

Fundamental Rights and Reverse Discrimination

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Abstract: Reverse discrimination – whereby member states may treat their own nationals worse than nationals of other member states by invoking a “purely internal situation” in which European law does not apply – has long been a problem within the European Economic Community turned European Union. Using as a touchstone the *Zambrano* case, to be decided shortly, this paper argues that introducing citizenship alters the status of individuals vis-à-vis their governments, implies equality of treatment among citizens, and should eliminate reverse discrimination. Raising examples from the United States and Canada, I show how the introduction of federal rights empowered individuals and redrew the relationship between the governments of the center and the units. Citizenship limits the power of member states to treat their own nationals worse than nationals of other member states. This does not eliminate the tension between center and unit (or federal and regional; EU and member state) law but should give extra weight to former over the latter. Jurisdictional issues remain, but the rise of Union citizenship means that EU law should grow to encompass any right protected or promoted by shared citizenship.

*“a Community national who goes to another Member State [...should] be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say ‘civis europeus sum’ and to invoke that status in order to oppose any violation of his fundamental rights.”*¹

*“In the long run, only seamless protection of fundamental rights under EU law in all areas of exclusive or shared EU competence matches the concept of EU citizenship.”*²

Introduction

These two quotations encapsulate much of the longstanding debate about reverse discrimination and the proper relationship between European Union citizenship and fundamental rights. They also illustrate a gradual expansion of the scope of application of EU law, from a focus on movers to a focus on all EU citizens, coupled with a continuing debate about the appropriate extent and magnitude of the fundamental rights protected by Union citizenship. The first quotation is the opinion of Advocate General Jacobs from December 1992 (just before the entry into force of the Maastricht Treaty and its citizenship provisions) and the second is the opinion of Advocate General Sharpston from this past October, in a case to be decided imminently.

Reverse discrimination – whereby member states may treat their own nationals worse than nationals of other member states by invoking a “purely internal situation” in which European law does not apply – has long been a problem within the European Economic Community turned European Union. Using as a touchstone the *Zambrano* case (the case on which Advocate General Sharpston delivered the opinion quoted above), this paper argues that introducing citizenship alters the status of individuals vis-à-vis their governments, implies equality of treatment among citizens, and should eliminate reverse discrimination. Raising examples from the United States and Canada, I show how the introduction of federal rights empowered individuals and redrew the

¹ Opinion of Advocate General Jacobs delivered on 9 December 1992, *Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw - Ordnungsamt*, Case C-168/91 [1993] ECR I-1191.

² Opinion of Advocate General Sharpston delivered on 30 September 2010, *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEM) (Reference for a preliminary ruling from the Tribunal du travail de Bruxelles (Belgium))*, Case C-34/09. Judgement scheduled for 8 March 2011.

relationship between the governments of the center and the units. Citizenship limits the power of member states to treat their own nationals worse than nationals of other member states. This does not eliminate the tension between center and unit (or federal and regional; EU and member state) law but should give extra weight to former over the latter. Jurisdictional issues remain, but the rise of Union citizenship means that EU law should grow to encompass any right protected or promoted by shared citizenship.

To reach this conclusion, I first sketch a brief history of reverse discrimination in European law, highlighting some of the key cases and developments that have made the “purely internal situation” ever more limited and its invocation ever more contentious. In this context, it is appropriate to recall that, in international relations, ensuring the application of fundamental rights is a matter of state sovereignty. The limits placed on reverse discrimination are simultaneously the limits of Member State sovereignty in the face of European law, particularly the ability of Member States to deny their nationals the rights enjoyed by other Union citizens. Next, I chart the rise of Union citizenship, showing how its growth has reinvigorated the longstanding prohibition of discrimination on the basis of nationality. Reverse discrimination becomes a practice which is incompatible with Union citizenship’s commitment to equality. Of course, the European Union is not a unitary state but rather has more in common with a federal political system. Thus the tensions between difference and equality which exist in federal states also continue to exist in the Union. In the final section, I illustrate how two federal states – the United States and Canada – have managed the strains between the need for local community and an overarching federal citizenship that guarantees the same rights to all members of the polity.

A Short History of Reverse Discrimination in the EU

Advocate General Sharpston’s opinion of September 30, 2010, in the *Zambrano* case addresses pointed questions at the persistence of reverse discrimination and has sparked significant interest.³ The ruling is due to be delivered on March 8, 2011 (next week Tuesday) thus it is quite topical for this EUSA conference. The *Zambrano* case invokes several questions, most notably whether there exists or should exist a right of residence for a citizen of the Union in the territory

³ Opinion of Advocate General Sharpston on the *Zambrano* case, cited above at footnote 2.

of the Member State of which the citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the Member States. Advocate General Sharpston argues that the prohibition of discrimination on grounds of nationality (Article 18 TFEU) should be interpreted as prohibiting reverse discrimination caused by the interaction between the right to move and reside freely within the territory of the Member States (Article 21 TFEU) and national law that entails a violation of a fundamental right protected under EU law, where at least equivalent protection is not available under national law.

This argument is grounded on the theory that “transparency and clarity require that one be able to identify with certainty what ‘the scope of Union law’ means for the purposes of EU fundamental rights protection” and the concomitant idea that, “in the long run, the clearest rule would be one that made the availability of EU fundamental rights protection dependent neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted, but rather on the existence and scope of a material EU competence. To put the point another way: the rule would be that, provided that the EU had competence (whether exclusive or shared) in a particular area of law, EU fundamental rights should protect the citizen of the EU even if such competence has not yet been exercised.” The Advocate General refers to the Treaty’s affirmation that the EU ‘is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’ to argue that this “guarantee ought not to be made conditional upon the actual exercise of legislative competence. In a European Union founded on fundamental rights and the rule of law, protection should not depend on the legislative initiative of the institutions and the political process. Such contingent protection of rights is the antithesis of the way in which contemporary democracies legitimise the authority of the State” (here she cites John Locke’s *Two Treatises of Government*). Her opinion concludes that, “[i]n the long run, only seamless protection of fundamental rights under EU law in all areas of exclusive or shared EU competence matches the concept of EU citizenship.”⁴

In framing the question of reverse discrimination in terms of its relationship with Union citizenship, this opinion follows a long line of opinions and rulings emphasizing the importance

⁴ Opinion of Advocate General Sharpston on the *Zambrano* case, cited above at footnote 2.

of Union citizenship, which the European Court of Justice has ruled is “destined to be the fundamental status of nationals of the Member States,” conferring on them, in the fields covered by Community law, equality under the law, irrespective of their nationality.⁵

Note the important qualifier: equality under the law for Union citizens is limited to fields covered by Community law. Thus the key question becomes precisely the extent of Community law in protecting fundamental rights. Reverse discrimination originally arose because the European Court of Justice did not want to intrude on the prerogatives of Member States in areas outside the scope of Community law.

The Treaty of Rome prohibited any discrimination based on nationality,⁶ and as early as the early 1970s the Court was quite clear that any discrimination based on nationality was outlawed “whatever be its nature and extent.”⁷ The expansive wording of the prohibition on discrimination based on nationality has led many commentators to wonder why the Court was reluctant to apply the prohibition to cases of reverse discrimination.⁸

Indeed, some early commentators concluded (in retrospect, perhaps a little prematurely) that Community law would ensure that reverse discrimination (in French, des «discriminations à

⁵ *Rudy Grzelczyk v. CPAS*, Case C-184/99 [2001] ECR I-6193.

⁶ Article 7: “Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.”

⁷ *Marine Labour Code (Commission v France)*, Case 167/73, 4 April 1974, para 44 [1974] ECR 373.

⁸ Thus Schermers notes, “it is striking that the Court has been reluctant until now to apply [the prohibition on discrimination on the basis of nationality] to cases of reverse discrimination to the detriment of the nationals of the Member State concerned. It is unclear how this limitation can be justified both in terms of fairness and of uniform application of Community law, as well as in view of the large wording of EC Article 12.” Henry G Schermers, *Judicial Protection in the European Communities*, 5th ed. (Deventer: Kluwer Law and Taxation Publishers, 1992), 92.

reboours») would not affect the free movement of people because the European Court of Justice would be cautious to make sure equal treatment and nondiscrimination would be followed.⁹

The Court's decision in *Knoors* made clear that reverse discrimination would be disallowed only in cases where there was a sufficient connection with Community law.¹⁰ The Court ruled that, although the provisions of the treaty relating to establishment and the provision of services "cannot be applied to situations which are purely internal to a member state," the Treaty's reference to 'nationals of a member state' who wish to establish themselves in the territory of another member state "cannot be interpreted in such a way as to exclude from the benefit of community law a given member state's own nationals when the latter, owing to the fact that they have lawfully resided on the territory of another member state and have there acquired a trade qualification which is recognized by the provisions of community law, are, with regard to their state of origin, in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the treaty." However, the ruling continued, "it is not possible to disregard the legitimate interest which a member state may have in preventing certain of its nationals, by means of facilities created under the treaty, from attempting wrongly to evade the application of their national legislation as regards training for a trade."¹¹ In this case, Mr Knoors, a Dutch citizen wanting to establish himself in the Netherlands after having obtained a professional qualification in Belgium, was subject to Community law. But only individuals with sufficient connection to Community law would be able to avail themselves of these rights.

Similarly to the right of establishment, the right to free movement was restricted to cases involving Community law: "The application by an authority or court of a member state to a worker who is a national of that same state of measures which deprive or restrict the freedom of movement of the person concerned within the territory of that state as a penal measure provided for by national law by reason of acts committed within the territory of that state is a wholly

⁹ Gérard Druesne, "Remarques sur le champ d'application personnel du droit communautaire: des «discriminations à rebours» peuvent-elles tenir en échec la liberté de circulation des personnes?," *Revue trimestrielle de droit européen* 15 (1979): 429-439.

¹⁰ *J. Knoors v Staatssecretari van Economische Zaken*, Case 115/78 [1979] ECR 399.

¹¹ *Knoors*, cited above.

domestic situation which falls outside the scope of the rules contained in the EEC treaty on freedom of movement for workers.”¹²

And as with the right to establishment and the right to free movement, so too family reunification under Community law was restricted: Member State nationals who had not made use of the right of free movement and were thus in a ‘purely internal situation’ could not rely on Community law to obtain a right of residence for their family members: “The treaty provisions on freedom of movement for workers and the rules adopted to implement them cannot be applied to cases which have no factor linking them with any of the situations governed by community law.”¹³

Reverse discrimination was restricted somewhat by the decision that, in cases of dual or plural nationality, individual may claim the application of Community law against any member state of nationality.¹⁴ But it remained striking that “court challenges that would anywhere else have been fundamental rights cases were in Europe cases about economic integration.”¹⁵ This peculiar situation existed because the jurisprudence was based not on a Community commitment to upholding fundamental rights but rather on the Community’s aims of establishing a free market.

The Introduction of EU Citizenship

The key rights of European Union citizenship – primarily the right to live and the right to work anywhere within the territory of the Member States – significantly predate the formal introduction of EU citizenship into the treaties and can be traced back to the Treaty of Paris, with its political development starting in the 1950s even before the Treaty of Rome established the

¹² *The Queen v Vera Ann Saunders*, Case 175/78 [1979] ECR 1129.

¹³ *Elestina Esselina Christina Morson v State of the Netherlands and Head of the Plaatselijke Politie within the meaning of the Vreemdelingenwet; Sweradjie Jhanjan v State of the Netherlands*, Joined cases 35 and 36/82 [1982] ECR 3723.

¹⁴ *Claude Gullung v Conseil de l’ordre des avocats du barreau de Colmar et de Saverne*, Case 292/86 [1988] ECR 111.

¹⁵ Ian B. Lee, “In Search of a Theory of State Liability in the European Union,” Jean Monnet Working Paper 9/99 (available at <http://centers.law.nyu.edu/jeanmonnet/papers/papers99.html> last accessed February 27, 2011).

European Community.¹⁶ As a legal status, however, citizenship of the Union was introduced in the Maastricht Treaty, which entered into force in 1993. Others have argued that “the status of ‘Community citizen’ [was] officially recognized from the moment when the Treaties granted rights to individuals and the opportunity of enforcing them by recourse to a national or Community court.”¹⁷

Certainly, the doctrine of direct effect is important for European rights and does alter the relationship between individuals and member states. Nevertheless, there was always an economic element or a link to economic activity in the cases decided by the Court, so that prior to the formal introduction of Union citizenship in the Maastricht Treaty the status had no legal standing independent of the economic aims of European integration.¹⁸

The announcement in the Treaty of Maastricht that “Citizenship of the Union is hereby established” altered the situation. Advocate General Jacobs argued that the right to equality and non-discrimination “raises the expectation that citizens of the Union will enjoy equality, at least before Community law.”¹⁹

Advocate General Colomer argued that the creation of citizenship of the Union “represents a considerable qualitative step forward” because it separates freedom of movement from its

¹⁶ Willem Maas, “The Genesis of European Rights,” *Journal of Common Market Studies* 43, no. 5 (2005): 1009-1025. Willem Maas, *Creating European Citizens* (Lanham: Rowman & Littlefield, 2007).

¹⁷ European Commissioner (later Commission Vice-President from 1981-1985) Viscount Étienne Davignon cited in Willem Maas, *Creating European Citizens*.

¹⁸ In my book, *Creating European Citizens*, I argue that the project of European integration has always been about more than economics – that it is just as much about creating a community of people, transcending nation states. This argument does not negate the fact that, in terms of European law and the cases decided by the European Court of Justice, such non-economic logic is difficult to find before the 1990s.

¹⁹ Opinion of Advocate General Jacobs, *Faccini Dori v. Recreb Srl*, Case C-91/92 [1994] ECR I-3325. Compare F.G. Jacobs, “Citizenship of the European Union: A Legal Analysis,” (2007) 13 ELJ 591.

functional or economic need and “raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union.”²⁰

Others concur. As Advocate General Kokott has noted, “Union citizens can assert their right to free movement even if the matter concerned or the benefit claimed is not governed by Community law.”²¹ And Advocate General Mazák agrees: “Union citizenship, as developed by the case-law of the Court, marks a process of emancipation of Community rights from their economic paradigm.”²²

As might be expected, it is not only Advocates General who take this line of argument. As the Court ruled first in *D’Hoop* and has consistently repeated since: because “a citizen of the Union must be granted in all Member States the same treatment in law as that accorded to the nationals of those Member States who find themselves in the same situation, it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement.”²³

Such cases, while combatting reverse discrimination, continue to be based on the fundamental freedoms (such as freedom of movement) rather than on Union citizenship. The incongruity has recently led some commentators to advocate eliminating the distinction.²⁴ It is quite possible that

²⁰ Para 34 of Opinion of Advocate General Ruiz-Jarabo Colomer in *The Queen v. Secretary of State for the Home Department ex parte Shingara and Radiom*, joined cases C-65/95 and C-111/95 [1997] ECR I-3343.

²¹ Opinion of Advocate General Kokott, *Tas-Hagen and Tas v. Raadskamer WUBO van de Pensioen- en Uitkeringsraad*, Case C-192/05 [2006] ECR I-10451. para. 33.

²² Opinion of Advocate General Mazák, *Förster v. IB-Groep*, Case C-158/07 [2008], para.54.

²³ *Marie-Nathalie D’Hoop v Office national de l’emploi*, Case C-224/98 6191 [2002] ECR I-6191, paragraph 30, and *Schwarz and Gootjes-Schwarz*, paragraph 88. Repeated again most recently in Judgment of the Court (Second Chamber) of 20 May 2010. *Emiliano Zanotti v Agenzia delle Entrate - Ufficio Roma 2*.

²⁴ Tryfonidou writes: “the situation that now exists, under which there are different Treaty provisions governing the position of Member State nationals (i.e., the fundamental freedoms provisions, on the one hand, and the citizenship provisions on the other) should no longer be maintained; a vast topic which would appropriately form

the *Zambrano* decision next week will prohibit reverse discrimination not only the basis of economic logic (as in the past) but rather on the basis of the fundamental rights attached to Union citizenship.

If so, the Court would next need to delimit the scope of the fundamental rights attached to Union citizenship: Union citizens enjoy such a wide assortment of sources of rights (witness the invocation by Advocate General Jacobs, in the quotation at the start of this paper, of the European Convention on Human Rights) that it is not clear what kinds of cases would *not* fall under some sort of fundamental right.

Relevant for this problem is the discussion by Advocate General Poiares Maduro in the *Centro Europa 7* case.²⁵ Poiares Maduro recalls arguments for extending the role of the Court in reviewing Member State measures in order to assess their conformity with fundamental right, starting with Advocate General Jacobs's view that any national of a Member State who pursues an economic activity in another Member State may, as a matter of Community law, invoke the protection of his fundamental rights. Noting that the Court did not follow this suggestion, Poiares Maduro nevertheless suggests that all now share the "profound conviction that respect for fundamental rights is intrinsic in the EU legal order and that, without it, common action by and for the peoples of Europe would be unworthy and unfeasible. In that sense, the very existence of the European Union is predicated on respect for fundamental rights. Protection of the 'common code' of fundamental rights accordingly constitutes an existential requirement for the EU legal order."

Poiares Maduro continues that, while the European Court does not have jurisdiction to review any national measure in the light of fundamental rights, it does have "jurisdiction to examine

the basis of another extensive study and therefore will not be further discussed in this work." Alina Tryfonidou, *Reverse Discrimination in EC Law* (Alphen aan den Rijn: Kluwer Law International, 2009), 160-161.

²⁵ Opinion delivered on 12 September 2007, *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le Garanzie nelle Comunicazioni and Direzione Generale Autorizzazioni e Concessioni Ministero delle Comunicazioni*. Case C-380/05 [2008] ECR I-349.

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

Zambrano versus McCarthy

Advocate General Kokott’s opinion on the *McCarthy* case challenges Advocate General Sharpston’s opinion on *Zambrano*.²⁶ Advocate General Kokott argues that a Union citizen who has always resided in a Member State of which she is a national and has also never exercised her right of free movement guaranteed by EU law does not fall within the scope of EU law and that the right of free movement of Union citizens does not (in her view) alter this: “I am not of the view that Union citizens can derive from Article 21(1) TFEU a right of residence vis-à-vis the Member State of which they are a national even where – as in the case of Mrs McCarthy – there is no cross-border element.” Kokott admits that Union citizens who have made use of their right of free movement may rely on more generous EU rules on the right of entry and of residence than nationals of the host Member State who have always resided in its territory – reverse discrimination, but “EU law provides no means of dealing with this problem. Any difference in treatment between Union citizens as regards the entry and residence of their family members from non-member countries according to whether those Union citizens have previously exercised their right of freedom of movement does not fall within the scope of EU law.” Kokott continues: “It is true that in the legal literature consideration is given from time to time to inferring a

²⁶ Advocate General’s Opinion - 25 November 2010 *McCarthy*, Case C-434/09.

prohibition on discrimination against one's own nationals from citizenship of the Union. Advocate General Sharpston too has recently adopted a position to this effect. However, as the Court has stated on a number of occasions, citizenship of the Union is not intended to extend the scope *ratione materiae* of EU law to internal situations which have no link with EU law.”

This reliance on the distinction between a “purely internal situation” and one subject to EU law may change: “It cannot of course be ruled out that the Court will review its case-law when the occasion arises and be led from then on to derive a prohibition on discrimination against one's own nationals from citizenship of the Union.” But, for Kokott, the McCarthy case does not “provide the right context for detailed examination of the issue of discrimination against one's own nationals” because “a ‘static’ Union citizen such as Mrs McCarthy is not discriminated against at all compared with ‘mobile’ Union citizens”: a Union citizen in Mrs McCarthy's position “cannot rely on EU law in order to obtain for him or herself and his or her family members a right of residence in the Member State in which that Union citizen has always lived and of which he or she is a national.”

Advocate General Kokott's solution is to appeal to the European Convention on Human Rights: “the United Kingdom might be obliged, by virtue of being a party to the ECHR, to grant Mr McCarthy a right of residence as the spouse of a British national living in England. This is not, however, a question of EU law, but only a question of the United Kingdom's obligation under the ECHR, the assessment of which falls exclusively within the jurisdiction of the national courts and, as the case may be, the European Court of Human Rights.”

Unlike Advocate General Sharpston's call for “seamless protection of fundamental rights under EU law in all areas of exclusive or shared EU competence” in order to match the concept of EU citizenship, there is little in Advocate General Kokott's proposals to suggest an active role for the European Court of Justice or a review of fundamental rights as founded on Union citizenship.

Advocate General Kokott thus does not (here at least) appear to share the views of her colleague AG Sharpston or of AG Poiares Maduro, who argues that the prohibition of discrimination on the basis of nationality “is no longer merely an instrument at the service of freedom of movement; it

is at the heart of the concept of European citizenship and of the extent to which the latter imposes on Member States the obligation to treat Union citizens as national citizens. Though the Union does not aim to substitute a ‘European people’ for the national peoples, it does require its Member States no longer to think and act only in terms of the best interests of their nationals but also, in so far as possible, in terms of the interests of all EU citizens.”²⁷

The United States: The Incorporation Doctrine

This section to be written. I suggest that the appropriate lens for examining reverse discrimination is that of federalism, and that the political development of the incorporation doctrine in the United States provides a useful historical parallel with current and future developments in the European Union.

Canada: The Charter of Rights and Freedoms

This section to be significantly expanded. The case of Canada provides another useful parallel with the European Union and also one which is more contemporary, because the issues raised by the possibility of reverse discrimination in a federal state stem from introduction of the Canadian Charter of Rights and Freedoms in 1982. Its introduction challenged the constitutional division of powers between the federal and provincial governments. In the *Labour Conventions* case, the Privy Council had infamously held that the federal government lacked the constitutional authority to implement treaty obligations which encroached on provincial jurisdiction under section 92 of the Constitution Act 1867. Lord Atkin concluded that “an incursion by the federal government into provincial jurisdiction by means of the treaty power” was “as much an affront to the self-government principle” as any attempt would be for the executive to make domestic laws in a unitary state.²⁸ The result was that only when provinces agreed could the federal government encroach on provincial responsibilities. This delicate constitutional balance was upset with the introduction of the Charter of Rights and Freedoms: “At the most abstract level, the Charter elevates citizenship to a constitutional category. The citizens’ possession of rights

²⁷ Opinion of Advocate General Poiares Maduro, *Heinz Huber v Bundesrepublik Deutschland*, Case C-524/06 [2008] ECR I-09705. Para 18.

²⁸ *Canada (A.G.) v. Ontario (A.G.)* [1937] A.C. 326 (P.C.) [1937] 1 D.L.R. 673 [Labour Conventions].

changes the relationship between the governors and the governed. This is true in the obvious sense that the rights of the latter are judicially enforceable against the rights violations perpetrated by the former. Citizens participate not only as voters influencing the composition of legislatures, but also in their capacity to trump the majority legally by resorting to the courts.”²⁹

Conclusion

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

Such a formulation is a call to arms: “true citizenship, carrying with it a uniform set of rights and obligations” would mean that Union citizenship moves away from the principle that it complements and does not replace national citizenship (the formulation of the Amsterdam Treaty) and recognizes that rights are expansive and not easy to contain. This kind of expansive rights logic is not new and arguably is inherent in the principle of equality.³⁰

²⁹ Alan C. Cairns, “The Charter: A Political Science Perspective,” *Osgoode Hall Law Journal* 30:3 (1992) p.619.

³⁰ Thus, Herwig Verschueren argues: “All EU citizens, including those who find themselves in a purely internal situation, should be able to rely on the prohibition of discrimination based on nationality and they should also be able to invoke the right not to be obliged to migrate if they want to claim the status which applies to those EU citizens who have made use of the right to free movement.” Verschueren, “Reverse Discrimination: An Unsolvable Problem?” in Paul Minderhoud and Nicos Trimikliniotis, *Rethinking the free movement of workers: The European challenges ahead* (Nijmegen: Wolf Legal Publishers, 2009), p.118.

In an essay more than two decades old, entitled ‘Is Reverse Discrimination Still possible under the Single European Act?’, one commentator concluded that “aiming at an internal market, or completing it, while at the same time continuing to attach importance to the crossing of national frontiers is itself contradictory.”³¹ This presages the eventual elimination of the distinction between movers and non-movers, grounded not on economic logic but on the common status of Union citizenship.

Another more recent commentator states boldly that “reverse discrimination is no longer a justified difference in treatment and thus should no longer be permissible in the EC legal system”,³² but then prevaricates by concluding that the EU “is, and will always be, a supranational organization of limited scope and aims and, accordingly, its general principles and rules should only apply to situations that fall within its scope. Therefore, reverse discrimination will be able to fall within the scope of the Community principle of equality only if it conflicts with one of the (broader) aims of the Community and thus comes within the general scope of EC law.”³³ By contrast, I believe that the continuing tensions between the universalizing function of a central citizenship and decentralized sources of local rights highlights the contingent nature of all rights in compound polities and that the promise of Union citizenship is membership in a polity that is not simply multinational but that also supercedes nationality.³⁴

Because it introduces rights that apply directly to individuals and which individuals may invoke, Union citizenship is not simply another international treaty: the rights it introduces, coupled with the nature of the enforcement mechanisms in place to ensure that these rights are respected, mean that EU citizenship approximates Member State citizenship more than would a treaty between

³¹ Hans Ulrich Jessurun d'Oliveira, “Is Reverse discrimination still permissible under the Single European Act?” in *Forty years on : the evolution of postwar private international law in Europe : symposium in celebration of the 40th anniversary of the Centre of Foreign Law and Private International Law, University of Amsterdam, on 27 October 1989* (Deventer: Kluwer, 1990).

³² Tryfonidou, *Reverse Discrimination in EC Law*, 162.

³³ *Ibid.*, 166.

³⁴ Willem Maas, “Migrants, States, and EU Citizenship’s Unfulfilled Promise,” *Citizenship Studies* 12, no. 6 (2008): 583-595.

states to establish supranational organization of limited scope and aims.³⁵ This fits with the historical reality that the introduction of economic rights in the European Community was coupled with a political project, and that the effort to entrench and expand a set of supranational rights into a supranational citizenship reflects the will to create a community of people rather than simply a free market area.³⁶

³⁵ Willem Maas, "Unrespected, Unequal, Hollow?: Contingent Citizenship and Reversible Rights in the European Union," *Columbia Journal of European Law* 15, no. 2 (2009): 270-271.

³⁶ Maas, *Creating European Citizens*, 5, 7.