Court’s interpretation of the fundamental freedoms. I will propose a way to understand the Court’s considerations in *S&G* in light of its previous decisions. We can focus on two turns of phrase here: the Court’s consideration (in par. 43) that Articles 20 and 21(1) TFEU “find specific expression in the fundamental freedoms”; and the Court’s consideration (in par. 45) that use of the fundamental freedoms cannot be dissuaded merely because “it might appear desirable” for an additional relative to care for one’s child.

The first consideration originally appeared in the 1996 decision *Skanavi and Chryssanthakopoulos,* and made its most prominent appearance, at least in the field of rights of residence for Union citizens, in the 2002 decision *Olazabal.* In both of those cases, the referring court apparently wished to know whether the rights of residence based on Union citizenship added anything to the rights of residence based on the use of the freedom of establishment or the freedom of movement of workers, respectively. In both cases, the Court employed this formula to say, essentially, that nothing had changed: if a Union citizen was making use of one of the fundamental freedoms, he or she had no need to draw on the general rights based on Union citizenship.

And indeed, the role of Art. 21(1) TFEU would come at first to be seen by some commentators on the case-law of the Court (Grzelczyk, Baumbast and

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66 ibid., par. 45.
67 Such as, most prominently, Singh and Konstantinidis (supra Ch. 7 n. 78)
68 ECJ Criminal proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos (29 Feb 1996)
69 ECJ Ministre de l’Intérieur v Aitor Oteiza Olazabal (26 Nov 2002)
Chen) as having a “safety net function”\(^{50}\) or as “gap-filling”\(^{51}\) when an economically inactive Union citizen could not invoke one of the fundamental freedoms, or when the secondary legislation implementing the fundamental freedoms showed a lacuna. However, as we saw before,\(^{52}\) Chen evidenced the completion of a conceptual shift in the Court’s case-law, whereby rights of residence for economically inactive Union citizens were increasingly construed as being of a piece with those of economically active Union citizens, and then primarily based on Art. 21(1) TFEU. This development was paired with the adoption of Directive 2004/38, with its emphasis on consolidating the theretofore piecemeal legislation on rights of residence enjoyed by Union citizens and their family members, as well as the basis of those rights.

We also see that Art. 21(1) and/or Art. 20 TFEU have become the most productive source of derived rights of residence for family members of Union citizens in the home member states of Union citizens, i.e. in situations that might once have been seen as “purely internal”. This fact is heavily underscored by O&B, in which the Court expansively interprets derived rights of residence based on Art. 21(1) TFEU. The contrast with the legal landscape at the time *Carpenter* was handed down could not be more vivid. Then, Union citizenship when not combined with economic activity had clearly not yet come into its own as a source of rights of residence.

But now, we see that the order in which we review a Union citizen’s situation against TFEU provisions on rights of residence is reversed: we first look (as O&B provides) to see if the Union citizen has made use of Directive 2004/38 and her right to “genuinely reside” in a member state other than that of her nationality, in which case the family member has a right of residence derived from the Union citizen’s right of *residence* based on Art. 21(1) TFEU. If the Union citizen has never resided anywhere in the Union other than his home member state (i.e., if the Directive never applied), then we look to see if the Union citizen’s right of *movement* based on Art. 21(1) TFEU would be infringed, or if he would be deprived of the most essential of his rights based on Art. 20 TFEU if the family member were to be deported (*Ruiz Zambrano* with regard to Art. 20; *Shirley McCarthy*\(^{53}\) with regard to Art. 21(1); and *Alokpa*\(^{54}\) with regard to Art. 20). Only after all three of the previous tests have failed do we arrive at the question of whether the Union citizen is making use of a fundamental freedom—Art. 45, Art. 49 or Art. 56 TFEU—while remaining resident in her home member state, and whether the presence of the family member is essential to the exercise of that fundamental freedom. In S&G it is the fundamental freedoms that form the “safety net” or fill the gaps that are not covered by the general rights of Art. 21(1)

\(^{50}\) Supra Ch. 7 at n. 111.

\(^{51}\) Supra Ch. 8 at n. 28.

\(^{52}\) Supra Ch. 8 after n. 28.

\(^{53}\) See supra Ch. 8 n. 194.

\(^{54}\) See supra Ch. 8 n. 217.
and Art. 20 TFEU, although the case law on Art. 21(1) and Art. 20 TFEU offers
guidance for interpreting the fundamental freedoms in their gap-filling function.

How exactly does that work? We can examine the Court’s consideration
in S&G that Art. 20 TFEU and Art. 21(1) TFEU “find specific expression” in the
fundamental freedoms, and find that this consideration has a rather different
consequence for the sedentary Union citizens Sponsor S and Sponsor G than it
had for the mobile Union citizens Skanavi, Chryssanthakopoulos and Olazabal.
The referring courts had asked, with regard to those mobile citizens, if their rights
of movement and residence based on Union citizenship (Art. 21(1) TFEU) added
anything to the rights they enjoyed by making use of the freedom of movement of
workers (Art. 45 TFEU). No, the Court effectively replied: they’re already making
use of rights that equal or go farther than those provided by Art. 21(1) TFEU.

With regard to sedentary Union citizens, the Court is saying the same
thing: Art. 45, Art. 49, and Art. 56 TFEU, when used by Union citizens, are still
lege speciales relative to Art. 20 TFEU and Art. 21(1) TFEU, extending their
reach somewhat. *Vice versa*, Art. 20 TFEU and Art. 21(1) TFEU do not, as “bare”
norms of primary law, extend the reach of the fundamental freedoms: it is the
implementation of Art. 21(1) in Directive 2004/38 that extends their reach (and
quite significantly, at that), but then that Directive does not apply to sedentary
citizens.

Viewed in this light, the Court’s consideration that “the mere fact that it
might appear desirable” that an additional family member provide child care—and
thereby aid the use of a fundamental freedom—cannot be seen as essential to the
use of that fundamental freedom, fits with the previous case law: this formula is an
obvious restatement of the Dereci doctrine on Art. 20 TFEU, which in turn was
an important clarification of *Ruiz Zambrano*. Essentially: in the absence of
specific secondary legislation, a family member can only derive a right of residence
from a “bare” right of citizenship or fundamental freedom if that family member’s
presence is absolutely essential to the Union citizen’s enjoyment of that right or
freedom. This was the Court’s innovation with *Ruiz Zambrano* (which in turn
owed a great deal to *Rottmann*) in explaining how rights could be directly derived
from the Treaty provisions on Union citizenship. In this sense, the use of “bare”
(economic) fundamental freedoms is no longer subject to any particularly
privileged interpretation relative to the “bare” (not necessarily economic) rights of
Union citizenship.

Sponsor G, in this case, is in a position analogous to that of Jessica and
Diego *Ruiz Zambrano*: for Jessica and Diego, minor children unable to care for
themselves, their father is a family member whose presence is most immediately
material to their exercise of (all of) the most essential of their rights based on Art.
20 TFEU. They would *effectively no longer be Union citizens* if they were forced to
leave the territory of the Union. Likewise, for Sponsor G, Ms. G, as his spouse

55 *Supra* Ch. 8 n. 203.
56 *Supra* Ch. 8 n. 180.
and the mother and caretaker of his child and stepchild, is a family member whose presence is arguably most immediately material to his use of (one of) the fundamental freedoms, which are specific expressions of the rights conferred by Art. 20 and 21(1) TFEU. By contrast to the Ruiz Zambrano children, Sponsor G would not be effectively deprived of the enjoyment of all of the most essential rights attaching to his Union citizenship (i.e. he would not be forced to leave the territory of the Union) if his wife were to be denied residence in the Netherlands; after all, as a self-sufficient adult, he is still free to move to Belgium with his family, where she would certainly have a right of residence. But due to the fact that he has extended the reach of Art. 20 and 21(1) TFEU by using Art. 45 TFEU, he could be impeded in his use of a right of movement and/or deprived of that aspect of his Union citizenship, while living in the Netherlands.

Sponsor S, on the other hand, is in a position analogous to that of the Austrian wife of Mr. Dereci: by denying Mr. Dereci a derived right of residence, the Court had ruled, it could not be said that Austria was denying Dereci’s Austrian wife of the substance of the rights conferred by Art. 20 TFEU. “The mere fact that it might appear desirable” to her to have Mr. Dereci around was not enough: his presence was not immediately material to her exercise of her rights of Union citizenship, be they rights of residence or the use of the fundamental freedoms. Likewise, for Sponsor S, “the mere fact that it might appear desirable” to have his mother-in-law around to help with childcare does not by itself mean that he would be impeded in his exercise of a fundamental freedom from his home in the Netherlands and therefore deprived of one of the rights that are a specific expression of Art. 20 and 21(1) TFEU.

Conclusion: the shift from the “market” citizen to the “residence” citizen

To what extent are returning Union citizens and residentially sedentary entitled to the equality that conventionally mobile Union citizens enjoy, and what does this say about the role of Union citizenship, on the one hand, and the role of family life and economic activity, on the other?

As to any concern that Union law may have for the family life of residentially sedentary Union citizens: Schrauwen criticizes the Court for applying a stricter test in S&G than it did in Carpenter, where it had said (in par. 39) that the fundamental freedom Mr. Carpenter used “could not be fully effective if [he] were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse”. In S&G, on the other hand, the role of family life in the use of fundamental freedoms appears to be less overriding. On the one hand, as Schrauwen notes, the Court reminds us (in par. 37 of S&G) of how in Carpenter it read Art. 56 TFEU against the background of the right to family life. But then the Court goes on to say (in par. 42, with regard to G.) that it is for the member state court to decide whether the presence of the spouse is necessary to guarantee the Union citizen’s ability to continue working in another member state. What if, for instance, the national court were to consider that the Union citizen...
could just put his children into day care in order to be able to continue working? Then this would, strictly speaking, not be consistent with a reading in which the protection of family life is paramount.57

In fact, it appears the Court is only protecting family life for the residentially sedentary Union citizens when that family life serves a functional purpose for the exercise of a fundamental freedom.

To return to our central question of equality: with *O&B*, the Court has rather neatly resolved many of the questions that were still open from its *Singh-Eind* line of case law, expanding the equal applicability of Union law to even more types of “returning” Union citizens. Just as Directive 2004/38 aimed to consolidate the previously piecemeal legislation on the use of various fundamental freedoms under the common denominator of Art. 21(1) TFEU, so too has the Court now clarified that a derived right of residence for the family members of a returning Union citizen does not vary based on which fundamental freedom, if any, the Union citizen was using, and also explains that right in terms of the provisions of the Directive. So for Union citizens like Sponsor O and Sponsor B, who might have complained of reverse discrimination due to the fact they are treated unequally to Union citizens from other member states, the Court has provided a guideline by which they, too, can have the substance of the Directive apply equally to their third-country national family members.

The intriguing question that the Court has now left open, however, is the extent to which Art. 21(1) TFEU requires home member states to effectively recognize forms of partnership and marriage for their returning nationals that they would otherwise prefer not to. That would, perhaps somewhat paradoxically, open the door to a new form of unequal treatment for returning Union citizens relative to conventionally mobile Union citizens and residentially sedentary Union citizens on the other. I expect this matter to generate further preliminary questions and foster the debate on Union-wide norms of partnership and marriage.

With *S&G*, on the other hand, the Court has declined the opportunity to explain *Carpenter* in Directive 2004/38’s spirit of “resolving a sectoral and fragmentary approach to the right of free movement and residence”, as Schrauwen points out.58 Indeed, the residentially sedentary Union citizen has been given an only limited form of protection that does not track the protection provided by the Directive to conventionally mobile Union citizens. The irony is that *Carpenter*, in its day, served to explain how the *Singh* line of case law applied to all the fundamental freedoms involving personal movement, establishing a common denominator for explaining all derived rights of residence for family members of Union citizens (i.e. the avoidance of a “deterrent effect”, in light of the right to family life). Now, derived rights of residence for family members of residentially sedentary Union citizens can

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57 Schrauwen (2014), par. 6.  
58 ibid., par. 3.
citizens making use of a freedom of movement have been qualified as something different, with a less compelling and less vertically defined protection of the economic fundamental freedoms and family life.

Thus we see a split between O&B and S&G: economically inactive but fully mobile Union citizens who make use of Directive 2004/38 are entitled to more equality (and returning Union citizens get the most, i.e. the best of the equalities of Union law and the law of their own member state), while economically active but residually sedentary Union citizens are entitled to less equality. Nevertheless, given the right circumstances of their family life and economic activity, residually sedentary Union citizens are still entitled to more equality under Union law than their completely sedentary Union citizen neighbors.

We see that mere engagement in cross-border economic activity, without making use of the freedom of residence, is revealed to be not important enough to consistently activate the same equality that fully mobile Union citizens are entitled to, even those who engage in no economic activity at all! Indeed, the Court's decision in O&B and S&G may be a sign that the Union citizen is ever less a “market citizen” and ever more a “residence citizen”.

When the freedom of movement of workers was introduced, what the national of the member state making use of that freedom wanted or intended hardly mattered at all. The member states, acting as States on the stage of international law, probably told themselves that they were instituting that freedom largely to serve their own economic interests: the immigration benefits enjoyed by the worker and his family were granted almost grudgingly, as long as those interests were clearly being served. The worker was technically not free to decide to move to another member state to look for work, but was expected to first be offered work by an employer there. The employer, for its part, had to first make sure that no nationals of its own member state were available for the job before a work permit would be granted. In 1964, thanks to secondary legislation adopted by the Council, the worker became something less of a passive participant in the freedom of movement of workers, gaining the right to work without a work permit; what's more, the host member state was restricted in its ability to expel a worker.

For every right that the worker gained in the further development of the de facto citizenship that the freedom of movement of workers entailed, the member states could at least take comfort in the knowledge that only the member state nationals bearing the halo of economic utility were entitled to the vertical and horizontal equalities granted by Community law. Even when the Court, with Levin, expanded the notion of economic activity beyond the notion of earning a

59 See supra Ch. 6 at n. 31.
60 See supra in Ch. 5 at n. 71-76.
61 See supra in Ch. 5 after n. 79.
62 See supra in Ch. 5 at n. 80-81.
specific amount of money or having that work be one’s main objective, the member states could still comfort themselves with the knowledge that economically inactive (or barely active) member state nationals like the itinerant Italian Secchi\(^{63}\) were still not entitled to equality and could therefore still be expelled.

Before Union citizenship \textit{de jure} was introduced, and (after its introduction) before the rights of movement and residence entailed in it had fully developed, it seemed that the set of those entitled to this equality would be expanded by the Court qualifying an ever-greater number of activities as “economic”, and thus governed by the fundamental freedoms.\(^{64}\) By the time of writing of this thesis, however, it seems the Court, supported by Directive 2004/38, feels ever less compelled to sweeten the possibly bitter pill (for the member states) of equality for Union citizens by justifying it in terms of economic activity. Equality, as a means of integrating the citizen into the member state where she chooses to live, is no longer merely an accessory to economic activity, but is itself the goal of Union citizenship, in the vision of the Court.

However, the Union citizen can still use economic activity to augment that equality in two situations. The first concerns a conventionally mobile, but economically \textit{inactive} Union citizen like Secchi making use of Art. 21(1) TFEU and its implementation in Directive 2004/38. He can no longer be expelled (at least not as an automatic consequence) and enjoys the same equality in terms of derived rights of residence for his family members. But until he lives there self-sufficiently for five years and gains the right of permanent residence, he will not enjoy equality in terms of non-discriminatory access to the same social assistance and financial aid that nationals of the host state have. In this regard, the member states effectively still have to be convinced by Union law that it is in their interest to grant equality: so only when the Union citizen is economically active (i.e. is additionally making use of Art. 45 or 49 TFEU) will he also be equally entitled to social assistance (which, of course, can be reasonably expected to be only a limited or partial claim to social assistance, if the Union citizen is already working). And up to the time of completion of this thesis, the Court (likewise supported by Directive 2004/38) has shown respect for the member states’ hesitancy to grant full equality to economically inactive Union citizens.\(^{65}\)

The second concerns the sedentary Union citizen. She, to start with, enjoys only a limited form of equality based on Art. 20 TFEU,\(^{66}\) generally limited

\(^{63}\) See \textit{supra} in Ch. 6 at n. 150.
\(^{64}\) See, for instance, the comments of Barrett (2003), p. 407, contemporary to the handing down of \textit{Carpenter}.
\(^{65}\) Most recently in \textit{ECJ Elisa\textsc{b}eta Dano and Flor\textsc{in} Dano v Jobcenter Leipzig} (11 Nov 2014)
\(^{66}\) We can assume, as well, that the sedentary Union citizen can derive protection of her family life from Art. 8 ECHR. But this protection, conceived as it is in the “Hague” model of European integration (see \textit{supra} in Ch. 7 at n. 136), characterized by deference to State interests, would involve weighing the interests of the member state against her right to family life and only rarely leads to a right of residence \textit{ex nihilo} for a third-country national family member.
to protection from her home member state either effectively, or actually and
disproportionately depriving her of her Union citizenship. But she can augment
this minimal equality when remaining residually sedentary by engaging in
cross-border economic activity on the basis of Art. 45, 49, or 59 TFEU. In that
case, if she can prove to her hesitant home member state that the presence of her
third-country national family member is immediately material to her cross-border
economic activity, then the family member can obtain a derived right of stay.

That test, however, is permeable to the interests of the citizen’s own
member state in its weighing of family life against Union law’s interest in
protecting the fundamental freedoms: it is thus a hybrid of procedural deference
to member state interest, on the one hand, and the supranational “Westminster”
model67 within which Union law was conceived, on the other. In the situation of
the residually sedentary Union citizen, the last frontier of Union citizenship as a
challenge to what member states perceive to be their interests, we see that
economic activity is increasingly exceptional as a source of equality: a mere residue
of the Union citizen’s birth.

67 See supra in Ch. 5 at n. 6.
Conclusions

This thesis has examined the two duplex citizenships of the US and the EU, in which the citizenships of these two Unions each co-exist with the citizenships or nationalities of their component states. This was done in order to better understand the development of European Union citizenship and of its relationship to the nationalities of the member states.

Equality proves the most crucial and dynamic aspect of a duplex citizenship, in that a holder of such a Union citizenship can claim equal treatment from a (member) state. This can, in turn, insinuate a norm of equality into the citizenship or nationality of the (member) state.

Two devices based on equality served to analyze European Union citizenship following United States citizenship and, to a lesser extent, British subjecthood and Commonwealth citizenship. The first device was to distinguish between form and substance of citizenship, between a *de jure* citizenship or citizenship-as-status, of which the holder is (supposed to be) entitled to certain forms of equality; and citizenship-as-equality, a *de facto* citizenship, defined by the fact that citizens or nationals of several (member) states are all substantially entitled to certain forms of equality.

The second device was to discern four kinds of equality that a duplex citizenship can provide in a given (member) state or local polity: uniform equality, non-discrimination, cross-border equality, and portable equality. The first and third are “vertical”, the second and fourth are “horizontal”.

The main and surprising finding is that EU citizenship in a number of aspects is better developed than US citizenship. This is so especially when it comes to the protection of family life. The study explains why a category of “sedentary” EU citizens that does not enjoy the protection of EU law is destined to become ever more marginal.

Let me recall the research question: what does the analysis of these citizenships tell us about the influence that a duplex citizenship based on equality can exert on a nationality or more local citizenship? I will first summarize how United States citizenship developed on the frontiers of equality for racial minorities; then how the *de facto* citizenship of the European Community developed on the literal frontiers between the member states, in order to make them more permeable. Then I will indicate how with the introduction of European Union citizenship, the frontiers of equality there shifted to the rights of sedentary citizens belonging to minorities within the member states. We can then compare and contrast US and EU citizenship under the thematic headings of inequalities, people(s) and representation, citizenship’s emergence from a struggle against resistance to equality, and mobility and family. I will explain why I disagree with commentators who see EU citizenship as merely “horizontal”, and therefore not
on the same order as US citizenship. Finally, I will note one area in which EU
citizenship is more highly developed than US citizenship.

Review

Vertical and horizontal equalities in the US

Mobile United States citizens enjoy non-discrimination, i.e. an applicability of
state laws equal to citizens of the state they visit, based on the Privileges and
Immunities Clause of Article IV of the Constitution. This influences state
citizenship to the extent that citizens of a state, through the democratic legislative
process, are only able to pass laws that affect themselves and visiting United States
citizens equally; this is one way in which visiting citizens are “virtually
represented”,¹ and sedentary citizens can indirectly benefit. In the slavery era of
American history, however, we saw that such a purely formal non-discrimination,
i.e. a purely “horizontal” effect of federal citizenship, could not by itself be of any
benefit to disadvantaged sedentary state citizens. If a state’s legislature wished to
treat a given racial minority at a disadvantage, it would do so equally for visiting
citizens and its own inhabitants. If states so widely diverged in the substantive
equality they granted their own inhabitants, then federal citizenship, if it was to
mean anything, would have to entail more vertical equalities in the form of
benefits.²

Moreover, at the time, American constitutional law had the fatal flaw of
vertically entrenching certain inequalities (really, equalities in the form of
burdens) for black Americans, through the Fugitive Slave Clause and a weak
statutory implementation of the Extradition Clause. Finally, the Dred Scott
decision of the Supreme Court confirmed that black Americans could be denied
state citizenship and could never be United States citizens anyhow. So first of all,
black Americans would have to be admitted to United States citizenship, and not
denied access to state citizenship; second of all, the vertical equalities burdening
black Americans would have to be abolished; and finally, vertical equalities
benefiting United States citizens everywhere would have to be introduced before
horizontal equality could mean something.³

In the aftermath of the Civil War, the Thirteenth Amendment was
introduced to abolish slavery, and with it the Fugitive Slave Clause. Also, the
Fourteenth Amendment was introduced to “verticalize” United States citizenship,
and state citizenship as a consequence. United States citizenship became the
primary status of all those born on the territory of the United States, and in any
case the status of state citizenship could not be denied to United States citizens
resident in a state. However, the states with an interest in limiting the rights of

¹ See supra in Ch. 4 at n. 173.
² See supra in Ch. 3, on p. 147.
³ See supra in Ch. 3 on p. 149.
their black citizens still managed to do so by proceeding to hollow out the rights of citizenship with “Jim Crow” laws instituting and tolerating racial segregation: this system made black Americans “second-class” citizens, i.e. holders of a de jure citizenship without any de facto content of equality. The Supreme Court, perhaps fearing for the integrity of the Union and hesitant to interfere in the states' democratic processes, declined to read any substantive equality into United States citizenship.4

United States citizenship would only begin to gain a substantively vertical component, at least for mobile citizens, starting with Edwards v. California. With this decision, the Supreme Court confirmed that United States citizens effectively enjoyed a de facto uniform cross-border equality, based ostensibly on the Interstate Commerce Clause, to travel and to establish themselves in any state. While this equality did not, in and of itself, affect the equalities enjoyed by sedentary United States citizens, it was arguably based on an incipient notion of “representation reinforcement”: that states were now limited in their autonomy to determine who their own citizens were and thereby restrict United States citizens in their right to participation in the political process.5

In the struggle against state-mandated racial segregation, mobile United States citizens were likewise able to invoke the Interstate Commerce Clause to deny southern states the autonomy to segregate public transport wherever it had a cross-border element: starting with the decision Mitchell v. United States, which began a line of case law and executive rulings from the Interstate Commerce Commission banning segregation in all forms of interstate transport. This would likewise only be a de facto equality enjoyed by mobile United States citizens, as it had little to do with citizenship as such, but was based on a federal power to regulate commerce within the territory of the United States.6

It would take the direct application of federal norms of citizenship, starting with the ruling Brown v. Board of Education, for the possession of United States citizenship to start to entail equalities de jure. With Brown, the Supreme Court had finally declared that the Equal Protection Clause of the 14th Amendment was directly applicable against state law as a source of equality: this notion of protection of the laws, prohibiting racial segregation (and going farther than merely non-discriminatory application of state laws), constituted a truly vertical equality benefiting United States citizens. Buoyed by the civil rights movement, which had already been inspired by the Supreme Court’s rulings such as Boynton v. Virginia, Congress moved to further implement the 14th Amendment and attach real equalities to United States citizenship with legislation such as the Civil Rights Acts of 1957, 1960, 1964 and 1968 and the Voting

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4 See supra in Ch. 4, section “The Slaughterhouse Cases and Plessy v. Ferguson: the judicial abrogation of the Reconstruction Amendments” on p. 160.
5 See supra in Ch. 4 on p. 191.
6 See supra in Ch. 4 on p. 177.
7 See supra in Ch. 4, section “Brown v. Board of Education: effectively instituting a uniform equality” on p. 178.
Rights Acts. These statutes aimed to deal the *coup de grâce* to segregation and denial of electoral rights for sedentary United States citizens, including segregation and effective denial of electoral rights on the part of private parties (with the blessing or tolerance of state law). Strikingly, the Congress based much of this legislation (at least to the extent that it affected private parties) on a cross-border equality, but directed against private businesses deemed to be engaged in interstate commerce, such that sedentary United States citizens also could benefit from this equality.

States were thus no longer free to exclude United States citizens, to treat their citizens however they liked, or to legally tolerate substantively discriminatory treatment: the most important equalities entailed in state citizenship were derived from United States citizenship.

Vertical and horizontal equalities in the European Community

At the time of the foundation of the European Economic Community, a *de jure* status of citizenship, even one with ambiguous value, was completely lacking. However, a powerful *de facto* citizenship grew out of the freedom of movement of workers that was instituted in the Community. If the most historically entrenched form of discrimination in Europe was discrimination based on nationality (in particular, with regard to the right of movement and residence, as enforced by the member states’ respective immigration laws), then the hereby instituted equalities very effectively combated that discrimination for all those mobile member state nationals who could be qualified as “workers”.

Yet despite being born of the notion of banning discrimination, the most compelling of these legal equalities was not, actually, “horizontal” non-discrimination as such, whereby member state laws would merely have to be applied equally to mobile member state nationals. The most compelling equalities were in fact the cross-border equalities—the right of residence first and foremost—which were “vertically” legislated to leave little or no room for the member states to give them divergent interpretations. This would be especially apparent in the case law of the European Court of Justice wherever those vertical norms gave mobile member state nationals something of an “extra” relative to the nationals of the host member state, such as the right to medical coverage while traveling (*Unger*).

Furthermore, member states’ autonomy to determine that their laws applied to their *own* nationals was limited in cases where one of their own nationals had made use of the freedom of movement of workers and had thereby become entitled to the applicability of “vertical” Community legislation (*Knoors*).

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8 See *supra* in Ch. 4, section "Legislating uniform electoral equality and cross-border equality" on p. 180.
CONCLUSIONS

This particular effect of *de facto* Community citizenship possibly presented the most direct challenge to the member states’ “claim” to their own nationals, at least when they were or had been mobile. Moreover, although this *de facto* citizenship was limited to mobile member state nationals who could be qualified as a “worker”, the European Court of Justice made sure that there was also little room for divergent interpretation of what a “worker” was (*Levin*), so that member states could not effectively pick and choose the nationals of other member states who were allowed to make use of the freedom of movement of workers and the rights accessory to it.

Nonetheless, the history of the emergence of this citizenship is considerably stained by the fact that the original six member states of the Community, acting jointly and together with the European Commission, did in fact attempt to use indirectly racial criteria to pick and choose the nationals of all the member states who would be entitled to this *de facto* citizenship, by excluding member state nationals hailing from non-European territories. Member states’ conflicting interests ultimately rendered this legislative provision moot. But the Six were able to unanimously coerce the United Kingdom, upon its accession to the Community, into decisively excluding most of its own non-European nationals, the Commonwealth citizens, from access to Community citizenship. (Allegiance, the ultimate basis of Commonwealth citizenship, would thereby be revealed not to provide much in the way of equality or legal certainty.)

The more freedom of movement came to be seen as the basis of a form of Community citizenship, the more it would be interpreted in conformity with the principle of equality: non-discrimination would come into its own as a compelling form of equality when it came to the university tuition a member state could charge mobile member state nationals, including those who were not resident there as “workers” (*Gravier*). With the foundation of the European Union, the introduction of a *de jure* European Union citizenship immediately followed a bid on the part of the member states (as the Council) to regain control over the degree of equality that would be granted to, in particular, economically inactive Union citizens. In any case, the introduction of European Union citizenship was paired with something of a limitation of the historical significance of member state nationality (somewhat to citizens’ disadvantage) in terms of immunity from extradition and the ability to seek asylum in other member states.

**European Union citizenship and the frontiers of its development**

It now remained to be seen to what extent Union citizenship would succeed at being more than a hull, a *de jure* status with limited *de facto* content. The equalities granted to economically inactive mobile Union citizens, who had the most to gain from the introduction of Union citizenship, would be a key test of this. With *Grzelczyk*, the European Court of Justice once more gave the member states a scare by pronouncing Union citizenship to be “destined to be the
fundamental status” of Union citizens and using this as a basis to grant an economically inactive mobile Union citizen an equal entitlement to social assistance. With *Baumbast and R.*, the Court declared the fundamental rights, in particular the right to family life, to be incorporated in the freedom of movement of workers, and as a consequence Union citizenship. The member states (as the Council), now legislating together with the European Parliament, made use of the opportunity to legislatively limit economically inactive Union citizens’ right to social assistance (of which the Court’s recent judgment *Dano,* handed down as I completed this thesis, is a logical consequence), at the same time as they recognized *Baumbast* and granted expanded cross-border equality to mobile Union citizens and their family members.

To return to the effect that Union citizenship was to have on member state nationality: the frontiers of the struggle to derive equality from Union citizenship would now often be defined by Union citizens of non-European origin or who had non-European family members. With *Chen,* the Court declared once more that states could not pick and choose which nationals of other member states they would recognize as Union citizens. This would more or less directly lead *Chen’s* member state of nationality, Ireland, to change its nationality law to the disadvantage of children of non-European immigrants, to close at least one door of access to Union citizenship.

However, persons who were already Union citizens would increasingly succeed in invoking their Union citizenship against their own member states of nationality. One British citizen, who might otherwise have been seen as sedentary, succeeded in stretching the definition of “mobility” in order to obtain the applicability of vertical norms of Union law to his non-European wife’s right to stay in the UK (*Carpenter*). A German national would succeed in having Germany recognize his right to bear a surname in accordance with the law of Denmark, the member state where he was a long-term resident (*Grunkin-Paul*). The Court of Justice would expand on a previous finding (*Surinder Singh*), that a Union citizen who had made use of the freedom of movement of workers could also exercise the cross-border right to be accompanied by his non-European family member with him in derogation of his own member state’s immigration law, to include the situation that he was no longer a worker (*Eind*). (And the availability of this “Europe route” would later be further expanded to those mobile citizens who had never been economically active at all, with *O & B.*)

And in certain circumstances, it was now possible for a Union citizen to invoke Union citizenship against his own member state without so much as the pretense of mobility. As to a German national whose nationality, and therefore Union citizenship had been withdrawn, the Court asserted that Union law might stand in the way of the loss of member state nationality (*Rottmann*). And perhaps most earth-shatteringly, the Court confirmed in the case of Union citizens who were young children and had never been mobile at all that their non-European

9 ECJ Dano (11 Nov 2014)
parents could stay with them, in derogation of the immigration law of their member state of nationality. This was to ensure that they would not be deprived of the most important of their rights as Union citizens (Ruiz Zambrano).

It is this last judgment of the European Court of Justice that I choose for my most direct comparison with the case law of the Supreme Court: Brown v. Board of Education. Brown likewise marked the first time that its Court dared to intervene between a state (or at least a local authority) and a duplex citizen who “belonged” to that state, without finding any necessity for the citizen to be actively engaged in interstate movement. In both cases, significantly, each Court chose duplex citizens who were children to make its respective pronouncement. The Supreme Court invoked the importance of children’s education as a foundation of the citizenship of the United States; the Court of Justice invoked the importance of not depriving the children of the most essential of their rights as Union citizens by forcing them to leave the territory of the Union. Both pronouncements invoked a greater ideal than interstate movement, although in the case of the European Court of Justice, later judgments (McCarthy and Dereci) did seem to imply that the “most essential” of the children’s rights as Union citizens might be their ability to someday autonomously make use of their freedom of movement.

Or did they? Any such implication was in turn cast into relief by Alokpa, which implied that not just any member state of the Union was primarily responsible for protecting the most essential rights of children’s Union citizenship as provided by Art. 20 TFEU, but rather their member state of nationality. After all, even if the Ruiz Zambrano or Moudoulou children had been effectively forced to leave the territory of the Union because their parent(s) did not have a right to stay there to care for them, they would still retain the de jure status of Union citizenship and could ostensibly return as adults someday to make use of their freedom of movement and residence. But such a citizenship would be a hull, empty of any feeling of identity: the Ruiz Zambrano and Moudoulou children would hold Belgian and French passports, respectively, but would have been deprived of the opportunity to grow up Belgian and grow up French, respectively.

This statement provides us with our most compelling point of comparison with Brown (the importance of entitlement to primary education in one’s state of citizenship) but also our most striking contrast between European Union citizenship and United States citizenship.

Conclusions by theme

Inequalities

The most important equalities entailed in United States citizenship developed against the background of the most profound inequality in the fabric of the United States: the de jure and de facto subjugation and discrimination of African slaves and their descendants. The equalities entailed in the de facto citizenship of
the European Economic Community, on the other hand, developed against the historical background of de jure discrimination against nationals of other member states, i.e. the imposition of restrictions on movement and residence by means of member states’ immigration law. No ideal of combating discrimination based on race or ethnic origin played a significant role in the development of Community “citizenship”; in fact, as noted, much of the development of this citizenship seemed to be based on an active bias against everyone who was not a “real European” (i.e. a white one). Thus, member states’ restrictions on the immigration of non-European family members of sedentary member state nationals remained untouched, or even proliferated.

The introduction of de jure European Union citizenship, accompanied by the dismantlement of most of the physical barriers to movement within the Union (with the institution of the Schengen Area), largely crowned the project of abolishing discrimination based on member state nationality for mobile citizens and allowing them to integrate into the societies of host member states (even if it is repeatedly marred by the imposition of discriminatory restrictions de jure on Union citizens from accession states). At that time, commentators could rightly wonder if Union citizenship, which still did not (and does not) replace member state nationality and still did not institute any uniform equalities for all Union citizens everywhere in the Union (aside from a handful of political rights), really added anything to the de facto Community citizenship that already existed. That citizenship, now consolidated and attached to de jure Union citizenship in Art. 21(1) TFEU, entailed almost solely cross-border equalities. Perhaps implicitly, commentators were measuring Union citizenship against the standard of United States citizenship, which was presumed to equally guarantee freedom of movement and residence in all the states, with no distinctions between one’s state of origin and any state of destination, and which also benefited sedentary citizens.

But then Art. 20 TFEU, of which paragraph 1 is, in a manner of speaking the “Citizenship Clause” of the EU constitution, developed in significance in the case law of the Court. The right to European Union citizenship as a source of other rights can perhaps be qualified as a uniform equality for all Union citizens, but admittedly not as one that can be invoked by a given Union citizen against simply any of the member states or against the Union institutions. Instead, it is primarily incumbent on the member state of nationality to protect Union citizenship itself, by neither actually depriving the Union citizen of his Union citizenship as a disproportionate means to an end (Rottmann) nor effectively depriving the Union citizen of her Union citizenship (Ruiz Zambrano, read in conjunction with Alokpa). European Union citizenship, in line with the motto of the Union, “unity through diversity”, is not an undifferentiated status: to be a European citizen does not mean that one can burn the passport of one’s own member state, as an overenthusiastic Monnet may once have hoped.10

10 Supra in Ch. 5 at n. 55.
Rather, one’s status as a European citizen remains rooted in one’s own member state of nationality. European Union citizenship, to the extent it protects sedentary Union citizens and returning Union citizens, is now gradually proving its value in integrating minorities within member states as a means of protecting that rootedness. Union citizenship accomplishes this by effectively reinforcing minorities' representation in their own member states, thereby limiting a member state's latitude to treat its own nationals as it wishes. I will now go into more detail on how “representation reinforcement” works similarly and differently in the European Union and the United States and the notion of “integration” in Union law.

People(s) and representation

When we scratched the surface of the de jure status of United States citizenship, we found that the Constitution does not immediately guarantee many positive equalities for U.S. citizens. In the first place, United States citizens are not aliens, and so they are not subject to deportation from the territory of the United States pursuant to any immigration law that Congress passes. As a derived consequence of this, they cannot be denied any of the protections that the Constitution extends to “persons” generally.

In the second place, United States citizens, when merely sojourning in other states, enjoy non-discriminatory application of the laws of that state thanks to the Privileges and Immunities Clause of Article IV of the Constitution; yet not as United States citizens, but as citizens of another state. Their right to be a citizen of the state in which they reside, indeed the duplex nature of their citizenship, is one of the few positive rights that they are granted, in this case by the Citizenship Clause of the Fourteenth Amendment. They owe their freedom to move to and reside in the state of their choice—without being hindered by any law that that state may enact—at least in part to their right to participate in the political process there, i.e. to the reinforcement of their ability to be represented there.11

Yet we will find no positive provision in United States citizenship guaranteeing their right to vote and to be elected in that state once they become a citizen of that state: only the negative provisions of the Constitution that ban states from abridging those rights. In fact, after scratching surface after surface of rights contained in and implied by other rights, we have reached the inner sanctum of the American constitutional order: government by the people and of the people. This principle was never positively enacted in so many words in the Constitution, but it developed into a fundamental principle of the American constitution (with a small “c”) through the American Revolution, the Civil War and the civil rights movement.12

11 Supra in Ch. 4 at n. 172 et seq.
12 See supra in Ch. 4 on p. 188.
It is this principle that ultimately dictates that the “people” of any given state cannot be a constant and cannot be determined by genetics, language or birth. At its heart, United States citizenship guarantees mobility. Viewed from a sociological perspective, United States citizens regularly make active use of that mobility, thereby effectively choosing the “people” that they will be a part of, even if they do not move for primarily political reasons. Once there, they can form majorities with like-minded citizens to make and repeal laws as they see fit on the level of the state, where lion’s share of the laws that actually affect them on a daily basis are passed.

These “peoples” are constantly changing through mobility: the U.S. Census Bureau reports that in 2010, 27% of U.S. citizens were born in the U.S. and resided in a state other than the one in which they were born, from which it follows that at least that percentage of U.S. citizens had changed state citizenship at least once in their lives (at the very least—since the census data, which track only the state of birth and the state of current residence, cannot account for foreign-born U.S. citizens who have made use of internal mobility, nor for U.S. citizens who had moved back to their states of birth after residing in another state). If citizens, at least to some extent, are migrating to states where they will find like-minded people, some conclude that this leads to states becoming more politically polarized—a finding that will ring true to observers of any Presidential election, in which most states are solidly “red” or “blue” and consistently deliver all of their electors to the candidate of one party or the other.

But as a counterweight to the right to mobility, the rights of citizens belonging to sedentary minorities also deserve protection: it cannot be so that their only recourse to unjust laws is to “vote with their feet” and move to another state, because that would mean that they are effectively being driven out. This is where the second form of representation reinforcement named in Carolene Products comes in. By contrast to the first form of representation reinforcement, which protects access to the procedural machinery of democracy, the second form has more to say about the substantive content of laws that have already been passed by the majority. Thus any strict scrutiny leading to the disapplication of these laws in favor of unrepresented minorities can be even more accurately described as “virtual representation”.

Citizenship’s emergence from a struggle against resistance to equality

It is not only when the citizen votes or is elected and thereby gets a law enacted that she is an actor within constitutional democracy; she is also an actor within constitutional democracy when she invokes her duplex status of citizenship before a court in order to have a state law disapproved. (We thus see how Van Middelaar is

13 Ren and U.S. Census Bureau (Nov 2011)
14 Bishop and Cushing (2008)
15 Supra Ch. 4 n. 177.
able to characterize the “Europe of Citizens” as belonging to the lawyers.\textsuperscript{16} In theory, therefore, a single citizen can stand in the way of the will of the majority, and this can in fact be another source of representation for her: the citizen’s position is comparable to that of a practitioner of judo, who when shoved by a much more powerful opponent can use the momentum of that shove to throw her opponent down onto the mat.

Certainly, one “political struggle”\textsuperscript{17} behind the development of U.S. citizenship into a productive source of equality was in fact the democratic movement to legislate equality (with the marches, campaigns, and demonstrations that immediately come to mind). But there was also a bigger, broader, and certainly much longer-lived political resistance to equality—indeed, the white majorities of (former) slave states fought a war to maintain slavery and struggled mightily for a century thereafter to maintain racial segregation. Despite the strong Constitutional enactments of the Fourteenth and Fifteenth Amendments, federal judges long feared treading too heavily on the will of these democratic majorities. But when the Supreme Court finally dared to grant the legal claims made by U.S. citizens, demolishing key pillars of the institution of segregation, their rulings delivered a shot in the arm (and a new vocabulary) to the democratic struggle for equality.

When it comes to the European Union citizen, who has not (yet) marched en masse on Brussels to clamor for more rights of citizenship, we can likewise view the resistance of political majorities in the member states to the equal treatment of (ethnic or statistical) minorities among their own nationals as being of key importance. It is the member state legislation passed as an expression of this resistance that in its own way contributes to the development of Union citizenship, as it grants disadvantaged Union citizens ever more opportunities to submit their grievances to a court. And every preliminary referral from a member state court, I dare to claim, gives the European Court of Justice another opportunity to make sweeping pronouncements on the rights entailed in Union citizenship.

The political debate of some member states of the European Union has been dominated in recent years by what Hirsch Ballin calls “neo-democrats”, referring to the notion of democracy in which the will of the majority should not be limited by courts and human rights.\textsuperscript{18} And the political debate on immigration and citizenship in these member states reveals clearly that the demos in this democratic majority is presumed to be the “nation”, i.e. the “people” in a genetic, linguistic, and cultural sense. Nationals who do not belong to this genetic, linguistic, or cultural demos are made out to be mere “passport holders” of the member state, not real members of the people. Immigration from outside Europe is supposed to pose a threat to the integrity of the nation; thus immigration,

\textsuperscript{16} Supra in Ch. 5 at n. 48.
\textsuperscript{17} Cf. d’Oliveira, supra in Ch. 7 at n. 111.
particularly family migration, must be limited with restrictions such as income requirements. (For that matter, that which is called “mobility” in the “citizenship” discourse of the European Union is often likewise unwanted “immigration” when viewed from the perspective of the “nation”.)

Those non-European family members who do manage to join sedentary nationals of a member state may be obliged to pass language and/or “integration” examinations prior to being allowed to immigrate (as in the Netherlands and Germany) or after a number of years of residence in the member state. At the very least, such an examination will test their competence in one of the languages of that member state, i.e. their ability to interact with the “people” that is presumed to speak one of those languages. More often than not, it will also test for “cultural” competence, i.e. the family member’s degree of absorption of the values of the member state.19

The contrast with the notion of “integration” of citizens in European Union law, on the other hand, could not be more stark. Already in Regulation 1612/68, the Community legislator had expressed concern for the “integration” of the families of workers in a host state,20 and the Court of Justice later underlined this very consideration as evidence of the importance accorded to allowing a worker to have his family members with him.21 This notion of integration largely only entails legal obligations for the host member state. The host member state must not only treat the Union citizen equally to its own nationals by applying its laws without discrimination, but it must also grant the Union citizen a substantive equality to its own nationals by making the right of residence of the Union citizen’s family members, regardless of nationality, as self-explanatory as the right of residence of the family members of a member state national who share that nationality.22 Once these equalities apply, integration is presumed to follow as a matter of course during the course of the Union citizen’s residence in a member state.

When the sedentary Union citizen with non-European family members is subjected to his member state’s restrictive notion of integration, he is exposed as a “second-class” Union citizen relative to mobile Union citizens, on the one hand, and fellow member state nationals who do not have any non-European family members, on the other. (Van Walsum points out another striking discrepancy: despite the fact that Dutch immigration and integration policy claims to have the goal of ensuring egalitarian gender norms in relationships,23 the income requirements of Dutch immigration law impose a quite conservative “breadwinner ideal” on the Dutch partner,24 while EU law stipulates nothing of the sort.25)

20 as noted by the Court in Baumbast, supra Ch. 7 n. 118.
21 Commission v. Germany, cited in Baumbast, supra Ch. 7 n. 122.
22 Supra Ch. 5 at n. 127.
23 Supra Ch. 8 n. 53.
25 ibid., p. 70.
Aside from the so far limited circumstances in which Union law “virtually represents” the sedentary citizen (such as if he is a child), his only option is to “vote with his feet” by moving to another member state: this means that his family members can join him there without being subject to a strict income requirement or to any linguistic or cultural integration requirements at all. Compared to the doctrine of the constitutional law of the United States that provides “virtual representation” to sedentary members of minority groups, this legal dynamic might appear to have the worrying effect of allowing the democratic majority in a member state to “drive out” this member of a minority group.

But it is important to note that European Union citizenship precisely does not entail a right of participation in the (larger) political process of a destination state, nor is the Union citizen’s freedom of movement and residence grounded on that right as it is in the United States. So although Union law does not allow the mobile Union citizen to participate in the political process of the destination state in order to make the laws there more favorable to her family members, it does not require her to do so either: her family members already obtain favorable treatment there from the vertical provisions of Union law. And in fact, if any such Union citizen could be said to have been “driven out”, she has every right to return to her home member state after a period of genuine residence in a host member state; at this point her family members will obtain a right of residence that is not only exempt from the restrictions of the home member state’s immigration law, but is also completely unconditional on the Union citizen’s continued activities or means of subsistence, by contrast to mobile Union citizens who do not have the nationality of that member state. The returning Union citizen has thereby gone from being a “second-class” Union citizen, to a “first-class” Union citizen (in the host member state), to a “super-citizen” (in the home member state), enjoying the best of both Union citizenship and member state nationality.

Mobility and family

Of course, aside from the sedentary Union citizens who are children and the Union citizens who are adults able to make use of mobility, a great number of

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26 Although interestingly: Union citizenship does entail a right to participate in municipal elections. Union citizens thus all enjoy a more or less uniform freedom to choose to be part of a “people” on the level of the city, which means that municipal political citizenship can be said to largely be a derivative of Union citizenship, in the same way that state citizenship is a derivative of United States citizenship. In fact, the introduction of this equality in the Union required some member states to actually change their constitutions (see Schönberger (2005), p. 437 at n. 460), thereby signaling that the member state was letting go of its State monopoly on municipal citizenship. Nevertheless, the point to be made here is that mobile Union citizens cannot democratically influence laws on immigration, since these are invariably made on the level of the member state.

27 as the Court ruled in Eind, supra Ch. 8 n. 75.

28 See supra in Ch. 9 on p. 417.
sedentary Union citizens—adults practically unable to make use of mobility (such as Shirley McCarthy29)—are still effectively exposed to treatment as "second-class" citizens. This could be said to leave intact a large portion of a standard critique of Union citizenship, namely that it only benefits those privileged enough to make use of mobility.30 It is true that the positive provisions of Union law do not yet provide (or have not yet been interpreted to provide) for these sedentary Union citizens.

But we already established that the federal (constitutional) law of the United States does not actually positively provide for much at all of the equality enjoyed by United States citizens as United States citizens. Much of that equality, such as is provided for by the Equal Protection and Due Process Clauses of the Fourteenth Amendment, is the result of simply being able to reside in the territory where that equality pertains and being immune from deportation from that territory.

In a similar way, sedentary Union citizens enjoy a certain minimum standard of protection of family life based on Union law as an indirect, but no less compelling consequence of their Union citizenship, or at least their member state nationality. Let me explain this. First of all, all of the member states of the European Union are also states parties to the European Convention on Human Rights. Because we can presume, for the most part, that all Union citizens will have an unconditional right of residence in their own member states, we can say that all sedentary Union citizens will enjoy at least a minimum level of protection of their human rights: in no case, for instance, can a member state introduce slavery (Art. 4 ECHR), and the introduction of a system of racial segregation or apartheid would almost certainly constitute a violation Art. 3 ECHR. As to the protection of family life based on Art. 8 ECHR, however, this level of protection only rarely entails a positive obligation on a member state to admit a non-European family member of a member state national.

There is also another, even less straightforward way in which Union law can benefit sedentary Union citizens, although it is not through any directly legal effect, but by a ripple effect through the democratic process (which can ultimately lead to direct legal effect). The Family Reunification Directive of Union law31 does not at all apply to Union citizens, but only to third-country nationals resident in a member state. Thus a third-country national family member of a third-country national resident can complain that some provision of that member state’s immigration law represents a violation of that Directive, while a third-country national family member of a national of that member state cannot. Yet if the Court of Justice declares some provision of member state immigration law to be a violation of the Directive, it would create a politically odd situation if the

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29 see Kochenov’s and Plender’s critical note in Ch. 8 n. 196.
31 Directive 2003/86/EC
member state’s law were only changed to the benefit of third-country nationals: mobile Union citizens would have the strongest right to be joined by their non-European family members, followed by third-country nationals, followed at the bottom by the member state’s own nationals. For a member state to treat its own nationals worse than mobile Union citizens is one thing, which obviously does not quite register in the public democratic debate. But for a member state to treat its own nationals worse than third-country nationals resident there would seem to be quite another: such treatment might arouse a political clamor beyond the member state nationals directly affected by such unequal treatment.

So the member state in question may well choose to head off such criticism by making a political choice of changing the law to benefit third-country nationals and its own nationals equally, as we saw in the wake of Chakroun.\textsuperscript{32} In fact, the parallel relationship between the Family Reunification Directive and “internal” Dutch immigration law continued to develop after that: a subsequent Dutch deputy minister responsible for immigration also made such an across-the-board change in immigration policy\textsuperscript{33} when the highest Dutch administrative court ruled\textsuperscript{34} that disproportionately high fees for family reunification were also in violation of the Family Reunification Directive.

And finally, immediately prior to the time of completion of this thesis, Dutch immigration law on family members of Dutch nationals finally went fully through the thin looking glass that separated it from the Family Reunification Directive. In October 2014, the same Dutch deputy minister in charge of immigration asserted, in response to parliamentary questions about reverse discrimination of Dutch nationals, that Dutch immigration law treated family members of Dutch nationals and third-country nationals absolutely identically, thus there could be no reverse discrimination.\textsuperscript{35} The highest Dutch administrative court, in a judgment of December 2014, seized on this statement as evidence that the Dutch immigration law that applied to family members of Dutch nationals constituted a voluntary extension of the Family Reunification Directive to the “internal” situation. Therefore, taking the ECJ’s 2012 decision Romeo\textsuperscript{36} into account, this formerly “internal” situation now fell within the ambit of Union law, and family members of Dutch nationals could directly invoke the Directive.\textsuperscript{37}

\textsuperscript{32} Supra in Ch. 8 at n. 105.
\textsuperscript{33} F. Teeven, “Brief van de Staatssecretaris van Veiligheid en Justitie aan de Voorzitter van de Eerste Kamer der Staten-Generaal” of 28 November 2012, in *Eerste Kamerstukken*, 2012-2013 session, 31 549, K
\textsuperscript{34} Afdeling bestuursrechtspraak van de Raad van State, 9 October 2012, ECLI:NL:RVS:2012:BY0145 (2012b)
\textsuperscript{36} *ECJ Giuseppa Romeo v. Regione Siciliana* (7 Nov 2013), par. 21-23.
Perhaps realizing that its interpretation of the Directive would be such a live wire in its consequences for member state nationals, the ECJ recently dodged the question\(^{38}\) of whether Germany’s language test requirement constituted a violation of the Directive; the Court rather conveniently noted that the family member involved was Turkish and therefore was anyhow exempt from the requirement, due to the “standstill”\(^{39}\) provided for by of Turkish-EU Association law.

**The Union’s vertical citizenship: contra Magnette and Schönberger**

Finally, I will address the critique of Magnette\(^{40}\) and Schönberger\(^{41}\) that Union citizenship remains fundamentally “horizontal” or “isopolitical”, and therefore not compelling, because it is primarily characterized by the relationship between a Union citizen and the member states of which she does not have the nationality, rather than by a direct, “vertical” relationship between the Union citizen and the Union. Such a “vertical” relationship, by contrast, can be found between a United States citizen and the federal government, Schönberger implies. I can dispute both these authors’ qualification of the rights of Union citizens as primarily “horizontal”, as well as the implications of Schönberger’s comparison to United States citizenship.

As I have made clear in my analysis, I find the most compelling equalities of a duplex citizenship precisely not to be the “horizontal” equalities such as non-discrimination or portability of rights, but the “vertical” equalities that are unvarying for all duplex citizens who find themselves in the same situation: either wherever they are, in which case it is a uniform equality, or only when they are crossing borders. I agree with Schönberger and Magnette that “horizontal” aspects of any citizenship cannot carry the day, but I disagree with their qualification of the free movement rights as “horizontal”. The fact that it is up to the member states of the European Union to actually implement these vertical equalities does not make them any less compelling: the fact of the matter is that they do implement these equalities in a largely consistent manner, with little opportunity to derogate from them or interpret them with significant variations. If the equalities entailed by Union citizenship were truly horizontal or isopolitical, characterized only by reciprocity, comity and purely formal non-discrimination, then they would look something more like the equalities guaranteed by the moribund European Establishment Convention (or indeed, for black Americans in the slavery-era United States) and would not have many, if

\(^{38}\) ECJ *Naime Dogan v Bundesrepublik Deutschland* (10 July 2014)

\(^{39}\) See supra in Ch. 8 at n. 90.

\(^{40}\) Magnette (1999), p. 18 and 227-229.

any, characteristics of a citizenship. (As to the other “horizontal” form of equality, portability of rights granted by the law of a member state: my research reveals that it is not at all a prominent aspect of duplex citizenship, as it is the least uniform form of equality, and, especially where it is a matter of comity, is not very legally compelling. Portability of rights only really figures in citizenship where it is actually part and parcel of another vertical norm of equality, such as the Fugitive Slave Clause of the United States Constitution42 or the freedom of movement of Union citizens.43)

As to the comparison to the United States: an outsider to the United States, who mainly sees what the federal government is doing in the area of foreign policy, may well overestimate the significance of the federal government in the daily life of a United States citizen. In fact, an average citizen of the United States does not have much contact with any agencies of the federal government or with any enforcers of federal law, and when she does, is more likely than not to perceive such contact as unpleasant (the mention alone of a few such agencies is sure to provoke a response: the Internal Revenue Service [responsible for federal taxation], the Transportation Security Administration [responsible for airport security] or the Federal Bureau of Investigation). It is true that a United States citizen also obtains her passport from a federal agency (the Department of State), if she ever applies for a passport at all; but she will probably only ever use it or carry it with her when she is traveling outside the territory of the United States. (To the extent she carries an identification document on her otherwise, it will almost unvaryingly be a driver’s license issued by her state’s motor vehicles department.)

To the extent that a United States citizen benefits from the vertical equalities granted by her citizenship, it is largely because her state citizenship has been shaped by United States citizenship: she experiences those vertical equalities (including the right to vote in federal elections, which are wholly organized by state authorities) because the laws of her state are in conformity with them. It would only be at the moment that she perceived a state action based on a law to be in violation of her rights as a United States citizen that she would go to federal court to have the law struck down, or complain to a federal agency that in turn would bring a case against the state. To the extent that state legislatures “implement” norms of United States citizenship, they do not do so directly, but only indirectly, by anticipating the threat of a citizen going to federal court (or to a federal enforcement agency that could take a state agency to court).

In fact, the relationship between states and the federal government in the United States is even to this day considerably more antagonistic than the relationship between the member states and the institutions of the European Union. Goldstein identifies numerous fundamental differences in the historical development of the Community/Union compared to the United States. The

42 Supra in Ch. 3 before n. 71.
43 Supra in Ch. 9, section “The ‘passporting’ of family life” on p. 410.
United States emerged from the start with a distrust of central authority, and the federal government replaced Britain as the subject of that distrust; while the member states of the Community grew together, creating a central authority for the first time. Much of the territory of United States, by its vastness and sparse population, was (and is) inhospitable to the establishment of bureaucratic control. The federal legal order has its own court system, and does not have to rely on the state courts. In the United States, citizenship as an institution functions as something of a linchpin between the federal and state legal orders: states do not “obey” federal law on citizenship so much as it is invoked against them by their own citizens.

In the member states of the Community, on the other hand, a culture of bureaucratic control was more entrenched. Since the Community does not have its own court system in the member states, the development of the Community was characterized by the empowerment of local courts. The Community subsidized training programs for courts and legal industries (including academia) in member states, and the case law of the Court of Justice naturally appealed to judges in member states. Furthermore, Union law is largely implemented and executed by the member states themselves, especially when it comes to directives, which member states are obliged to incorporate in their own legislation.

But this deeper integration does not take away from the fact that citizenship of the European Union, as that of the United States, is an institution functioning as a linchpin between the member state and federal legal orders. In fact, as in the United States, individuals invoking their rights as Union citizens before a court (or, for that matter, complaining to the European Commission in an attempt to have the Commission start infringement proceedings against the member state at the European Court of Justice based on Art. 258 TFEU) can actually shape the equalities that they are entitled to as member state nationals.

The only truly significant legal difference between United States citizenship and European Union citizenship, in my view, is the fact that nowadays, state citizenship is derived from United States citizenship, while European Union citizenship is derived from member state nationality. I can go on to note the differences I sense in the political nature of the citizenships of the United States and the European Union, but this is purely as an aside to my thesis, a thread for other researchers to pick up on in the future. United States citizenship and state citizenship are bound by the common principle of “government by the people and of the people”, which is arguably the real source of mobile United States citizens’ right to move to the state of their choice, more so than the formal provisions of the Constitution on citizenship.

Not all member states of the European Union, on the other hand, have constitutions explicitly based on the notion of “popular sovereignty” (a related, but

44 Goldstein (2001)
45 See supra in Ch. 4 on p. 188.
CONCLUSIONS

conceptually somewhat distinct ideal that has more currency in Europe⁴⁶). Or if they do, such as Germany’s, the notion of the “people” is ethnically bounded (even though German nationality law was reformed somewhat in the 1990s⁴⁷ to allow aliens resident in Germany to more easily become “German”, and therefore part of the “people”). It is very much the question whether all of the member states could ever accept Union citizens getting a right to participate in the member state’s political process simply by virtue of being resident there as Union citizens. However, the European Commission is currently moving to mobilize Union citizenship, much less controversially, as a means of convincing some member states not to disenfranchise their own nationals when they are making use of their freedom of movement.⁴⁸

Moreover, European Union citizenship may contain the germ of the notion of “government by the people and of the people”, at least if we accept Barnard’s and Lenaerts’ suggestion that where citizens do not have access to the political process, they are “virtually represented” through the rights the Treaties grant them.⁴⁹ This can also have an effect on the democracy of a member state, particularly where the Union citizens are also nationals of that member state who form a minority or who are otherwise practically excluded from participating in the democratic process. If enough sedentary and returning Union citizens were to place themselves in a position in a member state where the member state’s own laws did not apply to them (e.g., member state nationals obtaining rights of residence for their non-European family members or their same-sex spouses), it could place pressure on the democratic majority of that member state to re-evaluate the desirability of that law and the extent to which the legislature truly took the interests of all of the member state’s nationals into account.

In his comparison of European Union citizenship to United States citizenship, Schönberger focuses (rightly) on Edwards v. California as the moment at which United States citizenship really starts to mean something for those holding it. But he seems to see the fact that the United States had been turned into “essentially a single welfare state” as the greatest impetus to the Court’s introduction of freedom of movement for US citizens; the European Union, by contrast, is not yet such a welfare state.⁵⁰ Indeed, that aspect of Edwards, denoted by the statement that “that the peoples of the several States must sink or swim together”,⁵¹ is certainly compelling. But it is one aspect of many, and as I have argued, I see the political rights of the citizen, and the notion of “representation reinforcement” (which also plays a role in Union citizenship) as being the most relevant aspects of Edwards.

⁴⁶ See, for insight into the roots of this conceptual split, supra in Ch. 2 surrounding n. 13.
⁴⁹ See supra in Ch. 8 on p. 354.
⁵¹ Schönberger (2007), p. 77; also quoted by ECJ judge Timmermans supra in Ch. 7 at n. 114.
(Anyhow, the recent exertions of the member states and institutions of the European Union to save the euro may well increase the popular realization that the peoples of the member states of the European Union, likewise, must sink or swim together.)

As to the formation of a common identity, which Schönberger seems to find to be another compelling aspect of United States citizenship, he notes that the fact that a French citizen can move to Italy and be treated largely equally to Italian citizens does not make “Europeans” out of the French and the Italians. As to the formation of a common identity, which Schönberger seems to find to be another compelling aspect of United States citizenship, he notes that the fact that a French citizen can move to Italy and be treated largely equally to Italian citizens does not make “Europeans” out of the French and the Italians. In other words, mere freedom of movement does not an identity of citizenship make, which is a fair enough statement. (Magnette, for his part, does not believe that the small elite of mobile Union citizens, making use of the freedoms Union law grants them, provides a satisfactory basis for a “European civil society” as a “subjective community”.)

But Schönberger was also writing before Rottmann, Ruiz Zambrano, and Alokpa were handed down: those judgments implied that the most vertical and uniform equality of all entailed by Union citizenship has to be protected not by the other member states, but by the Union citizen’s own member state. Indeed, with Rottmann, the Court diverged down this new path despite the fact that Advocate General Maduro, citing Schönberger in his Opinion in that case, had described Union citizenship as little more than an “interstate citizenship”.

I would say that Schönberger’s point about identity can be reversed and rephrased in light of the new vision of Union citizenship: it is the fact that the French children of a Togolese mother are “Europeans” that means that they can be (substantively) French. Union citizenship does not divest Union citizens of their nationalities, but it can free them from being “subjects” of their respective nations.

Epilogue: Two children named Ruiz

Finally, for all the alleged flaws of European Union citizenship when compared to United States citizenship, such as the fact that economically inactive citizens still can be denied a right to social assistance when they make use of mobility, or the fact that sedentary citizens are denied the full protection of Union citizenship, there is one aspect of European Union citizenship, when it does provide protection, that shines by comparison. I have admittedly forced a comparison of member states’ denial of a right of residence to non-European family members of their own nationals with American states’ imposition of racial segregation on their own black citizens. It should be clear that I am not trying to substantively equate these forms of state action; but I do see them as being formally comparable, as they both mean that a minority class of citizens is being denied an advantage that

54 Supra in Ch. 8 at n. 155.
the majority class of citizens enjoys as a matter of course: be it the right to go to quality public schools or the right to be with one’s family members.

But the right to family life, to the extent that it can derogate immigration law, is something that only exists in the European Union’s legal order, and does not at all exist in U.S. constitutional law. Perhaps as a corollary to the fact that United States citizenship also coalesced into a common State nationality around the same time as States started imposing restrictions on migration, it never developed legal effects that reached across international borders. European Union citizenship, on the other hand, developed precisely in the shadow of, and in response to, the maintenance of restrictions of migration by member states continuing to act as States. So where Union citizenship does provide for the protection of family life with non-European family members, it provides a quite extraordinary degree of protection. In this regard, the European Union’s constitutional order reflects the fact that in an age of migration, its citizens’ lives are increasingly defined by a web of cross-border family relationships that cannot be pinned down to any one State.55

This contrast between the two legal orders was made painfully clear in March 2011. In that month, the European Court of Justice handed down its decision in *Ruiz Zambrano*, recognizing that two children who had the *de jure* status of Union citizenship would be denied the *de facto* enjoyment of their citizenship if their parents could not stay with them to care for them in the children’s country of nationality.

In the same month, United States border officials effectively denied entry to the United States to a United States-born citizen who shared the same paternal surname as the Ruiz Zambrano children: 4-year-old Emily Ruiz. She had been traveling with her Guatemalan grandfather on a flight from Guatemala; but because of an irregularity in her grandfather’s immigration history, he was denied entry to the United States. Emily had to be released to a responsible adult. But Emily’s Guatemalan father, who lived in the United States but without a legal immigration status, was given the choice of either putting her on a plane back to Guatemala or allowing her to become a ward of the state of Virginia; so he had her return to Guatemala.

Emily’s attorney, David Sperling, stated that Emily was being treated as a “second-class citizen”;56 he was thereby consciously referring to the *de jure* status of United States citizen as a hull, empty of the *de facto* right to family life enjoyed by United States citizens whose family members are likewise United States citizens. European Union citizenship, by contrast, acknowledges that Union citizenship ought not be such a hull: citizenship is more than merely a passport. It is the opportunity to lead an integrated life in one’s state of citizenship, surrounded by the family members one loves and depends on.

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55 See, generally Van Walsum (2012)
56 Dolnick (2011)
Summary

Frontiers of Equality
in the development of US and EU citizenship

This dissertation aims, simply put, to draw some lessons from the historical development of the citizenship of the United States for the benefit of understanding the continuing legal development of the citizenship of the European Union.

When making the same comparison, commentators often seize on US citizenship as a nationality on the international scene or a single allegiance owed to the exclusion of all others. These aspects of US citizenship have largely to do with the United States being a State (in international law, the ultimate bearer of sovereignty over a given territory). Choosing these as the terms of comparison will lead to the foregone conclusion that since the European Union is not (yet) a State, but rather a collection of States, EU citizenship does not by any account stack up to US citizenship as a compelling legal status. Other commentators focus on US citizenship as status that is possessed by all members of the "people" of the United States, who are presumed to be connected in a common national identity and political discourse, both of which are lacking in the EU.

The present study avoids these terms. It does not claim that EU citizenship is anything like a nationality (or that the EU is a State to which allegiance is owed), nor that it ought to be. EU citizenship is not seen as a legal expression of exclusiveness, nor does it have to be paired with any sociological phenomenon of political or cultural identity.

If one digs a bit below such obvious differences, one may strike upon promising similarities. Both US citizenship and EU citizenship are "layered" or "duplex" citizenships: a person cannot possess the citizenship of one of those Unions without simultaneously possessing the citizenship (or nationality) of a (member) state. Both EU citizenship and US citizenship are exerting a force on the (member) states, whereby the latter are obliged to grant various forms of equal treatment to citizens: first to citizens or nationals of other (member) states, but ultimately to their own citizens or nationals as well.

I see a legal claim to equality as the key aspect of the citizenships of both of the Unions: all holders of a citizenship can invoke it to be treated on par with other holders of that citizenship in a given situation, thereby actively resisting the application of discriminatory laws that they would otherwise be subjected to. In this respect, the legal relationship between EU citizenship and the nationalities of the member states of the EU allows for a fruitful comparison with the relationship between US citizenship and the citizenships of the several states.

In the first place, both EU and US citizenship work on a "horizontal" plane through the form of equality called non-discrimination: a citizen or national
of one (member) state, when residing in or visiting another (member) state, has to be given the same treatment before the law as citizens or nationals of that (member) state. But it is where a “vertical” legal norm is established, providing that all citizens in a given situation have to be treated the same in all the (member) states, that citizenship is most compelling. Taken to its logical conclusion, any such vertical effect of citizenship on a (member) state limits the latter in its own latitude to discriminate against minority groups among its own citizens or nationals; the people affected thereby rise from being “subjects” of their respective (member) states to becoming more fully “citizens” in their respective Union.

This dissertation is structured to explore the respective development of both US citizenship and EU citizenship historically, as largely chronological sequences of events. Four chapters are dedicated to US citizenship, five to EU citizenship. These histories track the development of each citizenship from being more “horizontal” in effect to more “vertical” in effect, and also from being a bundle of de facto equalities enjoyed by a certain defined group of people to becoming a de jure status possessed by all (Union) citizens that guarantees equal treatment.

US citizenship starts off filling a void left by its predecessor British subjecthood. Subjecthood is defined by a reciprocal relationship between subject and monarch: the subject owes the monarch allegiance and the monarch owes the subject protection in return. This relationship implies a horizontal form of equality for subjects who find themselves in different realms headed by the same monarch. The British king’s subjects in his American realms (who had chafed under their subjection to the British Parliament’s legislation) broke away by making legal arguments based on the relationship of allegiance to protection. As members of a new republican order, empowered to legislate over themselves, they begin to call themselves “citizens” rather than “subjects”. But it would take almost two centuries for US citizenship to become a compelling legal status defined primarily in terms of equality rather than merely a new form of subjecthood defined by allegiance.

The history of EU citizenship, for its part, begins after the Second World War, when various groups of States hatch grand plans for European integration in which no concept of citizenship plays a role, and in which the States’ nationals ideally have little to say. British subjecthood is to resurface later as an aside in the European context, when the United Kingdom accedes to the European Economic Community: despite being called “Commonwealth citizenship” by this point, which is admittedly a layered form of citizenship, we see that it is still ultimately based on (an abstract idea of) allegiance that compels little equal treatment of its holders.

Both US and EU citizenship develop and become more compelling in the face of challenges of institutionalized inequality in (member) states, or even in each of their Unions as a whole. In my histories of each, I focus on landmark court cases and legislation to show how this development happens incrementally. In the early
history of US citizenship, ideals of equality already play a role in Congress’ legislation on granting citizenship to immigrants (at least: voluntary immigrants of European origin and their descendants). But this period is more decisively marred by the enslavement of involuntary immigrants of African origin and their descendants. Slavery is not only institutionalized in some states, but is also protected with perverse forms of “equality” guaranteed by the Constitution and the Congress’ implementation of it. This institutionalized “anti-citizenship” of black Americans, when confirmed by the Supreme Court in the *Dred Scott* decision, breaks the tie between state citizenship and US citizenship and is one of the factors leading to the Civil War.

After the abolition of slavery, the Constitution is amended to introduce US citizenship as a *de jure* status for all persons born on US soil, including former slaves and their descendants. But *de facto*, states persist in discriminating against black citizens. This goes on with the blessing of the Supreme Court, given most notoriously in *Plessy v. Ferguson*, and makes them “second-class” US citizens, in other words holders of a *de jure* citizenship without a *de facto* content of equality. Black Americans who are disadvantaged by the system of segregation continue to invoke their US citizenship in court, as do needy white Americans whose interstate migration is restricted by wealthier states. The Supreme Court grants these disadvantaged citizens some relief on both fronts (*Mitchell v. United States*, *Edwards v. California*), but on the formal basis of interstate commerce rather than US citizenship: for the time being, only mobile US citizens, i.e. who cross state borders, are entitled to equality. Ultimately, however, the Supreme Court comes around to responding to a call to vertically intervene between a state and its own citizens (who are “sedentary”, i.e. have not crossed interstate borders) with its 1954 decision *Brown v. Board of Education*, in which it rules that the children of Topeka cannot be forced to attend segregated schools. Buoyed by this and other victories in court, the civil rights movement ultimately leads Congress to pass legislation to enable US citizens everywhere, not only those who cross interstate borders, to obtain the equal protection of the law in the face of their own states’ activity or neglect.

What would eventually become EU citizenship, on the other hand, develops against the background of the legal inequality that States have institutionalized as against the nationals of other States. Of course, this institutionalized inequality based on nationality, by which the national of another State (i.e. an “alien”) has to ask for permission to enter and stay in a host State (and is liable to deportation when that permission is not granted or is rescinded), is known as “immigration law” and is by no means unique to Europe. But starting ever so cautiously with the treaty to establish the European Coal and Steel Community, and more decisively with the treaty to establish the European Economic Community, the member states of the Community institute a supranational “freedom of movement of workers” that amounts to a unique dismantlement of member states’ historical restrictions on immigration. When a national of one member state is working in another member state, he or she gains an ever-stronger right (not permission) to
stay and work there and a right to be treated equally to nationals of the host member state. In this freedom of movement of workers, we can identify a European citizenship avant la lettre, in which member state nationals who are working in another member state can make consistent legal claims to equal treatment. The equality so gained can go even farther than the equality enjoyed by the host member state’s own nationals: mobile member state nationals are guaranteed the right to be accompanied or joined by their closest family members, regardless of those family members’ own nationalities. Considering that almost no member states unconditionally guarantee such a right for their own nationals, that phenomenon shows that this de facto citizenship is already “vertical” in nature and cannot be explained purely in terms of non-discriminatory treatment.

Nonetheless, the early history of European “citizenship” is also marred by an institutionalized inequality: the Council, in which the member states are represented, adopts (on the express proposal of the European Commission) secondary legislation to determine which member state nationals are entitled to make use of the freedom of movement of workers, to the exclusion of member state nationals coming from the post-colonial territories outside Europe associated with France and the Netherlands. It is doubtful, at the time, whether this initial legislative attempt to establish indirectly racial criteria for access to equality actually can be enforced if all nationals of a given member state hold indistinguishable passports. But when the United Kingdom accedes to the Community in 1973, the original member states successfully pressure it to clearly define its own nationality, for purposes of the freedom of movement of workers, largely to the exclusion of Commonwealth citizens from the vast former British Empire outside Europe. Indeed, if the freedom of movement of workers is already something of a de facto European citizenship by this point, then member states appear to wish to limit that grant of equality to Europeans of indigenous origin, i.e. white ones. Member states also have difficulty with granting equality to their own nationals who are (descendants of) immigrants from outside Europe: they raise the traditional barriers of immigration law ever higher for those nationals’ family members. Finally, the member states hesitate to expand freedom of movement in the Community to economically inactive nationals of other member states, fearing a burden on their respective welfare states.

With the entry into force in 1993 of the Treaty of Maastricht, EU citizenship is introduced as a de jure status that, at least in theory, includes a general freedom of movement and residence, not only for the economically active. At first it remains very much the question whether this new status really adds something new to the de facto citizenship previously established with the freedom of movement of workers. In 1990, freedom of movement had already been “vertically” introduced for economically inactive member state nationals (students, retirees, and self-sufficient persons), but strikingly, the “horizontal” equality accorded them (the right to equal treatment relative to nationals of a host member state) is sharply limited, at least in terms of the right to social assistance and student financing. Nonetheless, the Court of Justice slowly rises to the challenge of economically inactive mobile Union citizens invoking their Union citizenship
as a source of equality, declaring momentously in its 2001 decision *Grzelczyk* that “Union citizenship is destined to be the fundamental status of nationals of the Member States”. The legislature of the Union, in which the European Parliament now plays a major role next to the Council, responds to the judicial developments by passing clear, consolidated legislation on the rights of movement and residence of mobile Union citizens. The *de jure* status of Union citizenship thus gains ever more content in the form of equality.

Meanwhile, Union citizens whose own member states make it difficult for them to be joined by their family members from outside the EU make use of their Union citizenship to circumvent their own member states’ restrictive immigration laws. By making use of mobility to move to another member state, these citizens are able to benefit from the previously mentioned “vertical” provisions of Union law that allow them to be joined by their family members under fairly easy conditions in the host member state. These Union citizens can then return to their own member states and continue to have Union law apply to their family members’ right of residence. Yet this phenomenon only serves to confirm that the benefits of Union citizenship are largely reserved for mobile Union citizens.

In its 2010 decision *Rottmann*, however, the Court of Justice breaches the previously “purely internal” situation between member states and their own (sedentary) citizens: when a German national whose German nationality has been rescinded by German law invokes his (thereby likewise rescinded) Union citizenship, the Court confirms that Union law can intervene between a member state and its own nationals when Union citizenship is at stake. It was thence only a short leap to the Court’s 2011 decision *Ruiz Zambrano*, in which it confirms that two young Belgian children had the right to have their Colombian parents with them to take care of them in Belgium, despite the fact that these Union citizen children had never crossed an interstate border, because “the most essential of their rights” as Union citizens were at stake. The Court subsequently confirmed in its 2013 decision *Alokpa* that it is for a Union citizen’s own member state, more than any other member state, to protect the most essential rights of Union citizenship; thus the latitude of member states to treat their own nationals however they like is further limited.

By now it has become clear how landmark court cases and legislation demonstrate the development of citizenship — both in the US and the EU — against the background of unequal treatment of certain groups of citizens. Citizens note that they are subject to unequal treatment by law and subsequently invoke their citizenship as a source of equality before a court or in the legislative process. If the court confirms that these citizens have been treated unequally, or the legislature expands the equality that citizens should enjoy, other citizens become more aware of how they, too, can invoke their citizenship as a source of equality. This starts a lasting dialogue of equality between citizenship of a Union, on the one hand, and (US) state citizenship and (EU) member state nationality, on the other, making equality into a guiding principle of those legal statuses as well.
Two leading commentators on EU citizenship, Christoph Schönberger and Paul Magnette, acknowledge that EU citizenship can in fact be compared to US citizenship without presuming that the EU ought to be a State, but they conclude that EU citizenship is still largely horizontal, characterized by a relationship of reciprocity between the member states and a relationship of non-discrimination between any given member state and the nationals of other member states who live there. These commentators (implicitly) claim that US citizenship is more vertical, and thus more compelling, because US citizens can invoke their citizenship before institutions of the federal government, or because US citizens are bound by a common political or social identity.

I agree with them that a horizontal citizenship is not terribly compelling: indeed, if a citizenship is only horizontal in effect, then it is not even really necessary as a mediating status, as the same effects could just as easily be produced by a treaty among the member states guaranteeing reciprocal non-discrimination for each other's nationals. And when rights of movement and residence are guaranteed by such traditional instruments of international law, moreover, there is typically quite a bit of room for states parties to implement those rights with variations or with exceptions for reasons of public order and security. However, I diverge from Schönberger and Magnette by asserting that EU citizenship is in fact strongly vertical, as it is coupled with legal norms that all member states have to implement equally and with few variations.

I respond that even in the US, the primary effects of US citizenship are not necessarily to be found in the relationship between US citizens and the federal government, but in the relationship between US citizens (as state citizens) and their own state and local governments, which are bound not to violate their citizens' rights as US citizens. Citizenship is indeed effective as a vertical legal norm, but this is regardless of whether or not that norm is actually invoked before a (central) federal institution. And while Schönberger's and Magnette's respective critiques may have been more valid at a time when EU citizenship amounted to little more than the de facto citizenship enjoyed under the freedom of movement of workers, the judgments of the European Court of Justice in *Rottmann* and *Ruiz Zambrano* can be seen as game changers: they open a new frontier for EU citizenship to intervene between a member state and its own nationals. That is a vertical effect that cannot be explained in terms of non-discrimination or in terms of member states reciprocally according privileges to each other's nationals.

Finally, I note that for all its alleged flaws, there is one area in which EU citizenship provides protection to all of its mobile citizens and the most vulnerable of its sedentary citizens, and where US citizenship provides none: family life. The story of Emily Ruiz is telling: Emily is a young US citizen who is accompanied by her grandfather on a flight from Guatemala, on her way to join her father in Virginia. She is effectively denied entry to the US because both her father and grandfather are Guatemalan and neither of them has a regular immigration status in the US. Within the now-settled doctrine of EU citizenship, on the other hand, such a situation would be impossible: it is recognized that if
one cannot make practical use of one’s citizenship because one cannot be together with one’s family, then citizenship is an empty hull, nothing more than a passport.
Samenvatting

 Opschuivende grenzen van rechtsgelijkheid in de ontwikkeling van de burgerschappen van de VS en de EU

Dit proefschrift stelt zich tot doel, simpel gezegd, lessen te trekken uit de historische ontwikkeling van het burgerschap van de Verenigde Staten om de voortgaande juridische ontwikkeling van het burgerschap van de Europese Unie beter te kunnen begrijpen.

Commentatoren die dezelfde vergelijking ondernemen leggen vaak de nadruk op het burgerschap van de VS als een nationaliteit, volkenrechtelijk gezien, of op een enkele getrouwheid die verschuldigd is met uitsluiting van alle andere getrouwigheden. Dit heeft te maken met het feit dat de Verenigde Staten samen één staat zijn (in het volkenrecht, de ultieme drager van soevereiniteit binnen een bepaald grondgebied). Wie deze aspecten kiest voor de vergelijking komt vanzelf tot de conclusie dat, aangezien de EU (nog) geen bondsstaat is, maar een statenverbond, het EU-burgerschap de vergelijking met het VS-burgerschap niet kan doorstaan. Andere commentatoren richten zich op het VS-burgerschap als een status die alle leden van het ‘volk’ van de Verenigde Staten bezitten, leden die (naar men aanneemt) allen met elkaar verbonden zijn in een gemeenschappelijke nationale identiteit en een gemeenschappelijk politiek discours. Ook deze kenmerken ontbreken in de EU.

Het onderhavige onderzoek bedient zich niet van zulke termen. Het gaat niet uit van het uitgangspunt dat het EU-burgerschap op enige wijze op een nationaliteit lijkt (of dat de EU een staat is waaraan getrouwheid verschuldigd is), en beweert evenmin dat het EU-burgerschap een nationaliteit hoort te zijn. Het EU-burgerschap wordt niet opgevat als een juridische uitdrukking van een uitsluiterende verhouding, evenmin hoeft het EU-burgerschap gepaard te gaan met enig sociologisch kenmerk zoals een politieke of culturele identiteit. Wie wat dieper graaft onder de opvallende verschillen treft veelbelovende gelijkenissen aan. Zowel het VS-burgerschap als het EU-burgerschap is een ‘gelaagd’ of ‘duplex’ burgerschap: het is uitgesloten dat een individu het burgerschap kan bezitten van één van die Unies zonder tegelijkertijd bezitter te zijn van het burgerschap (of nationaliteit) van een (lid)staat. Zowel het EU-burgerschap als het VS-burgerschap oefent een invloed uit op de (lid)staten waardoor deze verplicht worden op verschillende wijzen gelijke behandeling te verstrekken aan de burgers: in eerste instantie aan de burgers of onderdanen van andere (lid)staten, maar uiteindelijk ook aan hun eigen burgers of onderdanen.

Ik zie de *eis van gelijkheid* als het belangrijkste aspect van de burgerschappen van beide Unies: alle bezitters van zo’n burgerschap kunnen deze inroepen om in een bepaalde situatie op één lijn te worden behandeld met andere bezitters van hetzelfde burgerschap, waardoor zij actief weerstand bieden aan de
toepassing van discriminatoire wetten waaraan zij anders onderworpen zouden zijn. Zo gezien is de juridische verhouding tussen het EU-burgerschap en de nationaliteiten van de lidstaten van de EU een vruchtbare bron voor vergelijking met de verhouding tussen het burgerschap van de VS en dat van de afzonderlijke deelstaten.

In eerste instantie werken de burgerschappen van zowel de EU als de VS ‘horizontaal’, via de vorm van gelijkheid die non-discriminatie heet: op een burger of onderdaan van een (lid)staat die in een andere (lid)staat woont of die (lid)staat bezoekt zijn de wetten van die (lid)staat van gelijke toepassing als op een burger of onderdaan van die (lid)staat. Maar pas als een burgerschap een ‘verticale’ juridische norm omvat, waardoor alle burgers in een bepaalde situatie gelijk moeten worden behandeld in alle (lid)staten, begint het een wezenlijke invloed uit te oefenen op het burgerschap of de nationaliteit van een (lid)staat. Het logische gevolg van zo’n verticale werking van een burgerschap is dat de (lid)staten beperkt worden in hun vrijheid om hun eigen burgers of onderdanen discriminatoir te behandelen; de betrokken personen worden daarbij, in plaats van (letterlijk) ‘onderdanen’ van hun respectievelijke (lid)staten, volwaardige ‘burgers’ van hun respectievelijke Unie.

Dit proefschrift is een historische studie van de respectievelijke ontwikkeling van het burgerschap van zowel de VS als de EU. Vier hoofdstukken zijn gewijd aan het VS-burgerschap, vijf aan het EU-burgerschap. Deze histories volgen de ontwikkeling van ieder burgerschap van een burgerschap met een eerst grotendeels ‘horizontale’ werking tot een burgerschap met een meer ‘verticale’ werking, en daarnaast van een burgerschap de facto dat een bepaalde groep burgers een bundel van gelijkheden biedt tot een status de jure voor alle burgers van iedere Unie die gelijke behandeling garandeert.

Het VS-burgerschap komt tot stand in de ruimte die achtergelaten wordt door zijn voorganger, het Britse onderdaanschap. Onderdaanschap is gedefinieerd door de wederkerige verhouding tussen onderdaan en monarch, waarbij de onderdaan de monarch getrouwheid verschuldigd is, daartegenover de monarch zijn onderdaan bescherming. De onderdanen van de Britse koning in zijn Amerikaanse rijkssieden (die onder het juk hadden geleefd van de wetgeving van het Britse Parlement) hebben hun onafhankelijkheid uitgeroepen met juridische argumenten die gebaseerd waren op de verhouding tussen getrouwheid en bescherming. Als leden van een nieuwe republikeinse orde, nu in staat wetten voor zichzelf te maken, noemen zij zich ‘burgers’ in plaats van ‘onderdanen’. Maar het duurt nog bijna twee eeuwen voordat het VS-burgerschap een dwingende juridische status wordt, gedefinieerd in termen van gelijkheid, in plaats van enkel een nieuwe vorm van onderdaanschap gedefinieerd in termen van getrouwheid.

De geschiedenis van het EU-burgerschap, op zijn beurt, begint na de Tweede Wereldoorlog, als een groep staten grote plannen maakt voor Europese integratie. Een notie van burgerschap speelt geen rol, en de onderdanen van de staten hebben weinig te vertellen. Het Britse onderdaanschap verschijnt ook in deze Europese context, nu als een bijkomstigheid van de toetreding van het
Verenigd Koninkrijk tot het Europees Economisch Gemeenschap: ondanks het feit dat het inmiddels ‘burgerschap van het Gemenebest’ heet, kennelijk een gelaagd ‘burgerschap’, is het toch uiteindelijk gebaseerd op (een abstract idee van) getrouwheid en biedt het bar weinig gelijke behandeling voor zijn bezitters.

De burgerschappen van de VS en de EU ontwikkelen zich en worden invloedrijker tegen de achtergrond van uitdagingen van geïnstitutionaliseerde ongelijkheid in (lid)staten, of zelfs in de respectievelijke Unies als geheel. In ieder van mijn vertellingen focus ik op mijlpalen in de jurisprudentie en wetgeving om te laten zien hoe deze ontwikkeling stap voor stap plaatsvindt. In de vroege geschiedenis van het VS-burgerschap spelen ideal en van gelijkheid een rol in de wetgeving van het Congres over het verlenen van burgerschap aan immigranten (althans, vrijwillige immigranten van Europese afkomst en hun nakomelingen). Maar het bestaan van de slavernij voor onvrijwillige migranten van Afrikaanse afkomst en hun nakomelingen vormt een smet op dit tijdperk. De slavernij is niet alleen een institutie in sommige deelstaten, maar wordt zelfs beschermd door de Amerikaanse grondwet en de wetgeving van het Congres. Dit geïnstitutionaliseerde ‘anti-burgerschap’ voor zwarte Amerikanen, dat ook bevestigd wordt door het Hooggerichtshof in het Dred Scott-arrest, doorbreekt de wederzijdse afhankelijkheid van het burgerschap van een deelstaat en het burgerschap van de Unie en is een van de factoren die tot de Burgeroorlog leidt.

Na de afschaffing van de slavernij wordt de Amerikaanse grondwet geamendeerd om het VS-burgerschap in te voeren als een status de jure voor alle personen die geboren zijn op het grondgebied van de VS, inclusief voormalige slaven en hun nakomelingen. Maar de facto blijven deelstaten zwarte burgers discrimineren. Dit gebeurt met de goedkeuring van het Hooggerichtshof, in welk verband het meest infame arrest Plessy v. Ferguson is, en maakt hen tot ‘tweederrangs’ burgers, met andere woorden tot bezitters van een burgerschap de jure dat de facto geen gelijkheid inhoudt. Zwartem Amerikanen die benadeeld worden door het stelsel van segregatie blijven beroep doen op hun VS-burgerschap voor de rechter, net als arme blanke Amerikanen wier interstatale migratie belemmerd wordt door rijkere deelstaten. Het Hooggerichtshof geeft deze benadeelde burgers enig soelaas op beide fronten (Mitchell v. United States, Edwards v. California), maar op de formele basis van het verkeer tussen de deelstaten in plaats van het burgerschap van de VS: voorlopig genieten enkel mobiele burgers van de VS, d.w.z. zij die interstatale grenzen overschrijden, gelijke behandeling. Maar uiteindelijk gaat het Hooggerichtshof in 1954 ‘om’ wanneer het geroepen wordt verticaal tussen een deelstaat en de eigen burgers van die deelstaat te komen (die ‘sedentair’ zijn, d.w.z. die geen grenzen hebben overschreden) met zijn arrest Brown v. Board of Education, waarin het bepaalt dat de kinderen van Topeka niet gedwongen kunnen worden naar gesegregeerde scholen te gaan. Deze en andere overwinningen blazen leven in de burgerrechtenbeweging, die het Congres er uiteindelijk toe brengt nieuwe wetgeving aan te nemen waardoor alle burgers van de VS, niet alleen degenen die

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grenzen overschrijden, een afdwingbaar recht krijgen op gelijke behandeling in weerswil van het doen en nalaten van hun eigen deelstaten.

Wat uiteindelijk het burgerschap van de EU zal worden, ontwikkelt zich tegen de achtergrond van de juridische ongelijkheid die staten historisch hebben geschapen en aangescherpt ten aanzien van de onderdanen van andere staten. Deze geïnstitutionaliseerde ongelijkheid op grond van nationaliteit, waardoor de onderdan van een andere staat (m.a.w. een 'vreemdeling') om toestemming moet vragen om toegang te krijgen tot een staat en om daar te verblijven, heet 'vreemdelingenrecht' en is geenszins beperkt tot Europa. Maar vanaf een uiterst voorzichtig begin met het verdrag tot oprichting van de Europese Kolen- en Staalgemeenschap, en meer doorslaggevend met het verdrag tot oprichting van de Europese Economische Gemeenschap, brengen de lidstaten van de Gemeenschap een supranationaal 'vrij verkeer van werknemers' tot stand dat gezien mag worden als een unieke afbraak van de beperkingen op immigratie die de lidstaten tot dan toe in stand hielden. Wanneer een onderdan van de ene lidstaat in een andere lidstaat werkt krijgt hij een steeds sterker recht (geen gunst) om daar te verblijven en werken en een recht om gelijk te worden behandeld met onderdanen van die lidstaat. Dit vrij verkeer voor werknemers kunnen wij zien als een Europees burgerschap *avant la lettre*, waarin onderdanen van lidstaten die in een andere lidstaat werken consistente aanspraken kunnen doen gelden op gelijke behandeling. De gelijkheid die op die manier verkregen wordt, kan zelfs verder gaan dan de gelijkheid die de eigen onderdanen van een lidstaat genieten: mobiele onderdanen van lidstaten wordt het recht gegarandeerd dat hun gezinsleden hen kunnen begeleiden of zich bij hen kunnen aansluiten, ongeacht de nationaliteiten van die gezinsleden. Aangezien praktisch geen enkele lidstaat zo'n recht garandeert voor zijn eigen onderdanen, laat dit fenomeen zien dat het hieruit ontstane burgerschap *de facto* al 'verticaal' van aard is en niet kan worden uitgelegd puur in termen van een verbod op discriminatie naar nationaliteit.

Maar ook de vroege geschiedenis van het Europese 'burgerschap' vertoont een smet in de vorm van een geïnstitutionaliseerde ongelijkheid: de Raad, waarin de lidstaten vertegenwoordigd zijn, neemt (op het uitdrukkelijke voorstel van de Europese Commissie) secundaire wetgeving aan die bepaalt welke onderdanen van lidstaten gebruik mogen maken van het vrij verkeer van werknemers: de onderdanen van lidstaten die afkomstig zijn uit de postkoloniale gebiedsdelen buiten Europa die geassocieerd zijn met Frankrijk en Nederland worden uitgesloten. Het valt te betwijfelen of deze criteria, die indirect te maken hebben met ras, wel gehandhaafd kunnen worden als alle onderdanen van een bepaalde lidstaat in het bezit zijn van paspoorten die niet van elkaar zijn te onderscheiden. Maar als het Verenigd Koninkrijk tot de Gemeenschap toetreedt in 1973 is het optreden van de lidstaten wel effectief: het VK wordt onder druk gezet om zijn eigen nationaliteit duidelijk af te bakenen, met betrekking tot de begunstigden van het vrij verkeer van werknemers, ter uitsluiting van Gemeenbestburgers die afkomstig zijn uit het enorme voormalige Britse Rijk buiten Europa. Als het vrij verkeer van werknemers nu al een soort Europees
burgerschap \textit{de facto} voorstelt dan is het duidelijk dat de lidstaten die gelijkheid willen beperken tot autochtone Europeanen, m.a.w. blanken. Lidstaten aarzelen verder gelijke behandeling te geven aan hun eigen onderdanen die (nokomelingen van) immigranten van buiten Europa zijn: zij verhogen de traditionele barrières van het vreemdelingenrecht steeds meer voor de gezinsleden van die eigen onderdanen. En verder aarzelen lidstaten het vrij verkeer van personen uit te breiden tot economisch niet-actieve onderdanen van andere lidstaten, uit angst voor druk op hun respectievelijke verzorgingsstaten.

Met de inwerkingtreding van het Verdrag van Maastricht in 1993 wordt het EU-burgerschap ingevoerd als een status \textit{de jure} die, tenminste in theorie, een algemene vrijheid van verkeer en verblijf bevat, niet enkel voor economisch actieve. Aanvankelijk is het zeer de vraag of deze nieuwe status echt iets toevoegt aan het burgerschap \textit{de facto} dat voorheen tot stand was gebracht met het vrij verkeer van werknemers. In 1990 was het vrij verkeer al ‘verticaal’ ingevoerd voor economisch niet-actieve onderdanen van lidstaten (studenten, gepensioneerden en zelfvoorzienende personen), maar het opmerkelijke hieraan was dat de ‘horizontale’ gelijkheid die zij hierbij kregen (het recht op gelijke behandeling met de onderdanen van de gastlidstaten) aanzienlijk beperkt was, tenminste met betrekking tot sociale voorzieningen en studiefinanciering. Niettemin gaat het Hof van Justitie de uitdaging aan van economisch niet-actieve Unieburgers die hun Unieburgerschap inroepen als bron van gelijkheid; in 2001 verklaart het Hof gewichtig, in zijn arrest \textit{Grzelczyk}, dat ‘[d]e hoedanigheid van burger van de Unie […] de primaire hoedanigheid van de onderdanen van de lidstaten [dient] te zijn’. De Uniewetgever, waartoe nu ook het Europees Parlement behoort, reageert op de ontwikkelingen in de jurisprudentie door heldere, geconsolideerde wetgeving aan te nemen met betrekking tot de rechten van verkeer en verblijf van mobiele Unieburgers. De status \textit{de jure} van het Unieburgerschap wint dus steeds meer aan inhoud in termen van gelijkheid.

Ondertussen maken Unieburgers, wier eigen lidstaten gezinshereniging met hun familieleden van buiten de EU moeilijk maken, gebruik van hun Unieburgerschap om de strenge immigratiewetten van hun eigen lidstaten te omzeilen. Door naar een andere lidstaat te verhuizen kunnen deze burgers hun voordeel doen met de reeds genoemde ‘verticale’ bepalingen van het Unierecht dat het hun gezinsleden mogelijk maken zich bij hen aan te sluiten in de gastlidstaat op vrij soepele voorwaarden. Deze Unieburgers kunnen na enige tijd terugkeren naar hun eigen lidstaat en het Unierecht alsnog van toepassing laten zijn op het verblijfsrecht van hun gezinsleden. Maar dit fenomeen onderstreept alleen maar dat de voordelen van het Unieburgerschap voornamelijk genoten worden door mobiele Unieburgers.

In zijn arrest van 2010 \textit{Rottmann} slaat het EU-Hof echter een bres in de ‘zuiver interne situatie’ tussen lidstaten en hun eigen (sedentaire) onderdanen. Als een Duitser, wiens Duitse nationaliteit ingetrokken is op grond van het Duitse recht, een beroep doet op zijn (tegelijkertijd ingetrokken) Unieburgerschap, bevestigt het Hof dat het Unierecht tussen een lidstaat en zijn eigen onderdanen kan komen wanneer het Unieburgerschap op het spel staat. Van daaruit is het
maar een korte sprong naar het arrest van het Hof uit 2011 *Ruiz Zambrano*, waarin het Hof bevestigt dat twee jonge Belgische kinderen het recht hebben om hun Colombiaanse ouders bij zich te hebben, ondanks het feit dat deze jonge Unieburgers nog nooit een grens hebben overschreden, omdat ‘de belangrijkste aan de status van burger van de Unie ontleende rechten’ op het spel stonden. Vervolgens bevestigt het Hof in zijn arrest van 2013 *Alokpa* dat het met name aan de eigen lidstaat van een Unieburger is, meer dan aan de andere lidstaten, om deze belangrijkste rechten van het Unieburgerschap te beschermen: zo wordt de vrijheid van lidstaten om hun eigen burgers willekeurig te behandelen verder beperkt.

Zo laten mijlpalen in de jurisprudentie en de wetgeving zien hoe het burgerschap – zowel in de VS als de EU – zich ontwikkelt tegen de achtergrond van ongelijke behandeling van bepaalde groepen burgers. Burgers constateren dat zij onderworpen zijn aan ongelijke behandeling door de wet en roepen vervolgens hun burgerschap in voor de rechter of in het wetgevingsproces. Als de rechter bevestigt dat deze burgers ongelijk behandeld zijn, of als de wetgever de gelijkheid uitbreidt die burgers horen te genieten, worden andere burgers zich ervan bewust dan ook zij hun burgerschap kunnen inroepen als een bron van gelijkheid. Hierdoor komt een duurzame dialoog op gang tussen burgerschap van een Unie enerzijds en het burgerschap van een deelstaat (in de VS) of de nationaliteit van een lidstaat (in de EU) anderzijds, waardoor ook binnen de laatstgenoemde status gesteld gelijkheid een leidend beginsel wordt.

Twee belangrijke commentatoren van het EU-burgerschap, Christoph Schönberger en Paul Magnette, erkennen dat het EU-burgerschap inderdaad vergelijkbaar is met dat van de VS, maar zij veronderstellen dat de EU een staat hoort te zijn, maar zij concluderen dat het EU-burgerschap nog grotendeels horizontaal van aard is, gekenmerkt door een verhouding van wederkerigheid tussen de lidstaten en een verhouding van non-discriminatie tussen een gegeven lidstaat en de onderdanen van andere lidstaten die er wonen. Deze commentatoren beweren (al dan niet impliciet) dat het VS-burgerschap verticaler is, en dus invloedrijker, omdat VS-burgers meer contact hebben met een federale overheid, of omdat VS-burgers aan elkaar gebonden zijn in een gemeenschappelijke politieke of sociale identiteit.

Ik ben het met hen eens dat een horizontaal burgerschap op zichzelf veel minder ingrijpend is: als een burgerschap enkel horizontale effecten sorteert dan is het niet echt nodig als bemiddelende status, aangezien dezelfde effecten kunnen worden bereikt met een verdrag tussen de lidstaten waarbij wederkerige non-discriminatie voor elkaars onderdanen wordt afgesproken. Bovendien: wanneer rechten op verkeer en verblijf gegarandeerd worden door zulke traditionele volkenrechtelijke instrumenten hebben staten die partij zijn bij zo’n verdrag gewoonlijk nogal wat speelruimte om die rechten met variaties te implementeren, of om uitzonderingen in te roepen inzake de openbare orde en openbare veiligheid. Anders dan Schönberger en Magnette stel ik evenwel dat het EU-burgerschap toch sterk verticaal is van aard, aangezien het gekoppeld is aan

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rechtssystemen die alle lidstaten op gelijke voet moeten implementeren, met weinig variaties.

Ik stel verder dat zelfs in de VS, de primaire werking van het VS-burgerschap niet per se te vinden valt in de verhouding tussen VS-burgers en de federale overheid, maar in de verhouding tussen VS-burgers (in hun hoedanigheid als burgers van een deelstaat) en hun eigen deelstatelijke en lagere overheden, die gehouden zijn geen inbreuk te maken op de rechten van hun burgers als VS-burgers. Het burgerschap is inderdaad effectief als een verticale rechtssystemen, maar dat geldt ongeacht of die norm wordt ingeroepen voor een (centrale) federale instantie. En hoewel de respectievelijke kritieken van Schönberger en Magnette mogelijk enige geldigheid hadden toen het EU-burgerschap nog weinig meer voorstelde dan het burgerschap _de facto_ dat genoten werd in het kader van het vrij verkeer van werknemers, kunnen de arresten _Rottmann en Ruiz Zambrano_ van het Europees Hof van Justitie worden beschouwd als baanbrekend: zij doen de grenzen opschuiven van het gebied waarin het EU-burgerschap tussen een lidstaat en één van zijn eigen onderdanen kan komen staan. Dat is een verticale werking die niet kan worden verklaard in termen van non-discriminatie of in termen van lidstaten die wederkerig rechten toekennen aan elkaars onderdanen.

Tot slot merk ik op dat, ondanks alle beweerde gebreken van het EU-burgerschap, er één gebied is waarin het bescherming biedt aan al zijn mobiele burgers en aan de meest kwetsbare van zijn sedentaire burgers, en waarin het VS-burgerschap geen bescherming biedt: het gezinsleven. Het verhaal van Emily Ruiz is veelzeggend: Emily is een jonge burger van de VS die begeleid werd door haar grootvader op een vlucht vanuit Guatemala, op weg om zich aan te sluiten bij haar vader in Virginia. Aan haar was de toegang tot de VS effectief ontzegd omdat zowel haar vader als haar grootvader Guatemalteken zijn zonder een regelmatige verblijfsstatus in de VS. In de doctrine van het EU-burgerschap, zoals zij laatst aangevuld is met het _Ruiz Zambrano_-arrest, is dat uitgesloten: als een EU-burger geen praktisch gebruik kan maken van zijn EU-burgerschap omdat de burger niet samen kan zijn met zijn gezinsleden, is burgerschap maar een lege huls, niets meer dan een paspoort.
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