

**Robert Schuman Centre
for Advanced Studies**

**Contested Boundaries
Citizens, States,
and Supranational Belonging
in the European Union**

LISA CONANT

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**ROBERT SCHUMAN CENTRE
FOR ADVANCED STUDIES**

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in the European Union**

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European Forum

The European Forum was set up by the High Council of the EUI in 1992 with the mission of bringing together at the Institute for a given academic year a group of experts, under the supervision of annual scientific director(s), for researching a specific topic primarily of a comparative and interdisciplinary nature.

This Working Paper has been written in the context of the 2000-2001 European Forum programme on “Between Europe and the Nation State: the Reshaping of Interests, Identities and Political Representation” directed by Professors Stefano Bartolini (EUI, SPS Department), Thomas Risse (EUI, RSC/SPS Joint Chair) and Bo Stråth (EUI, RSC/HEC Joint Chair).

The Forum reflects on the domestic impact of European integration, studying the extent to which *Europeanisation* shapes the adaptation patterns, power redistribution, and shifting loyalties at the national level. The categories of ‘interest’ and ‘identity’ are at the core of the programme and a particular emphasis is given to the formation of new social identities, the redefinition of corporate interests, and the domestic changes in the forms of political representation.

INTRODUCTION¹

In the contemporary European Union (EU), the European Parliament includes a Belgian citizen representing an Italian constituency and an Italian citizen representing a Belgian constituency. A national court's reference to the European Court of Justice (ECJ) allowed a British citizen to circumvent nationality requirements and become a student teacher in Germany. Ongoing legal challenges opened the vast majority of public sector employment to Europeans on the basis of their qualifications rather than their nationality. Even the citizens of countries only associated with the EU successfully invoke ECJ legal interpretation; Algerians and Moroccans have been convincing the highest French courts to grant supplemental pension benefits that the national administration refused to "export" to non-residents. Yet against all this transnational activity, less than two percent of Europeans reside outside their home country within the EU, and an even smaller fraction work in another EU Member State. Both EU institutions and national courts respect states' rights to restrict "sensitive" public service posts, including positions in prisons and the military, to their own nationals. And, EU Member States unanimously agreed to limit a long list of social welfare benefits to residents within their territories, with the approval of the European Court of Justice.

Such discrepancies suggest that shifts toward a more European basis for belonging coexist with enduring commitments to national and territorially bounded communities. Indeed, formal advances toward a supranational community of Europeans have persistently coincided with efforts to preserve national distinctions and resist EU encroachments. Over the course of nearly fifty years of regional integration, a striking range of economic, social, and political rights have developed to accommodate transnational interactions among individuals. Many of these rights are most commonly associated with national citizenship in liberal democratic states. The explicit declaration of European citizenship itself appeared in 1992. What is equally striking, however, are gaps in the content of European rights, official practices that diverge significantly from formal legal obligations, and the limited extent to which individuals try to exercise those rights that transgress traditional boundaries between national societies.

This paper examines the interactions that produce foundations for a supranational form of belonging, yet simultaneously preserve the national character of societies within the EU. National governing elites, migrants, and EU institutions have been creating the basis for the emergence of a European society. But the struggles between these actors, and the responses of broader publics, reflect that the process of reconstructing boundaries and belonging remains contested. Patterns of conflict and cooperation indicate that identification with

Europe and commitments to achieve a genuine community of Europeans are shallow.

National governments initially pursued regional integration in order to promote peace and prosperity on a continent plagued by devastating wars. For the original Member States, the Second World War discredited purely national solutions to European problems and made national preservation appear dependent upon cooperation. Joint control over coal and steel resources, along with market integration, were means to link (West) German interests to western Europe and encourage economic growth and modernization. The exchange and regulation of industrial and agricultural goods dominated the early integration agenda. Visions of European nation-building were largely absent, and arrangements to enable labor migration were a mere side-show that owed their existence to the anticipation of labor shortages.

The European legal provisions Member States adopted to facilitate labor migration did resonate with a small minority of individuals, who migrated across borders to take advantage of economic opportunities outside their home state. Migrants' experience in their new host states revealed major problems with the implementation and interpretation of their European rights. Supranational institutions then served as allies in migrants' efforts to enforce their rights against states. Member States had endowed supranational institutions with enforcement mechanisms in order to protect *themselves* from the negative consequences of other states' cheating. Supranational institutions used these enforcement mechanisms to act on their mandates to promote the European interest, and to expand their own institutional competencies. The European Commission, which oversees the administration of European law and prosecutes violations of it before the ECJ, can use its control over infringement proceedings as a source of pressure to shift the meaning and scope of European provisions. The ECJ, which resolves EU legal disputes, used its authority as the ultimate interpreter of European law to create a system of enforcement that protects *individuals* from the negative consequences of states' cheating. In this system of legal recourse, individuals realize their European rights before national courts. National courts refer disputes about European law to the ECJ, which interprets the relevant EU provision in a preliminary ruling. The national court then uses the ECJ's interpretation to decide the case. This multi-level system results in the enforcement of European law by national courts against national administrations.²

The legal struggle between migrants and Member States offers the ECJ the opportunity to expand a European foundation for belonging. Broad judicial interpretation of narrow provisions on labor mobility has created rights that Member States never intended to honor, and it has extended these rights to populations of beneficiaries that national governments certainly intended to

exclude. Some of the most controversial ECJ case law involves the extension of legal rights beyond citizens of EU Member States to the resident third country nationals of particular states formally associated with the EU: Algeria, Morocco, Turkey, and Tunisia. Yet even as the ECJ builds a set of European rights, it also respects the primacy of national loyalties in some instances. Limited by the parameters of Member State agreements, the ECJ maximizes opportunities for interaction among Europeans but stops short of any effort to challenge forms of exclusion that are linked to core national commitments.

Those ECJ rulings that expand European legal entitlements can involve political and financial liabilities for multiple Member States. Responses to these unanticipated developments, however, cannot be explained simply in terms of cost-benefit calculations. National governments have resisted some European rights that bore few costs, but challenged traditional notions of belonging. A recurring tendency to emphasize residence in the provision of social welfare benefits prioritizes territorial communities over those linked by national citizenship, without any necessary cost advantages. And, despite parallel financial burdens related to social welfare benefits for EU nationals and associated third country nationals, resistance to new entitlements has been strongest in the case of associated third country nationals, who remain largely unrecognized as members of a community of "Europeans."

Official resistance to migrants' claims suggests that national governments remain firmly committed to national communities. Loath to disobey the ECJ flagrantly, national governments usually resist legal obligations indirectly. National administrations obey individual judgments while they refrain from altering their practices. Such evasion can persist for long periods in the absence of sustained legal pressures.³ The European Commission's prosecution constitutes one possible source of such pressure. The other includes relentless litigation before national courts, which increases the costs of evasion and may convince administrations to come into conformity to avoid constant legal challenge.

That neither source of sustained legal pressure is readily available reflects further gaps in the commitment to a supranational community of Europeans. The European Commission does not have sufficient resources to investigate evasive practices exhaustively. As a result, it must rely on private complaints to identify possible infractions, and it must choose among the battles it wishes to fight. Relative to larger issues of European competitiveness and the interests of large firms, migrants rarely make the cut. Many officials dealing with social issues within the European Commission may be genuinely committed to the rights of individual Europeans. Yet, most collective efforts by the European Commission to ameliorate the situation of migrants seem to be responses to a distinct lack of

popular enthusiasm for European integration, and the prospect that future cooperation might fail to win domestic ratification as a result. The first significant efforts to publicize migrant rights followed the ratification crises of the 1992 *Treaty on European Union*.⁴ The European Commission's recent report on the need for a European system of legal aid for cross-border disputes followed the identification of endemic problems associated with individual access to European rights in a large-scale survey, pursued in the context of the negotiation and ratification of the 1997 *Amsterdam Treaty*.⁵

The plight of migrants before national courts further points to a fundamental lack of identification with other Europeans within civil society itself. Migrants face many obstacles to litigation. Insufficient knowledge about European rights, the limited number of lawyers specialized in the legal concerns of migrants, the lack of class actions and legal aid in the European legal system, and the sheer financial costs associated with litigation all prevent migrants from independently generating meaningful legal pressures. Organizational support could help migrants overcome many of the burdens associated with litigation. Organizational resources facilitate awareness, the coordination of promising claims, and forum-shopping for the national judges most receptive to an expansive interpretation of European legal rights. However, the national orientation of most labor and citizen organizations is typically unsympathetic to the situation of migrants. Migrant organizations themselves tend to represent particular ex-patriot ethnic communities and rarely are transnational in membership. Small networks of legal professionals demonstrate their commitment to a supranational conception of belonging by pursuing migrants' rights before national courts and the ECJ. However, even these few individuals and organizations that help migrants appear to be primarily committed to universal rights, rather than regionally contingent forms of belonging. Most who aid migrants assist individuals facing discriminatory treatment within their community, regardless of whether they are of "EU" origin or not. These patterns of civic organization, along with persistently low levels of intra-EU migration, indicate that national societies remain uninspired by the prospect for a supranational community of Europeans.

Finally, on some occasions where legal pressures effectively challenged quiet forms of evasion, national governments engaged in more active forms of resistance to maintain traditional social boundaries. Member States acted unanimously to overrule a line of ECJ case law in order to limit payment of particular social security benefits to residents within their borders. In response to the accretion of rights for associated third country nationals, Member States preempted the ECJ's ability to extend these rights to new populations by collectively eliminating all measures that confer individual rights in the newer association agreements with states of the former Communist bloc. Germany also

sought to preempt ECJ interference by abandoning a proposal for a new social program that might have been subject to European legal obligations and by carefully constructing the operation of another social program to restrict access *de facto* according to traditional territorial criteria. These responses to the ECJ's efforts to construct a more European basis for belonging demonstrate that Member States continue to privilege national and territorial communities over any potential European society.

The paper proceeds in three sections: first, I discuss the extent to which European law reflects an effort to restructure boundaries and the basis for belonging within the EU. Next, I trace how this process has been contested, identifying the evasive practices and overt confrontations associated with efforts to dismantle traditional boundaries and conceptions of belonging. Finally, I evaluate how individuals and civil society have responded to evolving legal obligations. The dominant pattern of interaction among these actors suggests that any new European foundation for belonging remains thin.

EUROPEAN LAW: THE END OF NATIONALITY AND TERRITORY AS A BASIS FOR BELONGING?

European rights that facilitate labor mobility erode the importance of territory and nationality as criteria for inclusion in communities that enjoy equal treatment with respect to employment, residence, social welfare benefits, and taxation. The advent of European citizenship also confers a few supranational political rights, creating a polity that transcends national boundaries to a limited degree. Yet, in this section I will argue that the historic lack of a broader commitment to the development of a transnational European society is evident from the gaps and restrictions associated with EU legal provisions. Both Member States and the ECJ have refrained from challenging central features of national exclusiveness as European rights have evolved. The checkpoints where individuals find themselves interrogated about whether they belong have largely ceased to be connected to the territorial boundaries between Member States. Instead, individuals find their European and national credentials under scrutiny well inside national borders when they apply for public sector jobs, social and medical assistance, social security benefits; admission to higher education, tax exemptions, and the right to vote. At these checkpoints, the markers that identify those who belong remain intimately connected to national origin, economic status, and the location of permanent residence.

The national citizens of Member States owed their first rights to move freely between member countries to the expectation of labor shortages and the potential economic benefits of greater labor mobility. As a result, early European treaty provisions limited free movement rights to those who worked, established

businesses, or provided services.⁶ The first regulation on labor rights even limited the authorization to work in another Member State to situations involving an insufficient number of national workers.⁷ This explicit protection disappeared by 1968, leading to the creation of a formally open labor market in the private sector.⁸ In this new regional market, Member State nationality served as the core marker of the right to cross borders to participate in the economy of another Member State.

Yet an exception for the public service simultaneously restricted transnational employment rights.⁹ The public service exception allowed Member States to ensure that their own citizens served the national community in fields encompassing communications, culture, education, energy, health care, scientific research, and transportation. Migrant challenges to this exclusion resulted in over twenty years of litigation about the appropriate definition of public service.¹⁰ The ECJ's definition significantly narrowed the public service exception, but it nonetheless preserved exclusive access for posts that presume "a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality."¹¹ Subsequent ECJ case law consistently recognized the importance of national ties in the performance of particular occupations. Meanwhile, a stream of ECJ decisions denounced nationality requirements for employment in public health care, education, and civilian research as well as essentially commercial services related to culture, transportation, and public utilities.¹² Despite the claims of Member States, the ECJ did not consider any of these areas to require a core commitment to the state or its national community. The European Commission followed the ECJ's lead. After a series of cases had reinforced a narrow reading of the public service exception, the European Commission made a formal announcement that this exception to the free movement of workers remained justifiable only for high state offices, the judiciary, armed forces, and police and tax authorities.¹³ Together, the ECJ's definition of public service and European Commission's interpretative guidelines simultaneously expanded migrant access to public sector employment and retained exclusive criteria for those occupations that demand national loyalty.

Productive economic status, whether in the private or public sector, historically served as the key marker signifying the right to reside in another Member State. EU provisions did not extend residence rights to those who are not active in the economy until 1990, when commitments to abolish frontier controls intensified as part of the effort to complete the internal market. And national governments limited this right to migrants with sufficient wealth and social insurance to provide for their own needs.¹⁴ Even the formal realization of free movement and residence rights for all Europeans through the *Treaty on European Union* (TEU) in 1992 still depends on financial independence in

practice. EU Member States are not about to welcome any migrant who is dependent upon social and medical assistance (public assistance or “welfare”). EU provisions exempt social and medical assistance from their scope of obligations. The *European Convention on Social and Medical Assistance*, an achievement of the Council of Europe, establishes very limited reciprocal rights for the nationals of all but two EU Member States. Individuals qualify for medical and social assistance outside their home country only by having been legally resident in a host state for 5 – 10 years, depending on their age. Continuous long term residence and close ties within a territory are the key markers of belonging at this checkpoint. Those Europeans who fail to meet these criteria face potential deportation, where their “true” home country must assume responsibility for their needs.¹⁵ Otherwise, EU Member States only care for those Europeans who demonstrate a clear entitlement to live among the national community. Such entitlement derives primarily from previous residence that was independent of social and medical assistance.

Migrants challenge their exclusion from particular social welfare benefits by disputing distinctions between social assistance and social security in EU provisions. EU cooperation on social welfare measures has always been confined to the aggregation, coordination, and export of benefits that individuals become entitled to largely through their status as workers.¹⁶ Labor mobility could only be viable if workers were not penalized for crossing borders to pursue employment and returning “home” to retire. As a result, productive economic status gains migrants access to all potential social security benefits and any other “social and tax advantages” granted to national citizens within a Member State. Economic activity also signals the right to equal treatment for members of the migrant’s family, regardless of their nationality.¹⁷ Through participation in the market, migrants and their families become eligible for full integration into their host community.

The ECJ’s expansive interpretation of both social security and social advantages has significantly broadened migrant rights to equal treatment within national communities. Member States’ failure to provide definitions for social security and social assistance in EU provisions left the ECJ free to construct its own categories, which typically led to the classification of borderline benefits as social security.¹⁸ Meanwhile, an absence of a definition for “social and tax advantages” led the ECJ to rule that migrants are entitled to all advantages “which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective economic status as workers or by virtue of the mere fact of their residence on the national territory.”¹⁹ As a result of this ECJ case law, many social welfare benefits intended for national citizens and residents must be provided to migrants who are neither citizens nor residents. No longer a mere temporary factor of production,

currently or previously active migrants and their families command the support of virtually all community structures.

Despite this expansive interpretation, however, the ECJ simultaneously recognizes a distinction between social assistance and social security that respects fundamental differences in the obligations states have toward national citizens and migrants. According to the ECJ, social assistance encompasses legislation designed to provide benefits to those in *need*, where eligibility is dependent upon an element of individual assessment such as means-testing but not on periods of employment, affiliation, or insurance.²⁰ Such social assistance falls outside the scope of EU obligations, and therefore, will not be exported to follow a migrant's movement across national boundaries. Migrants' qualification to receive such social assistance from a host state will also be dependent upon the long term residence requirements of the *European Convention on Social and Medical Assistance*. Migrants from or in Austria and Finland, the two EU member states that are not parties to this convention, will also find themselves without any entitlement to social assistance.

By contrast, the ECJ categorizes as social security any "legislation which confers on the beneficiaries a legally defined position which involves no individual and discretionary assessment of need or personal circumstances."²¹ Migrants can coordinate and export these benefits regardless of further cross-national migration, and residence of any period will entitle them to such benefits provided by a host state. While these rulings blur distinctions between migrants and national citizens, they also recognize a sphere in which a national community may provide only for itself, i.e. the assistance available to those in "need," who hold no other entitlement to care. And although the ECJ rejects the notion that Member States can categorize their own benefits definitively,²² the ECJ has nonetheless refrained from challenging Member States' efforts to eliminate export requirements for a set of borderline benefits likely to fall under the judicial definition of exportable social security. Here, the ECJ has recognized the legitimacy of limiting benefits that are linked to a particular social environment to residents of the state granting the benefit.²³ For these benefits, which are primarily designed to provide a minimum standard of living for particular categories of persons such as the elderly or disabled, the marker of belonging is permanent resident. Those who leave the immediate community lose their right to such supplemental income support.

EU nationals hold the widest range of entitlements to these economic and social rights, but third country nationals gain access in a limited range of circumstances, further blurring the criteria of belonging in European society. Being the family member of an EU national formally marks an individual as entitled to equal treatment as a European, but only if the EU national has

exercised his or her European legal rights by crossing national boundaries to engage in economic activity in another Member State. The perverse result is that the third country spouses and children of EU nationals employed outside their home states will have more European rights than the third country family members of EU nationals who remain active only in their home states. The migrants' family will possess the right to reside with the migrant, conditional rights to remain permanently in the host state, admission to the educational system on the same conditions as nationals of the host state, the right to work, and access to all social security benefits and other social advantages.²⁴ None of these derived European rights apply to the families of EU nationals who remain in their home countries. Here, exclusively national rules on immigration apply, which often exclude third country family members from access to many of these rights.

The accretion of European rights among a set of associated third country nationals has been one of the most contentious developments for Member States. Association agreements between third countries and the EU articulate conditions of cooperation, with the general intention to foster economic exchange and development. Association agreements with Algeria, Morocco, Tunisia, and Turkey also include references to the nondiscriminatory treatment of nationals from these countries who work within the EU.²⁵ The inflow of workers from these associated states was important to European economies from the 1960s through the mid-1970s, when most of these agreements were adopted. The last agreements with any of these countries that mention equal treatment for workers include Turkish agreements from 1980, after which unemployment replaced labor shortages and demand for less skilled labor declined. Accords with Turkey, which were designed to facilitate potential membership, include the most extensive provisions concerning conditions of employment, access to education, and residence.²⁶ Accords with Algeria, Morocco, and Tunisia, which were concluded after the adoption of European regulations on social security coordination, include the strongest provisions concerning equal treatment in social security.

Migrant demands to realize these provisions challenged the exclusionary practices of national administrations and created the opportunity for the ECJ to extend European rights to resident workers from these countries. In disputes that arose over the application of these provisions before national courts, the ECJ claimed the competence to interpret all of these association texts as European legal measures.²⁷ By ruling that particular provisions of these agreements have legal effects, the ECJ created rights for Turks, Moroccans, Algerians, and Tunisians that are enforceable before national courts.

ECJ interpretation of these association texts has simultaneously conferred and denied a complex variety of rights. ECJ decisions that particular provisions

from Turkish accords were insufficiently precise or reliant upon further implementing measures denied Turkish nationals the right of free movement as workers and nondiscriminatory access to some social security benefits.²⁸ In these respects, Turks remain excluded from the community of mobile Europeans who enjoy access to employment and portable social security across the EU. However, the ECJ's case law on Decisions of the Association Council significantly expanded Turks' employment and education opportunities and granted exceptional European residence rights. On the basis of Turkish nationals' participation in the labor market, the ECJ granted the right to renew existing work permits, switch employers, and ultimately apply for any position in the labor market. The ECJ also created specific rights regarding access to employment by the relatives and children of Turkish nationals legally working within the EU.²⁹ Finally, the ECJ's linkage of the right to work with the right to reside created a legal right of residence for Turkish nationals. This introduction of a right to residence based on European law privileges Turkish nationals relative to all other third country nationals, who are exclusively subject to national measures on residence for periods longer than ninety days.³⁰ With respect to residence then, Turks with a solid record of labor market participation belong to Europe more than any other "foreign" group.

Meanwhile, the ECJ's conferral of legal effects to provisions of the association agreements with the Maghreb states grants nondiscriminatory access to social security schemes relative to host state nationals. As a result, Moroccan, Algerian, and Tunisian workers and their families essentially are entitled to the full range of social security benefits granted EU nationals under existing regulations.³¹ In one case, the ECJ granted derived rights to the spouses of this set of third country nationals that it had previously denied the spouses of EU nationals.³² To avoid the situation in which third country nationals would enjoy superior protection to EU nationals, the ECJ overturned its previous decision, granting the broader entitlement to EU nationals as well.³³ In this instance, inclusion of a group clearly on the edge of the community led to the expansion of rights among those more widely accepted as Europeans.

ECJ legal interpretation in this area poses the greatest challenge to traditional conceptions of boundaries and belonging in the EU. Association agreements, which Member States found expedient at one time, and whose application they fully intended to control, now provide the foundation for legal claims among individuals who are not the national citizens of any EU Member State. Migrants from countries conventionally considered to be outside of Europe are formally entitled to be treated as Europeans in important, if limited, spheres of life. Belonging, not unlike EU nationals, ultimately depends on national citizenship and economic status. Member States' decisions to limit the exportability of particular social welfare benefits, and the ECJ's acceptance of

this, has rendered belonging dependent upon permanent residence for many associated third country nationals as well.

The evolution of European political rights has trailed the development of economic and social rights and remains characterized by fundamental gaps in the extent to which Europeans belong to any supranational political community. The national citizens of Member States acquired their first “European” voting rights when direct elections to the European Parliament began in 1979. The selection and representation of Members of the European Parliament (MEPs) became truly supranational after the 1992 TEU granted EU nationals the right to vote and stand as a candidate in these elections in the Member State of residence, regardless of their nationality. The TEU linked this right to the introduction of the concept of “European citizenship.” The other important political right this European citizenship confers is the right to vote and stand as a candidate in municipal elections where one resides. Meanwhile, the right to vote in national elections remains regulated by national rules that typically restrict this right to citizens, regardless of their residence. Member States can also impose minimum residence periods to qualify for voting rights in municipal and European Parliament elections in the event that “foreign” EU nationals constitute a disproportionately high (defined as 20 percent) percentage of the local population.³⁴ Trust in European citizens apparently remains dependent on their being a small minority or long term residents. The supranational basis for European citizenship is also very shallow: individuals must be the nationals of an EU Member State to be European citizens, and this nationality is determined exclusively according to the national laws of each Member State. The 1997 *Treaty of Amsterdam* explicitly declares that European citizenship complements rather than replaces national citizenship, confirming two layers of belonging that preserve national distinctions.

Protection of more fundamental human rights in the EU has been limited and indirect, based primarily on the Council of Europe’s *European Convention on Human Rights* and the national constitutional traditions of the Member States. The ECJ has incorporated human rights principles from both of these sources in its case law. Member States confirmed the European Community’s respect for human rights in the preamble to the 1986 Single European Act (SEA), recognized the two traditional sources of human rights protections in the TEU, and extended the ECJ’s jurisdiction over these areas to EU actions in the *Treaty of Amsterdam*. By the conclusion of the negotiations for the Nice Treaty, Member States also announced an “EU Charter of Fundamental Rights,” but this Charter is merely a political declaration that carries no legal force. National constitutions and the Council of Europe’s Convention have protected most Europeans’ basic human rights relative to their own national governments. But protection against the actions of the EU itself has been much more precarious, traditionally dependent on the ECJ interpreting non-EU texts on fundamental rights and subject to

extremely restrictive standing rules. Rights to petition the European Parliament, and the right to contact the new European Ombudsman, help Europeans resolve their grievances toward EU institutions but are hardly a substitute for a set of legally binding rights relative to the EU. Freedom from the state, among the first political rights to emerge in liberal democratic states,³⁵ may be the last right Europeans achieve as citizens of the EU.

REALIZING THE SUPRANATIONAL COMMUNITY? DISCREPANCIES BETWEEN THE IDEA AND PRACTICE OF EUROPEAN BELONGING

The idea of European rights as a set of rules that demonstrate a broader basis of belonging diverges from national practices that retain traditional boundaries between communities. Although most national governments eventually rescinded nationality restrictions on most public sector employment, they avoided making these necessary legislative changes for nearly twenty years and continue to evade obligations associated with EU nationals' access to public sector employment today. And, despite consistent reinforcement of migrants' legal rights, national administrations continue to limit access to many social welfare benefits on the basis of territorial and national criteria. Member State responses reflect the extent to which national governments fail to recognize migrant EU nationals and associated third country nationals as members of a community of Europeans who deserve equal treatment.

Public Servants, Public Sector Employment, and the Contested National Bond

Member States have been reluctant to honor the implications of ECJ case law that granted all EU nationals access to most fields of public sector employment. Evasion prevailed during the decade after the ECJ issued its narrow definition of the public service exception to the free movement of workers in 1980. Two years after this initial suit against Belgium, the Belgians unsuccessfully defended the status of canteen staff and gardeners as public servants. To justify their restrictive employment practices under European law, they essentially had to claim that these positions, among others such as plumbers and electricians, somehow required the national bond or were closely connected to the exercise of official authority. The French apparently thought that French nurses had more need of the national bond than Belgian nurses, whose status as public servants had been denied four years before the French lost their case at the ECJ. The French also seemed to think that their high school teachers required more of a national bond than student teachers in Germany, where the ECJ had denounced nationality requirements six years earlier. Italians suffered from a similar delusion that the foreign language instructors in universities somehow qualified under the public

service exception. Such evasion persisted after the European Commission issued its recommendation on this issue in 1988, designed to promote free movement in areas that would clearly fall outside the range of legitimate protection. Member States ignored the European Commission's guidelines, and the ECJ continued to hear a stream of disputes about nationality clauses in sectors it had opened to EU nationals well into the 1990s.³⁶

As the steady trickle of migrant challenges to exclusionary practices persisted, the European Commission initiated a systematic program of prosecution. Ten Member States faced formal infringement proceedings by July 1990. The only two Member States without apparent violations included Ireland and the Netherlands.³⁷ The Member States' response to these legal pressures was largely cooperative. With the exception of Luxembourg, which initially "...replied that it did not envisage taking any special measures of the kind desired,"³⁸ all targeted Member States proposed reforms to align their official practices with the European definition of public service. By late 1994 Belgium, Denmark, France, Germany, Italy, Portugal, Spain, and the United Kingdom amended domestic legislation to abolish nationality conditions for at least some categories of public sector employment.³⁹ French and German reforms were not confined to fields targeted by the European Commission, but abolished nationality requirements for employment across broad fields of public service.⁴⁰ Yet Germany also continued to reserve appropriate public service positions for German citizens alone.⁴¹ And the French opening did not eliminate all potentially questionable restrictions, as continuing infringements against French discrimination in shipping and water transport demonstrated.⁴² The United Kingdom rescinded one of its few public sector restrictions, abolishing nationality requirements for certain categories of researchers, to meet European obligations.⁴³ Greece introduced a proposal to open public sector employment to EU nationals, but did not adopt it.⁴⁴ The ECJ subsequently denounced remaining restrictions in Greece and Luxembourg, and the European Commission continued infringement proceedings.⁴⁵

Despite all this reform and prosecution, however, the European Commission continued to identify obvious violations in national restrictions on positions that have nothing to do with the exercise of official authority, such as tourist guides and cellists, in addition to positions already deemed open: language assistants, public education, university instruction, postal delivery, telecommunications, radio and television broadcasting, airlines, shipping, surface transport, urban and regional transport, civilian research, medical care, and the distribution of water, gas, and electricity.⁴⁶ Most of these infringements targeted Luxembourg, which had insisted that it would not amend its legislation, as well as two of the usual suspects: Belgium and Greece. Yet the European Commission also had to use infringement proceedings to combat ongoing evasion in Member

States that had already adopted legislative reform to open public sector employment to EU nationals, including France, Italy, Spain, and the United Kingdom.⁴⁷ The ECJ consistently denounced blanket nationality restrictions throughout these infringement proceedings.⁴⁸ Reforms in Belgium ultimately depended on the Belgian *Conseil d'État's* (Council of State) declaration that European provisions on the free movement of workers were supreme to contrary provisions of the Belgian constitution.⁴⁹ Vigilant prosecution has been critical to extinguish restrictions in the other two laggards since Luxembourg relented only after the European Commission decided to pursue a daily penalty payment of 14,000 euro for continued noncompliance, and Greece still faces a referral for a daily penalty payment of 57,400 euro.⁵⁰

Migrant legal challenges and prosecution by the European Commission continue to identify lingering evasion. Long established and repeated ECJ prohibitions against discrimination in pay and working conditions for EU nationals employed in the public sector of a host state fail to induce changes in official practices.⁵¹ After opening much public sector employment to EU nationals, Member States began to discriminate against migrants by disregarding their experience in the public sector of other Member States. Cases in 1997 and 1998 indicate that the Dutch, Greek, and German governments expected that they could ignore professional experience or periods of employment from other Member States even though the ECJ had denounced such discrimination in an Italian case in 1994.⁵²

The contradictions between national governments' long term evasion, eventual willingness to reform restrictive legislation, and simultaneous evasion regarding other forms of discrimination suggest a number of problems with European commitments. Resistance could potentially be attributed to a tendency to use public sector employment to absorb national labor during periods of high unemployment or to the traditional importance of fields such as education to national socialization. Yet, national governments did not face any real threat of being inundated by "foreign" applicants. Very few EU nationals have ever been interested in exercising their right to work outside their home state, in either the public or private sector. The likely pool of qualified "foreign" candidates is miniscule in most fields of public sector employment, which is evident from both the low levels of migrant employment in those states with relatively open public sectors and the lack of opposition to reform by public sector unions in states with traditionally discriminatory hiring practices.⁵³ National governments simply could not be bothered with the hassle of legislative reform in order to help a small set of migrants, who would not even be able to register their gratitude with a vote in national elections. Persistent prosecution and migrant legal challenges, which held the potential for EU fines and financial liability in national courts by the early 1990s, undoubtedly changed most governments' attitudes toward the burden of

legislative reform.⁵⁴ Keeping a few migrants out of public sector employment was certainly not worth recurrent legal recriminations, with their potential for financial penalty. As a result, national governments eliminated most restrictions that had been clearly established as violations. Meanwhile, they left other remaining discriminatory practices intact, waiting for serious legal pressures to emerge.

Migrants, Residents, and Contested Access to Social Welfare

ECJ interpretation on nondiscriminatory access to social welfare benefits has been subject to enduring resistance by national governments. In the case of social and tax advantages, resistance manifests itself primarily as an evasive effort to exclude non-nationals from support conventionally offered to residents. Meanwhile, more active opposition to the export of social security benefits appears to privilege those individuals who remain within the state's territory. These contradictory trends are united in their effort to exclude non-nationals, who are least likely to meet the qualifying conditions attached to many social and tax advantages and are most likely to migrate after retirement or the onset of a disability.

With respect to social and tax advantages, the consistent and extensive ECJ case law denouncing virtually all forms of discriminatory treatment faces quiet evasion. Similar to the stream of parallel disputes over public sector employment, migrants generate a series of challenges that illustrate how national governments ignore prior judicial prohibitions against discrimination in the conferral of all social and tax advantages.⁵⁵ This trail of ECJ cases results largely from disputes over qualifying conditions, which frequently act to exclude non-nationals. National governments control access to benefits by attaching qualifying conditions without regard to the situation of migrants. When faced with a claim of discriminatory access, national administrations defend their rules in the hope that restrictions will escape censure. Yet any anticipation that qualifying conditions will fall outside the scope of ECJ interpretation on social or tax advantages is generally unjustified. Steve Peers observes that

Indeed, it is very clear that measures are still usually classified as 'social advantages' by the Court even if they are only available to residents meeting certain conditions... in the Court's practice, government measures will be classified as 'social advantages' if they are available to workers as workers, to residents as residents, *or* to specified classes of persons as specified classes of persons, unless the class of person in question is defined by a criteria inherently and inseparably related to nationality of a Member State. Since there are a paucity of such measures, the test ... laid out in *Even* has been met consistently except for military-related benefits...⁵⁶

In addition to the trail of individual challenges, the European Commission's 1997 report on the application of European law identified many overt and covert forms of national discrimination related to traditional social and tax advantages. The European Commission targeted potential and established violations in Belgium, France, Germany, Greece, Luxembourg, the Netherlands, Spain, and the United Kingdom. Much of this discrimination affects access to conventional advantages: access to employment for migrants' children, supplementary allowances for large families, early retirement schemes for frontier workers, study grants for workers, pension transfers, income tax, non-resident taxation, and social welfare benefits and services.⁵⁷ This enduring pattern of legal challenge is consistent with Member States' efforts to evade legal obligations. National administrations continue to apply discriminatory practices, which periodically inspire individual litigation before national courts or prosecution by the European Commission. However, unlike the situation with public sector employment, legal challenges have remained sporadic. Formal prosecution has been piecemeal, falling short of the systematic enforcement effort the European Commission engaged for public sector employment.

With respect to social security benefits, national governments supplemented evasion with more active forms of resistance to avoid their obligations to export particular types of social security. Evasion prevailed in this area until the European Commission prosecuted a long-standing French violation, which inspired the French government to negotiate an amendment to the existing European regulation in order to exempt particular benefits from exportation. In this case, national governments legislated unanimously in the Council of Ministers to overrule the ECJ's categorization of portable social security, creating a list of special non-contributory benefits that need not be exported. Meanwhile, ECJ case law on exportability contributed to the failure of one popular social measure and the careful design of another in Germany, where leaders sought to preempt ECJ interference.

ECJ judgments first classified a set of non-contributory Belgian benefits as social security, even though the relevant allowances were supplemental income support that seemed similar to social assistance. The ECJ's classification qualified the benefits for export, which Belgium contested as inappropriate. Meanwhile, the French recognized that a set of their benefits were analogous to the exportable Belgian benefits, but they continued to administer their benefits according to purely national criteria, which included residence and nationality conditions.⁵⁸ Even when a preliminary ruling identified French supplemental pensions as an exportable social security benefit in the 1974 *Biason* case,⁵⁹ the French authorities admitted no obligation to rescind restrictive national criteria. The French held that *Biason*, considered relevant only to the specific case, lacked consequences for the general administration of benefits. The French then sought

to solidify their position in discussions to amend the existing European regulation.⁶⁰

Over a decade later, the French faced a further set of individual challenges related to supplemental pensions in the 1987 *Giletti* case.⁶¹ Once again, the ECJ required exportation and the French refused to reform their legislation or issue new orders to institutions administering the funds.⁶² The European Commission pursued infringement proceedings against France, challenging the refusal to export and French nationality conditions before the ECJ in 1990 and 1991.⁶³ Meanwhile, in the 1991 *Stanton Newton* case,⁶⁴ the United Kingdom attempted to defend residence conditions for a mobility allowance whose criteria clearly fell under the ECJ's definition of social security. The European Commission cited the entire European case law on non-contributory benefits of mixed type and prevailed before the ECJ.⁶⁵

Having definitively lost before the ECJ, national governments retaliated by successfully orchestrating legislative overrule. Within a year of the British preliminary ruling and direct ECJ condemnation of French law, the Council of Ministers reached unanimous agreement to amend the existing European regulation in order to exempt a set of special non-contributory benefits of mixed type from the export requirement associated with social security.⁶⁶ Legislative overrule of the ECJ is conventionally considered to be next to impossible wherever unanimity is necessary because the interests of at least one Member State are likely to coincide with the ECJ, leading to a veto that maintains judicial interpretation.⁶⁷ Yet, this argument assumes the existence of contending national interests or competition between democratic constituencies. The ease with which Member States reached unanimous agreement in this case reflects the sorry position of migrants within the EU. Migrants, who are effectively excluded from the national polity in their host state, cannot generate any counter-vailing pressure on host governments themselves. Even the loyalty of sending countries to their emigrant nationals is shallow: although Spanish consular offices provide legal representation for some of their nationals' disputes in other Member States, Spain refrained from exercising its veto rights to help a sizeable group of migrant Spaniards in this instance. And national governments did not need to worry about offending any domestic constituency by excluding migrants from particular social security benefits. The Member States overturned the ECJ with secondary legislation in this instance, which did leave them vulnerable to judicial overrule on the basis of the treaty, which is considered the supreme source of European law. However, a migrant challenge with this precise claim failed to convince the ECJ as well. The ECJ chose to legitimate the linkage of particular benefits to permanent residence within the community granting the benefit, regardless of the discriminatory effect this would have on migrants.⁶⁸

During this process of legislative overrule, the German government refrained from exempting any particular German benefits from export. Since it could not predict the negative outcome of the anticipated treaty-based challenge to the revised regulation, the German administration instead structured domestic programs in order to preempt ECJ interference. Germany had been spared the need to export supplemental income schemes largely due to criteria associated with qualifying conditions and the administration of benefits through local and regional (*Land*) authorities. As a result, German leaders felt confident that existing German programs for social assistance would retain their status as social assistance and avoid exportation obligations. The German government then took precautionary steps to ensure that proposals for two new social benefits, which concerned a supplemental pension scheme and long term care insurance, would not result in further export obligations.

The German government abandoned its initiative for a supplementary pension scheme, the *Fink Modell*, despite the substantial support this program enjoyed from both Social and Christian Democrats. The *Fink Modell* was designed as a means to supplement the income of retirees who fell below the level that normally qualifies a resident for social assistance, relieving poor pensioners of the stigma of standard social assistance programs. German leaders opposed exportation of this type of benefit because they intend it as a means to assist individuals in coping with the cost of living in Germany,⁶⁹ which was essentially the objection that the French, Belgians, and British had to the exportation of their supplemental income programs as well.⁷⁰

The cancellation of the *Fink Modell* represents a preemptive action: the prospect of future ECJ interference altered the course of German policymaking. A country that traditionally promotes a high level of social protection abandoned a preferred new benefit scheme in order to avoid the imposition of extra-territorial obligations. This reaction, a choice to restrict the expansion of social protection rather than be compelled to export it, reflects a frustrating dilemma for those committed to improving social welfare. Ostensibly "progressive" case law contributed to a distinct lack of progress for poor pensioners within Germany. It is precisely such ECJ case law that has invoked the ire of high level German politicians, from former Social Minister Norbert Blüm to former Chancellor Helmut Kohl. German leaders called for "judicial restraint" and assailed the ECJ for overlooking the practical and financial consequences of its judgments.⁷¹ Yet the resistance to export requirements across Member States also reflects a fundamental lack of commitment to provide a minimum standard of living for Europeans. The cost of living certainly varies across Member States and the associated countries whose nationals are entitled to social security, but the generosity of richer states need only extend to those migrants who "earned" their

right to social security through prior contribution to the national economy. But no such magnanimity extends to these migrants.

In the case of long term care insurance (*Pflegeversicherung*), German officials hoped to preempt the exportability of benefits by categorizing program benefits to fall outside European export obligations. The German Care Insurance Law (*Pflegeversicherungsgesetz*) defined all of its benefits as “benefits in kind,” which are not subject to export obligations under European law. Social security programs offering benefits in kind must provide services for resident EU nationals as long as they have been insured against the relevant risk in a social security scheme of any other Member State. By contrast, social security programs that offer direct “cash benefits” must export payments to entitled recipients, regardless of their residence. German Care insurance offers both direct payments to institutions providing care and “care allowances” to individuals who receive care from family members in their own home. Direct payments to institutions providing care clearly function as a benefit in kind, but care allowances look suspiciously similar to traditional cash benefits. By labeling care allowance as a benefit in kind, however, Germany avoided the burden of covering care for migrants who have worked and paid social security contributions in Germany, but live in another Member State.⁷² Once again, German policymaking responded to ECJ decisions, but the intent was to avoid standard European legal obligations. Rather than yielding to European prohibitions against territoriality and national discrimination, Germany structured its rules to confine benefits within national boundaries.

In this case, however, migrants’ challenges to their obligation to pay contributions for a benefit from which they would be excluded led the ECJ to strike back. The ECJ ruled that German care allowances possess features similar to cash benefits, regardless of their classification in domestic legislation as benefits in kind.⁷³ Similar to its position on European definitions of public service and social security, the ECJ imposed its European definition of a cash benefit, with all of its export obligations. As a result, individuals working in Germany, but living elsewhere, must pay contributions, but they also have a legal right to export care allowance abroad.

Although Germany’s individual effort to territorialize benefits failed, the collective success of Member States in confining particular benefits within their borders, along with a broader trend to emphasize local provision of services, may ultimately have the unintended consequence of convincing migrants to remain in a host state that they would otherwise leave after retirement. The end costs to the government might be the same as if migrants had left the national community and exported their benefits. The ultimate cost of these policy decisions may even be greater than the costs of exportation because migrants choosing to remain would

qualify as long term residents for social and medical assistance, and their demand on this assistance would only be likely to increase with age and distance from family members in the home state. National governments rely on migrants' stronger attachment to their home countries, and unwillingness to remain permanently within a host community, when they anticipate they will save a dime with their export restrictions.

Evasion may triumph in this area because the European Commission has not committed to any systematic effort to prosecute discriminatory practices. Unlike the case of public sector employment, institutional support for migrants' legal entitlements to social welfare benefits has not materialized. The European Commission has even cautioned against expansions in statutory social benefits, arguing that the costs of social protection schemes can have a negative effect on employment and growth.⁷⁴ National governments, meanwhile, show no signs of a growing European commitment to greater social equality. Member States have demonstrated their intention of maintaining firm control over social security coordination by continuing to require unanimity, despite the broad expansion of qualified majority voting since the SEA in 1986.⁷⁵ Interests in social security cooperation were always linked tightly to the interest in promoting labor mobility. With the recent and exclusive exception of highly skilled labor, any interest in labor mobility diminished shortly after Member States laid solid foundations for equal treatment in European provisions due to the shock of the oil crisis and the recession and unemployment that followed. Economic decline and restructuring during the 1980s increased unemployment and contributed to large-scale redundancies among migrant workers in particular. Recent discussions about the potential need for an active labor immigration policy in both national and EU contexts narrowly focus attention on the emerging information economy's demand for highly skilled technical workers and the lack of home-grown talent.⁷⁶ Once again, economic status appears as the core marker of belonging for those outside traditional national communities.

Third Country Families, Associated Nationals, and Contested European Membership

Perhaps the clearest manifestation of the contested nature of European belonging is evident in conflicts over the place of non-EU nationals in European society. Discriminatory practices toward migrant EU nationals, although endemic with respect to public sector employment and social welfare benefits, pale in comparison to the exclusion that third country nationals experience within the EU. The European legal rights enjoyed by third country nationals encounter the most pervasive and intense official resistance. Yet, these peripheral migrants find allies, not only in the ECJ, but also in national courts and domestic organizations committed to the individual rights of everyone resident in their communities. It is

in the treatment of third country nationals that struggles within the state appear most contradictory, and membership in European society most confused. In addition to flagrant evasion, conflict over third country nationals' European rights generates bizarre paradoxes. National governments find themselves forced to treat the third country family members of EU migrants better than the third country family members of their own national citizens. Meanwhile, the nationals of associated states with no likely prospect of EU membership, such as Algeria and Morocco, have more European entitlements than the nationals of more recently associated states that are slated to enter the EU within this decade, such as Poland and Hungary.

Realizing the European rights of migrant EU nationals' families remains among the most persistent problem areas, particularly if dependants are third country nationals. Although migrants' families enjoy rights to equal treatment regardless of their nationality, national administrations frequently treat these individuals as if they were simply foreigners without any special legal rights.⁷⁷ Of course, these individuals could be treated as "regular" foreigners if they were merely related to the host state's own citizens. The 1986 *Gül* case⁷⁸ exposes both a clear violation of a basic right under European law and the contradictory position of third country family members in European society. German authorities tried to restrict a Cypriot physician, Gül, from obtaining a regular permit to practice medicine in Germany. Married to a British national working in Germany, Gül had received a temporary permit to practice medicine while training as an anesthesiologist in Germany. European law explicitly provides spouses of employed EU migrants with access to employment, and does not exclude them from particular professions. Spouses of migrant workers must simply demonstrate that they have the appropriate qualifications. Since Gül completed a German anesthesiology residency, he satisfied these requirements. Nonetheless, German officials claimed that European law did not provide the right to work in a particular profession such as medicine, insisted that non-EU nationals only receive temporary permits, and argued that renewal was not desirable because many German physicians were unemployed. The German observations even attempted to connect restrictions on the freedom of movement due to public health grounds to the public health sector, even though these exceptions are clearly designed to restrict the movement of diseased individuals rather than the movement of physicians. The Germans lost the case on all grounds.⁷⁹ Yet, had Gül been married to a German citizen who had always worked in Germany, the German government would have been legally justified in its restriction.

Member States have also responded to ECJ case law on the legal rights of associated third country nationals with evasion and preemptive acts that have produced a similar paradox. National governments contest the very principle that association agreements are part of the European legal order that confers

enforceable rights.⁸⁰ As a result, national administrations make the most strenuous efforts to evade these migrants' legal claims. In response to challenges, national governments have complied with individual decisions and avoided reforms to accommodate the rights of associated third country nationals. Furthermore, the Member States acted unanimously to preempt future judicial expansion of individual rights by eliminating measures for the equal treatment of migrants in all new association agreements.

With respect to evasion, Germany distributed ECJ case law granting residence and employment rights to Turkish nationals to competent authorities with instructions to interpret the legal decisions as restrictively as possible. Authorities should only respond favorably to instances with virtually identical factual conditions, which results in the need to bring new legal challenges for broadly parallel situations.⁸¹ As a result, national courts have been busy resolving over 200 disputes related to these rights.⁸² The French response to ECJ decisions that grant equal treatment in social security to associated third country nationals from Morocco and Algeria was almost identical to its handling of the export of supplemental income benefits for EU nationals. French authorities first ignored the implications of the ECJ's 1991 *Kziber* ruling,⁸³ which originated from a Belgian court. The French continued to refuse to rescind their general exclusion of associated third country nationals after an Algerian national successfully appealed for a supplemental income benefit from the French *Cour de Cassation* in 1991, who ruled according to the ECJ's *Kziber* decision without making any reference to it. French authorities treated these judgments as individual cases that lacked consequences for administrative practices writ large.⁸⁴ The French administration continued to resist reforms after a French court received a preliminary ruling on the case of an Algerian national in 1995.⁸⁵ French authorities ordered the offices distributing supplemental income benefits to provide benefits only to those individuals who initiated proceedings in French courts.⁸⁶

Such evasion is formally legitimate under European law because ECJ decisions officially apply only to the parties addressed by specific rulings. However, what is striking about this instance of evasion is that France was also defying its own constitutional court. Different agents of state power are acting against each other here. In January of 1990 the *Conseil Constitutionnel* had declared the denial of supplemental income schemes to nationals who have no special bilateral social security rights to be unconstitutional. This decision affects all foreigners in France, not just associated third country nationals.⁸⁷ In response to what they saw as an egregious breach of the law, organizations that assist migrants helped bring over eighty-nine cases for associated third country nationals before French courts. At least fifty-nine of these decisions accorded benefits, while fourteen rejected the applications.⁸⁸ Meanwhile, the French

administration remained content to consider specific cases as they proceeded through courts, awarding benefits under particular judicial orders for individual applicants.⁸⁹ In response to criticisms of this practice, French officials observed that the extension of social security rights to associated third country nationals would have strong, damaging implications for public finances.⁹⁰ But, the French state acted against itself yet again, when the *Conseil d'État*, which is essentially an extension of the national administration itself as the supreme administrative court, denounced such administrative practice as an abuse of power and annulled the relevant administrative orders.⁹¹

In addition to this evasion, Member States collectively preempted ECJ intervention in this area for all new association agreements with third countries. Most notably, the Member States eliminated migrant rights in association agreements with central and eastern European countries, including those scheduled for eminent EU membership. Member States refrained from including provisions for the equal treatment of migrant workers from prospective EU Members such as Poland, the Czech Republic, Slovakia, Hungary, Bulgaria, Romania, and Slovenia.⁹² The Member States even revoked nondiscrimination measures from a cooperation accord with Yugoslavia in 1991.⁹³ These actions are the national governments' collective response to the ECJ's interpretation of accords with Turkey, Algeria, Morocco, and Tunisia.⁹⁴ The Member States have certainly made their distaste for the ECJ decisions clear. They have also rendered the citizens of east and central Europe less European than the citizens of states many would classify in the Middle East. Of the four states with association agreements conferring migrant rights, only Turkey is a potential future member of the EU. And Turkey is virtually guaranteed to be granted membership later than countries in central Europe. Such preemption is hardly a warm welcome to prospective EU nationals.

The European Commission has not extended much of a welcome to associated third country nationals either. Instead of advocating that the ECJ confer legal effects on social security measures in the accords with Morocco, Algeria, and Tunisia, it argued for the necessity of further (intergovernmental) measures of the Association Council.⁹⁵ And, despite rampant evasion of consistent ECJ legal interpretation, the European Commission has only bothered to prosecute one likely infringement in this field, a case against France regarding social security benefits for Algerians, Moroccans, and Tunisians.⁹⁶ Yet, the European Commission did make one constructive proposal related to all third country nationals' rights within the EU: it suggested the rather minimalist humanitarian idea of extending social security benefits to cover urgent medical care for *insured* third country nationals who are briefly visiting a second Member State. Even this the Member States rejected.⁹⁷ Apparently, national governments would rather let third country nationals drop dead abroad than concede that social

security coordination for third country nationals is covered under legally enforceable European provisions.⁹⁸

In summary, Member States have responded to the ECJ's efforts to abolish national discrimination among Europeans with considerable resistance. National governments persistently attempt to evade the broad application of European legal rights to migrants within the EU. When pressed to bring practices into line with ECJ interpretation, Member States have reacted by adopting measures to overturn or preempt unwelcome migrant rights. These negative responses are consistent with patterns of interest to the extent that many legal entitlements entail financial costs while benefiting individuals who cannot even contribute to the reelection of national governments. Yet resistance also reflects the importance of traditional conceptions of identity, independent of overt economic or political interests, because 1) national governments long evaded and continue to evade virtually costless rights associated with public sector employment, and 2) they resist benefits for associated third country nationals to a much greater extent than benefits for EU migrants, despite parallel costs associated with rights for each population. As the European Court of Justice attempts to blur national boundaries by creating transnational European rights and obligations, Member States actively maintain and reconstruct territorial and national borders through their law, policy, and practice.

NO STAKE IN EUROPE? INDIVIDUALS AND CIVIL SOCIETY BETWEEN NATIONALIZED AND UNIVERSAL COMMUNITIES

The EU has the potential to create a European foundation of belonging for a population of approximately 300 million EU nationals. Yet, individuals have not been very responsive to their European entitlements throughout the history of integration. Only a tiny minority of EU nationals has ever exercised the free movement rights that provide them equal access to opportunities available in other Member States. According to the most recent census figures, only 4.9 million EU nationals live in a Member State other than the country whose nationality they possess, and only two million of these migrants are employed.⁹⁹ With the exception of substantial Italian migration in the early days of European integration, most intra-EU migration flows are limited to border regions.¹⁰⁰ Expectations of large scale migration from other southern Member States were never realized. This is partly due to delayed implementation of the free movement rights of workers from poorer new member countries such as Portugal and Spain. Free movement of goods, whether intentional or not, then tends to substitute for migration within the EU. Meanwhile, migration from non-member countries generally has outpaced migration of EU nationals.¹⁰¹ The population of associated third country nationals who possess explicit European legal rights, at 4.15 million, alone almost matches the population of migrant EU nationals. This group of non-

EU nationals includes residents of Turkish (2,300,000), Moroccan (1,000,000), Algerian (600,000), and Tunisian (250,000) nationality.¹⁰² Combined, the two populations of migrants who legally belong to Europe total approximately nine million, which constitutes slightly less than 3 percent of the entire population base within the European Union.

This migrant population, to the extent it is organized at all, is overwhelming organized in the form of associations representing single ethnic groups. Associations of migrants of the same national origin organize cultural and social activities and provide assistance to each other primarily in the form of general information about housing, employment, and vocational training within local communities.¹⁰³ Very few associations have a genuinely transnational membership. Exceptional cases include the European Union Migrants Forum and Euro-Citizen Action Service. Moreover, of the tiny minority of associations that provide legal assistance to migrants, virtually all provide this assistance without regard to the migrant's national origin. EU nationals do not hold a privileged position, except with the Euro-Citizen Action Service and the recently launched Free Movement Solidarity Fund. Otherwise, those who provide legal counsel to migrants deal predominantly with asylum, human rights, third country immigrants, and racism.¹⁰⁴ The small numbers of lawyers and associations that bother to help migrants overcome exclusion appear to be committed to the equal treatment of all individuals within their communities. Most attempt to enforce universal rights, rather than the particular rights of those with European credentials.

The resource constraints these associations face suggest that mobilizing civil society behind the equal treatment of migrants is difficult. Few organizations possess the resources to deploy litigation at all. Groups that have supported litigation to help migrants in the EU include the Immigration Law Practitioners' Association (ILPA) of London and *Groupe d'Information et de Soutien des Travailleurs Immigrés* (GISTI) in France. The Spanish Consulates have supported some litigation on behalf of migrant Spanish nationals as well. Litigation is usually very challenging for non-governmental organizations to carry out. GISTI relies overwhelmingly on volunteers and has limited resources to pursue litigation. Simply finding lawyers with sufficient expertise in European employment and social security rights constitutes a major problem.¹⁰⁵ The financial base of the new Free Movement Solidarity could be wiped out in a single case if appeals through one of the more expensive national legal systems were involved.¹⁰⁶ The paucity of organizational resources reflects the traditionally marginal position of migrants: migrant labor is concentrated in basic manufacturing in Germany; the traded services industry, construction, and public works in France; and basic services, excluding public administration, in the United Kingdom.¹⁰⁷ Meanwhile, most labor organizations and civic groups that represent individual interests focus on national communities and have not yet

engaged transnational or migrant issues seriously. In this respect, civil society in Member States remains overwhelmingly nationalized.

Employers are a potential champion of migrant rights since nondiscrimination measures expand the potential pool of qualified candidates. However, European employers in both the public and private sectors have remained relatively uninterested in promoting the free movement of workers. Serious interest in greater labor mobility has a very narrow focus on highly qualified labor.¹⁰⁸ This does not generate much political pressure for reform because highly qualified workers and their employers can generally be easily accommodated through piecemeal exceptions to existing practices. Demand for lower skilled labor, where most migrant male labor has been concentrated, has been declining in Europe over the past two decades. Decline and restructuring in manufacturing and mining sectors, as well as volatility in the construction sector, has contributed to increasing unemployment among migrant male workers. Laid-off migrant workers, who are generally older and experienced only in manual and unskilled jobs, have little hope of finding employment. The better qualifications of a second generation of "migrant" workers manifests itself in the increasing employment of foreigners across most sectors of the economy, including those once dominated by nationals. However, these young "migrants" still are unemployed at higher rates than young nationals, partially due to discrepancies in educational attainment between the children of migrant workers and nationals.¹⁰⁹

These trends in the labor market coincided with increasing migration within and into Europe. Increasing migration among EU nationals from 1988-1990 was followed by increasing migration of third country nationals into the European Union. The number of third country nationals increased suddenly, growing by more than 1.5 million people from 1990-1992. During this period Germany admitted eight times more foreigners, both EU citizens (160,000) and non-EU nationals (800,000) than other Member States. Nationals of central and eastern Europe account for twenty-five percent of this increase (over 200,000 people).¹¹⁰

With continuing high unemployment levels in Europe, the plight of new migrants attracted little sympathy. Member States have largely responded to the upsurge in migration with a policy of closure toward third country nationals. Although current EU nationals are not directly affected by these restrictive policies, reforms reflect official orientation toward migrants, in many cases migrants who are citizens of central and east European states who will be EU nationals in the near future. During the 1990s all EU Member States, with the exception of Denmark and Sweden, legislated major changes in their domestic migration regimes. Belgium, France, the Netherlands, and Spain tightened regulations concerning the entry and residence of foreigners. Italy, the

Netherlands, Portugal, and Spain created new measures to identify and reduce illegal migration and employment. German investigation of suspected illegal employment and abuse of unemployment benefits among foreigners intensified from the early 1990s.¹¹¹ Austria, Belgium, Finland, France, Germany, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom adopted more restrictive asylum procedures. In the German case, asylum reform required constitutional amendment. All of these legislative reforms expedite the identification of fraudulent claims, illegal residence, and underground employment, and they strengthen measures to deport foreign offenders.¹¹² The practical effect of these measures has been substantial: German recognition rates for asylum applications fell from a high of 29% in 1985 to approximately 3% by 1992.¹¹³

At the EU level, intergovernmental cooperation focuses overwhelmingly on security issues that frame the need for a common migration policy in terms of criminality. As a result, evolving EU provisions, many of which escape review by national and European legal institutions, concentrate on means of policing and control.¹¹⁴ The recent electoral success of Jörg Haider's Freedom Party in Austria is the darkest manifestation of anti-foreigner sentiment in Europe. Although other EU Member States denounced the inclusion of Haider's party in the Austrian government, the widespread increase in domestic restrictions on migration, and preliminary EU efforts to exclude third country nationals more effectively, reflect an official effort to restrict membership in European society.

In conclusion, neither states nor societies within the EU are responding enthusiastically to the opportunity to construct a genuinely European foundation for belonging. The exclusion of many migrants from their legal entitlement to equal treatment reflects a significant discrepancy between what ECJ justices and national officials consider to be appropriate practice. The ECJ created rights that national governments never intended to honor, and reactions of evasion, overrule, and preemption prevail as a result. Moreover, even the ECJ and European Commission refrain from challenging core forms of national belonging. Meanwhile, few individuals seize the opportunity to transgress traditional boundaries and integrate themselves within a transnational community of Europeans. Even fewer bother to work with others to achieve their common rights as Europeans. The supranational European society is elusive and will remain so until someone cares to build it.

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ENDNOTES

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² This is a simplification of a complex, long term process. For explanations, see Joseph Weiler, "The Transformation of Europe," *Yale Law Journal* 100 (June 1991), 2403-2483 and Karen Alter, "Who are the 'Masters of the Treaty'?: European Governments and the European Court of Justice," *International Organization* 52 (Winter 1998), 125-152.

³ For an explanation of the institutional structure that enables this evasion, see Lisa Conant, chapter 3, *Justice Contained: Law and Politics in the European Union*, (Ithaca: Cornell University Press, forthcoming).

⁴ Examples of this effort include the *Europe Direct: Dialogue with Citizens* webpage (<http://europa.int/citizens>), information pamphlets, and the toll-free telephone Signpost Service (0800 581591).

⁵ Antoine Fobe, "Donner une assistance juridique aux citoyens par-delà les frontières," Forum sur la citoyenneté européenne, 30 October 2000, Paris. Commission of the European Communities, *Green Paper on Legal Aid in Civil Matters: The Problems Confronting the Cross-Border Litigant*, COM (2000) 51 final (9 February 2000).

⁶ Articles 48, 52, and 59 of the *Treaty Establishing the European Economic Community*, 25 March 1957 (EEC).

⁷ Ruth Nielsen and Erika Szyszczak, *The Social Dimension of the European Community* (Munksgaard: Handelshøjskolens Forlag, 1993), 37.

⁸ Council Regulation 1612/68/EEC of 15 October 1968, *Official Journal of the European Communities* II (1968), 475.

⁹ Article 48, paragraph 4 EEC indicates that the free movement of workers does not apply to the public service.

¹⁰ The ECJ first argued for the necessity of a European definition of public service in *Giovanni Sotgiu v Deutsche Bundespost* C-152/73, (1974) *European Court Reports* (E.C.R.), 153.

¹¹ *Commission v Belgium* C-149/79, (1980) E.C.R. 3881.

¹² *Commission v Belgium* C-149/79, (1982) E.C.R. 1845; *Commission v France* C-307/84, (1986) E.C.R. 1725; *Deborah Lawrie-Blum v Land Baden-Württemberg* C-66/85, (1986)

E.C.R. 2121; *Commission v Italy* C-225/85, (1987) E.C.R. 2625; *G. B. C. Echternach v Minister van Onderwijs en Wetenschappen* C-389/87, (1989) E.C.R. 723; *Annegret Bleis v Ministère de l'Education Nationale* C-4/91, (1991) E.C.R. I-5627; *Association de Souffleurs aux Travaillleurs Immigrés (ASTI) v Chambre des employés privés* C-213/90, (1991) E.C.R. I-3507; *Volker Steen v Deutsche Bundespost* C-332/90, (1992) E.C.R. I-341; *Volker Sonntag v Hans and Elisabeth Waidman* C-172/91, (1993) E.C.R. I-1963; *Pilar Allué & Coonan v Università degli studi di Venezia* C-33/88, (1989) E.C.R. 1591 and C-259/91, (1993) E.C.R. I-4309; *Commission v Belgium* C-37/93, (1993) E.C.R. I-6295; *Adrianus Thijssen v Controledienst voor de Verzekeringen* C-42/92, (1993) E.C.R. I-4047; *Ingetraut Scholz v Opera Universitaria di Cagliari and Cinzia Porcedda* C-419/92, (1994) E.C.R. I-505; *Guido van Poucke v Rijksinstituut voor de Sociale Verzekeringen der Zelfstandigen and Algemene Sociale Kas voor Zelfstandigen* C-71/93, (1994) E.C.R. I-1101; *Ioannis Vougioukas v Idryma Koinonikon Asfalisseon (IKA)* C-443/93, (1995) E.C.R. I-4033; *Commission v Greece* C-290/94, (1996) E.C.R. I-3285; *Commission v Luxembourg* C-463/93, (1996) E.C.R. I-3207; *Commission v Belgium* C-173/94, (1996) E.C.R. I-3265; *R.O.J. Grahame and L.M. Hollanders v Bestuur van de Nieuwe Algemene Bedrijfsvereniging* C-248/96, (1997) E.C.R. I-6407; *Kalliopi Schöning-Kougebetopoulou v Freie und Hansestadt Hamburg* C-15/96, (1998) E.C.R. I-47; *Commission v Greece* C-187/96, (1998) E.C.R. I-1095; *Commission v Spain* C-114/97, (1998) E.C.R. I-6717.

¹³ Commission, Communication, *Official Journal of the European Communities* C-72 (13 March 1988b), 2.

¹⁴ Council Directive 90/364 EEC, *Official Journal of the European Communities* L-180 (13 July 1990), 26; Council Directive 90/365/EEC, *Official Journal of the European Communities* L-180 (13 July 1990), 28; Council Directive 93/96 EC, *Official Journal of the European Communities* L-317 (18 December 1993), 59.

¹⁵ *European Convention on Social and Medical Assistance*, 11 December 1953. Article 7 of this Convention specifies the conditions under which a signatory state may repatriate the nationals of another contracting party on the sole ground that they require social or medical assistance. Austria and Finland are the only current EU Member States that have not signed this Convention.

¹⁶ Article 51 EEC and Council Regulation 1408/71/EEC of 14 June 1971, *Official Journal of the European Communities* II (1971), 416.

¹⁷ Council Regulation 1408/71/EEC and Council Regulation 1612/68/EEC; *Württembergische Milchverwertung-Südmilch-AG v Ugliola* C-15/69, 1969; *Pieter Marsman v Roskamp* C-44/72, 1972; *Michel S. v Fonds National de Reclassement Social des Handicapés* C-76/72, 1973; *Donato Casagrande v Landeshauptstadt München* C-9/74, 1974; *Sotgiu* C-152/73, 1974; *Angelo Alaimo v French Republic* C-68/74, 1975; *Anita Cristini-Fiorini v Societé Nationale des Chemins de Fer Français* C-32/75, 1975; *Vito Inzirillo v Caisse d'Allocations Familiales de l'Arrondissement de Lyon* C-63/76, 1976; *Patrick Kenny v Insurance officer* C-1/78, 1978; *Diamante Toia-Palermo v Caisse Regionale d'Assurance Maladie de Lille* C-237/78, 1979.

¹⁸ *Helmut Heinze v Landesversicherungsanstalt Rheinprovinz* C-14/72, 1972; *Allgemeine Ortskrankenkasse Hamburg v Landesversicherungsanstalt Schleswig-Holstein* C-16/72, 1972; *Fossi* C-79/76, 1977; *Paulin Gillard v Directeur Regionale de la Sécurité Sociale de Nancy*

C-9/78, 1978; *Renzo Tinelli v Berufsgenossenschaft der Chemischen Industrie* C-144/78, 1979; *Even* C-207/78, 1979; *Allgemeine Ortskrankenkasse Mittelfranken v Landesversicherungsanstalt Ober- und Mittelfranken* C-818/79, 1980; *Tamara Vigier v Bundesversicherungsanstalt für Angestellte* C-70/80, 1981; *Castelli* C-261/83, 1984; *Hoeckx* C-249/83, 1985; *Angelo Camapana v Bundesanstalt für Arbeit* C-375/85, 1987; *Luciana Costa-Mazzier v Ministre de la Prevoyance Sociale* C-39/74, 1974; *Odette Callemeyn-Verbeke v Ministre de la Prevoyance Sociale* C-187/73, 1974; *Epoux Fracas v Belgian State* C-7/75, 1975; *Inzirillo* C-63/76, 1976; *Rita Frilli v Ministre de la Prevoyance Sociale* C-1/72, 1972; *Castelli* C-261/83, 1984; *Caisse Régionale d' Assurance Maladie de Paris v Giuseppina Biason* C-24/74, 1974; *Caisse Régionale d' Assurance Maladie Rhône-Alpes v Anna Giletti-Tomagno, Giardini, Tempar and Severini* C-379-381, 385/85 and 93/86, 1987; *Commission v France* C-236/88, 1990; *Commission v France* C-307/89, 1991; *Piscitello* C-139/82, 1983; *Roger Stanton Newton v Chief Adjudication Officer* C-356/89, 1991.

¹⁹ Defined first in *Ministère public v Even* C-207/78, 1979, and subsequently applied in *Francesco Reina v Landeskreditbank Baden-Württemberg* C-65/81, 1982; *Carmella Castelli v Office National des Pensions pour Travailleurs Salariés* C- 261/83, 1984; *Ministère public v Mutsch* C- 137/84, 1985; *Sarl Prodest v Caisse Primaire d' Assurance Maladie de Paris* C- 237/83, 1984; *Maria Frascogna v Caisse de Depots et Consignations* C-157/84, 1985; *Jozsef Deak v Office National de l'Emploi* C-94/84, 1985; *Vera Hoeckx v Openbaar Centrum Voor Maatschappelijk Welzijn Kalmthout* C-249/83, 1985.

²⁰ *Paola Piscitello v Istituto Nazionale della Previdenza Sociale (INPS)* C-139/82, 1983.

²¹ *Carlo Fossi v Bundesknappschaft* C-79/76, 1977; *Piscitello* C-139/82, 1983; *Hoeckx* C-249/83, 1985.

²² *Hoeckx* C-249/83, 1985; Bernd Schulte, *Die Judikatur des Europäischen Gerichtshof zur Abgrenzung des Sachlichen Anwendungsbereichs der Verordnung (EWG) Nr. 1408/71 im Hinblick auf Sozialhilfe- und Sozialhilfefähnliche Leistungen* (Bonn: Bundesministerium für Familie und Senioren, 1994); Werner Grotzer, "Wichtige Regelungen des SGV VI aus der Sicht der VO (EWG) Nr. 1408/71," *Deutsche Renten Versicherung* No. 1-2 (January-February 1993); Rob Cornelissen, "The Principle of Territoriality and the Community Regulations on Social Security (Regulations 1408/71 and 574/72)," *Common Market Law Review* 33 (1996), 439-471; Françoise Roger, "Europe et Fonds National de Solidarité," *Retraite et Société* No. 4 (1993), 42-73.

²³ Council Regulation 1247/92 of 19 May 1992, *Official Journal of the European Communities* L-136 (30 June 1992). The ECJ has found this regulation compatible with Article 51 EEC in *Kelvin Albert Snares v Adjudication Officer* C-20/96, (1997) E.C.R. I-6057 and continued to apply its restrictions: *Vera Partridge v Adjudication Officer* C-297/96, (1998) E.C.R. I-3467.

²⁴ *Massam Yvonne Dzodizi v Belgium* C-297/88 and 197/89, 1990.

²⁵ The Accord of Ankara of 1963, *Official Journal of the European Communities* L-217 (29 December 1964), 3687; The Supplementary Protocol to the Association Agreement between the EEC and Turkey of 1970, *Official Journal of the European Communities* L-293 (29 December 1972), 68; Decision No. 1/80 of the Association Council of 19 September 1980 (not published); Decision No. 3/80 of the Association Council of 19 September 1980, *Official*

Journal of the European Communities C-110 (25 April 1983), 60; Association Agreement between the EEC and Morocco of 27 April 1976, adopted by Council Regulation 2211/78 of 26 September 1978, *Official Journal of the European Communities* L-264 (27 September 1978), 2; Association Agreement between the EEC and Tunisia of 26 April 1976, *Official Journal of the European Communities* L-265 (27 September 1978), 2; Association Agreement between the EEC and Algeria of 26 April 1976, adopted by Council Regulation 2210/78 of 26 September 1978, *Official Journal of the European Communities* L-263 (27 September 1978), 2.

²⁶ An interview with a legal advisor, Bundesministerium des Innerns, Bonn, 25 January 1996. and "Gesetz zu dem Europa-Abkommen vom 16. Dezember 1991 zur Gründung einer Assoziation zwischen den Europäischen Gemeinschaften sowie ihren Mitgliedstaaten und der Republik Polen," *Bundesgesetzblatt* 1993 Teil II, Bonn (26 August 1993) 1316, 1322.

²⁷R. &V. *SPRL Haegemann v Ministre des Affaires Économiques* C-181/73, (1974) E.C.R. 449; *Meryem Demirel v Stadt Schwäbisch Gmünd* C-12/86, (1987) E.C.R. 3719; *S.Z. Sevince v Staatssecretaris van Justitie* C-192/89, (1990) E.C.R. I-3461; *Kazim Kus v Landeshauptstadt Wiesbaden* C-237/91, (1992) E.C.R. I-6781; *Z. Taflan-Met, S. Altun Baser, and E. Andabugdayci v Bestuur van de Sociale Verzekeringsbank te Amsterdam and O. Akol v Bestuur van de Nieuwe Algemene Bedrijfsvereniging* C-277/94, (1996) E.C.R. I-4085; *Bahia Kziber v Office National de l'Emploi* C-18/90, (1991) E.C.R. I-199; *Zoubir Yousfi v Kingdom of Belgium* C-58/93, (1994) E.C.R. I-1353; *Zoulika Krid v Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés (CNAVTS)* C-103/94, (1995) E.C.R. I-719; *Hallouzi-Choho v Bestuur van de Sociale Verzekeringsbank* C-126/95, (1996) E.C.R. I-4807; *Greece v Commission* C-30/88, (1989) E.C.R. 3711; *Hayriye Eroglu v Land Baden-Württemberg* C-355/93, (1994) E.C.R. I-5113.

²⁸*Demirel* C-12/86, 1987; *Akol* C-277/94, 1996.

²⁹*Eroglu* C-355/93, 1994.

³⁰*Kus* C-237/91, 1992. *Treaty of Amsterdam*, 1997. Turkish nationals can probably rely on at least two other measures, due to their parallel formulation with measures already granted legal effects. These include prohibitions against discrimination on the grounds of nationality for the conditions of work and pay and on the grounds of nationality for access to all forms of education for the children of Turkish workers. See *Sevince* C-192/89, 1990; *Kus* C-237/91, 1992; *Eroglu* C-355/93, 1994; *Kziber* C-18/90, 1991; *Yousfi* C-58/93, 1994; *Krid* C-103/94, 1995; and *Hallouzi-Choho* C-126/95, 1996; Denis Martin, *La Libre Circulation des Personnes dans l'Union Européenne* (Brussels: Bruylant, 1994), 325-362.

³¹Cases that have reached the ECJ consider particular benefits, but fall under the scope of Article 4 of Council Regulation 1408/71, which includes all forms of social security benefits. The Tunisian association agreement's measures on social security are identical to those in the association agreements with Morocco and Algeria. *Kziber* C-18/90, 1991; *Yousfi* C-58/93, 1994; *Krid* C-103/94, 1995; *Hallouzi-Choho* C-126/95, 1996. For detailed legal analysis of this case law, see Christoph Schumacher, "Soziale Sicherheit für Drittstaatsangehörige und Assoziierungs/Europa-Abkommen," *Deutsche Rentenversicherung* No. 10-11 (1995), 681-694; Otto Mallmann, "Zur Aufenthaltsrechtlichen Bedeutung des Assoziationsratsbeschlusses EWG/Türkei," *JZ* No. 19 (1995), 916-920; Roger 1993; Christoph Vedder, "Rechtswirkungen

von Assoziationsratsbeschlüssen: Die Kus-Entscheidung des EuGH," *Europa Recht* No. 2 (1994), 202-214.

³²Respectively, *Hallouzi-Choho* C-126/95, 1996 and *Kermaschek v Bundesanstalt für Arbeit* C-40/76, (1976) E.C.R. 1669.

³³*Cabanis-Issarte* C-308/93, 1996; Noreen Burrows, "Non-discrimination and Social Security in Co-operation Agreements," *European Law Review* 22 (1997), 166-169.

³⁴Article 19 of the *Treaty of Amsterdam*; Council Directive 94/8/EC of 19 December 1994, as amended by Council Directive 96/30/EC of 13 May 1996; Council Directive 93/109/EC of 6 December 1993 as summarized by European Communities, "Citizenship of the Union," <http://europa.eu.int/scadplus/leg/en/lvb/123026.htm>, <http://europa.eu.int/scadplus/leg/en/lvb/123025.htm>.

³⁵T.H. Marshall, *Citizenship and Social Class* (London: Pluto, 1992).

³⁶Refer to note 11 for the citation of these cases.

³⁷Martin 1994, 61.

³⁸*Commission v Luxembourg* C-473/93, 1996.

³⁹Commission, "Twelfth Annual Report on Monitoring the Application of Community Law – 1994," *Official Journal of the European Communities* C-254 (29 September 1995a), 35.

⁴⁰Commission, "Fourteenth Annual Report on Monitoring the Application of Community Law – 1996," *Official Journal of the European Communities*, C-332 (3 November 1997), 30; Décret No. 94 of 16 February 1994; the Tenth Public Service Amendment Act of December 1993; Commission 1995a, C-254, 35; Martin 1994, 61.

⁴¹Deutscher Beamtenbund (DBB), *Handbuch für den Öffentlichen Dienst in Deutschland* 1995 (Bonn: DBB Verlag GmbH, 1995), 62.

⁴²Commission 1997, C-332, 89.

⁴³Order No. 1221 of 12 May 1991; Martin 1994, 62.

⁴⁴Martin 1994, 61.

⁴⁵*Commission v Greece* C-290/94, (1996) E.C.R. I-3285; *Commission v Luxembourg* C-473/93, (1996) E.C.R. I-3207; Commission 1997, C-332, 88-89.

⁴⁶Commission, "Thirteenth Annual Report on Monitoring the Application of Community law – 1995," Com(96) 600 final, 29 May 1996, 121-128, 137-143; Commission 1997 C-332, 87-91 and 95-97.

⁴⁷Commission 1997, C-332, 87-91, 95-97.

⁴⁸*Commission v Luxembourg* C-473/93, 1996; *Commission v Belgium* C-173/94, 1996; *Commission v Greece* C-290/94, 1996.

⁴⁹ Commission 1997, C-332, 202.

⁵⁰ Commission, "Seventeenth Annual Report on Monitoring the Application of Community Law – 1999," COM (2000) 92 final (23 June 2000), Introduction, 11,44.

⁵¹ *Sotgiu* C-152/73, 1974; *Commission v Italy* C-225/85, 1987; *Allué* C-33/88, 1989 and C-259/91, 1993.

⁵² *Scholz* C-419/92, 1994; *Grahame and Hollanders* C-248/96, 1997; *Commission v Greece* C-187/96, 1998; *Schöning-Kougebetopoulou* C-15/96, 1998.

⁵³ Conant, chapter 6, forthcoming.

⁵⁴ Under Article 171 of the TEU (Article 228 of the *Amsterdam Treaty*), the ECJ may impose a financial penalty on states that have failed to comply with previous rulings. National judges may also order states to pay financial damages for breaches of European law in the aftermath of the ECJ's case law on state liability, which began with *Frankovich and Bonafaci v Italy* C-6/90, (1991) E.C.R. I-5357.

⁵⁵ *Ann Florence Reed v Minister van Justitie* C-59/85, 1986 *Pietro Pinna v Caisse d'Allocations Familiales de la Savoie* C-41/84, 1986 (I) and *Pietro Pinna v Caisse d'Allocations Familiales de la Savoie* C-359/87, 1989 (II); *Sylvie Lair v University of Hannover* C-39/86, 1988 *Annunziata Matteuci v Belgium* C-235/87, 1988; *Commission v Greece* C-305/ 87, 1989; *Lopes da Veiga v Staatssecretaris van Justitie* C-9/88, 1989; *Commission v Germany* C-249/86, 1989; *Klaus Biehl v Administration des Contributions* C-175/88, 1990; *URSSAF v Le Manoir* C-27/91, 1991; *Elissavet Paraschi v Landesversicherungsanstalt Württemberg* C-349/87, 1991; *Allué* C-33/88, 1989 and C-259/91, 1993; *V. J. M. Raulin v Minister for Education and Science* C-357/89, 1992; *M.J.E. Bernini v Minister for Education and Science* C-3/90, 1992; *Noushin Taghavi-Iannino v Ministre des Affaires Sociales* 243/91, 1992; *Carmina Di Leo v Land Berlin* C-308/89, 1990; *Commission v United Kingdom* C-279/89, 1992; *Commission v Belgium* C-326/90, 1992; *Commission v Belgium* C-300/90, 1992; *Hanns-Martin Bachmann v Ministre des Finances* C-204/90, 1992; *Commission v Luxembourg* C-111/91, 1993; *Maria Chiara Spotti v Freistaat Bayern* C-272/92, 1993; *Hugo Schmid v Minister van Sociale Voorzorg* C-310/91, 1993; *Ingetraut Scholz v Opera Universitaria di Cagliari* C-419/92, 1994; *John O'Flynn v Chief Adjudication Officer* C-237/94, 1996; *Commission v Belgium* C-278/94, 1996. These cases draw on Article 7 paragraph 2 on social and tax advantages as well as Article 12 on equal treatment of family members, which the ECJ interprets in reference to the provision on advantages, Martin 1994, 186.

⁵⁶ Steve Peers, "'Social Advantages' and Discrimination in Employment: Case Law Confirmed and Clarified," *European Law Review* 22 (1997), 164.

⁵⁷ Commission 1997, C-332, 28-29, 87-91, 93.

⁵⁸ Belgian invalidity cases: *Costa* C-187/73, 1974; *Callemeyn* C-187/73, 1974; *E. Fracas* C-7/75, 1975 predate an invalidity case against France: *Inzirillo* C-63/76, 1976, and a Belgian

case on supplemental income: *Frilli* C-1/72, 1972 predates parallel cases against France: *Biason* C-24/74, 1974; *Giletti and others* C-379-381, 139/82, 1983; *Commission v France* C-236/88, 1990; *Commission v France* C-307/89, 1991. Roger 1993, 43-48.

⁵⁹*Biason* C-24/74, 1974.

⁶⁰Roger 1993, 48.

⁶¹*Giletti and others* C-379-381/85 and 93/86, 1987.

⁶²Roger 1993, 49-51.

⁶³*Commission v France* C-236/88, 1990 and *Commission v France* C-307/89, 1991.

⁶⁴*Stanton Newton* C-356/89, 1991.

⁶⁵*Stanton Newton* C-356/89, 1991.

⁶⁶Council Regulation 1247/92 of 19 May 1992, *Official Journal of the European Communities* L-136 (30 June 1992).

⁶⁷ Fritz Scharf, "The Joint-Decision Trap: Lessons from German Federalism and European Integration," *Public Administration* 66 (Autumn 1988), 239-78; Andrew Moravcsik, "Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach," *Economic and Political Integration in Europe: Internal Dynamics and Global Context*, eds. Simon Bulmer and Andrew Scott, (Oxford: Blackwell, 1994), 69-70; Mark Pollack, "Delegation, Agency, and Agenda Setting in the EC," *International Organization* 51 (Winter 1997), 118-19; Alter 1998, 136-142; Alec Stone Sweet and Thomas Brunell, "Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community," *American Political Science Review* (March 1998), 66.

⁶⁸ *Kelvin Albert Snares v Adjudication Officer* C-20/96, (1997) E.C.R. I-6057; *Vera A. Partridge v Adjudication Officer* C-297/96, (1998) E.C.R. I-3467.

⁶⁹ Peter Clever, "Sozial Sicherheit im Rahmen der europäischen Integration," *Die Angestellten Versicherung* (7 August 1992); Peter Clever, "Grundsätzliche Bemerkungen zur Rechtsprechung des EuGH," *Die Angestellten Versicherung* No. 2 (1993b), 71-75; "Vor allem armen Rentnern helfen," *Kölner Rundschau* (19 December 1988); Thomas Link, "Finks Rentenrisiken," *Die Welt* (19 December 1988); Manfred Zuleeg, "Die Zahlung von Ausgleichszulagen über die Binnengrenzen der Europäischen Gemeinschaft," *Deutsche Rentenversicherung* No. 10 (1988), 621-629; interviews with two legal advisors in the Federal Labor Ministry, Bonn, 17 and 22 January 1996.

⁷⁰Roger 1993, 44, 47; British observations in *Stanton Newton* C- 356/89, 1991.

⁷¹Rothley 1993, 38; "Europäischer Gerichtshof: Kampfansage an die Unabhängigkeit," 1992, 34.

⁷² "Pflegeversicherungsgesetz," *Sozialgesetzbuch XI* (introduced 1 January 1995); *Bericht der Beauftragten der Bundesregierung für die Belange der Ausländer über die Lage der*

Ausländer in europäischen Staaten (Bonn: December 1995); Eberhard Eichenhofer, "Europarechtlichen Probleme der sozialen Pflegeversicherung," *Vierteljahresschrift für Sozialrecht* No. 4 (November 1994), 323-39; Gerhard Igl, "Entstehungsgeschichte der sozialen Pflegeversicherung -- Eine Einführung," *Vierteljahresschrift für Sozialrecht* No. 4 (November 1994), 261-64; *Manfred Molenaar and Barbara Fath-Molenaar v Allgemeine Ortskrankenkasse Baden-Württemberg* C-160/96 (1998) E.C.R. I-843.

⁷³ *Molenaar* C-160/96, 1998.

⁷⁴ The European Commission estimates that high statutory levies and charges, which total close to forty percent of the GDP of the European Union, act to slow growth. The European Commission also draws a connection between inappropriate social protection mechanisms and insufficient motivation to work. Commission, *White Paper on Growth, Competitiveness, and Employment*, Supplement 6/93 (Luxembourg: Office for Official Publications of the European Communities, 1993c), 124, 136.

⁷⁵ *Treaty of Amsterdam* (17 June 1997).

⁷⁶ Ralph Atkins, Thomas Hanke, and Cordula Tutt, "German Minister Calls for More Flexible Laws in Immigration Rethink," *Financial Times*, 26 September 2000; Deborah Hargreaves, "EU Launches Immigration Plan," *Financial Times*, ? October 2000.

⁷⁷ Interviews with a legal advisor, Groupe d'Information et de Soutien des Travailleurs Immigrés (GISTI), Paris, 22 February 1996; Representative from the European Trade Union Confederation, commenting on the problems identified by Inter-regional Trade Union Committees, Brussels, 6 March 1996; Representative of the Euro Citizen Action Service (ECAS), Brussels, 7 March 1996; Representative of the Bund der Spanischen Elternvereine, Bonn, 23 January 1996; Representative of the Bundesarbeitsgemeinschaft der Immigrantenverbände, Bonn, 24 January 1996.

⁷⁸ *Emir Gül v Regierungspräsident Düsseldorf* C-131/85, 1986.

⁷⁹ *Gül* C-131/85, 1986.

⁸⁰ Schumacher 1995, 687, 689 and Roger 1993, 66.

⁸¹ Interview with a legal advisor, Bundesministerium des Innerns, Bonn, 25 January 1996.

⁸² *Juris* search, 5 December 2000.

⁸³ *Kziber* C-18/90, 1991.

⁸⁴ Roger 1993, 63-68.

⁸⁵ *Krid* C-103/94, 1995.

⁸⁶ "Condition d'attribution du Fonds National de Solidarité," No. 347 and 365, 1994 and 1996; *Lettre-circulaire* No. 169-95, 1995.

⁸⁷ *Collectif des Accidentés du Travail (CATRED) et al* 1994, 3.

⁸⁸Sixteen were still in motion as of June 1994. Collectif des Accidentés du Travail (CATRED) et al 1994, 27-29.

⁸⁹Roger 1993, 68.

⁹⁰Condition d'attribution du Fonds National de Solidarité aux étrangers non ressortissants d'un État membre de la CEE," No. 347, 1994.

⁹¹ Conseil d'État, No. 174219 174220 176805 ¼ SSR, Groupe d'information et du soutien des Travailleurs Immigrés et Association "France Terre d'Asile," 14 Janvier 1998.

⁹²Martin 1994, 376-484. The one exception includes the existence of an individual right of establishment, so newly associated nationals from central and eastern Europe may start their own businesses in the EU. The EU apparently welcomes entrepreneurs, but not any potential competitors in the labor market.

⁹³Roger 1993, 68.

⁹⁴Schumacher 1995, 692; Elspeth Guild, *A Guide to the Right of Establishment under the Europe Agreements* (London: Baileys Shaw & Gillet, 1996); Martin 1994; European Trade Union Institute, *The Association Agreements between the European Community and Poland, Hungary, and Czechoslovakia: A Trade Union View* (Brussels: European Trade Union Institute, 1992).

⁹⁵Kziber C-18/90, 1991; Roger 1993, 66.

⁹⁶ Commission, "Fifteenth Annual Report on Monitoring the Application of Community Law – 1997," *Official Journal of the European Communities* C-250 (10 August 1998a), 42.

⁹⁷*Official Journal of the European Communities* C-242, 1995, 7.

⁹⁸ The Council of Ministers did not accept the proposal because national governments reject an EC competence for the coordination of social security benefits for third country nationals, arguing that this field is covered by the intergovernmental component of the EU's third pillar. Herwig Verschueren, "EC Social Security Coordination Excluding Third Country Nationals: Still in Line with Fundamental Rights after the *Gayusuz* Judgment?" *Common Market Law Review* 34 (1997), 991-992.

⁹⁹Commission, *Social Europe*, DG-V - No. 2/93 (Luxembourg: Office for Official Publications of the European Communities, 1994b), 31 and Commission, *The Demographic Situation in the European Union: 1994 Report*, DG-V - COM (94) 585, (Luxembourg: Office for Official Publications of the European Communities, 1995b), 67.

¹⁰⁰Thomas Straubhaar, "International Labour Migration within a Common Market: Some Aspects of the EC Experience," *Journal of Common Market Studies* 27 (1988), 50-51.

¹⁰¹Straubhaar 1988, 56-57.

¹⁰²Commission 1995b, 68. Figures are approximations for 1992. Turks represent the single largest group of third country nationals resident in the European Union, Moroccans rank third, Algerians sixth, and Tunisians fourteenth.

¹⁰³European Union Migrants Forum, "The European Union Migrants' Forum Proposals for the Revision of the Treaty on European Union at the Intergovernmental Conference of 1996," (Brussels: EU Migrant Forum, May 1995); Inter-regional Trade Union Committee, "Draft Political Call by the ITUCs to the ETUC, the Affiliated Confederations, the European Institutions, and States," (Brussels: European Trade Union Confederation, 14 July 1994); Euro Citizen Action Service (ECAS), "Draft ECAS Blueprint for a Chapter on European Citizenship in the Revised TEU," (Brussels: ECAS, 1996); Groupe d'Information et de Soutien des Travailleurs Immigrés (GISTI), *Les Étrangers et le Droit Communautaire* (Paris: GISTI, September 1995); Groupe d'Information et de Soutien des Travailleurs Immigrés (GISTI), *Plein Droit: La Revue du GISTI* (Paris: GISTI, bimonthly); Collectif des Accidentés du Travail (CATRED), Fédération Nationale des Accidentés du Travail et des Handicapés (FNATH), Groupe d'Information et de Soutien des Travailleurs Immigrés (GISTI), Groupe de Recherche et d'Action sur la Vieillesse des Étrangers en France (GRAVE), and Office Dauphinois des Travailleurs Immigrés (ODTI), "Les engagements internationaux de la France pour les handicapés et les retraités étrangers: Vers une égalité de traitement?" (Paris: June 1994).

¹⁰⁴Centre d'Information et d'Études sur les Migrations Internationales (CIEMI), "Migrants, solidarité, droits de l'homme, recherche/documentation," *Répertoire des Associations Immigrées et de Solidarité dans l'Union Européenne*, 10th Edition, (Paris: CIEMI, June 1994). Only 11 of 791 migrant associations in France, Germany, and the United Kingdom provide legal assistance as a primary activity. Sixty-four provide legal assistance as a secondary activity.

¹⁰⁵Interviews with a legal advisor of Groupe d'Information et de Soutien des Travailleurs Immigrés (GISTI), Paris, 22 February 1996; legal advisor of the Union of Industrial and Employers Confederations of Europe, Brussels, 6 March 1996; representative of the European Citizens Action Service, Brussels, 7 March 1996; representative of the Bundesarbeitsgemeinschaft der Immigrantenverbände, Bonn, 24 January 1996; representative of the EU Migrants Forum, Brussels, 4 March 1996; representative of the Bund der Spanischen Elternvereine, Bonn, 23 January 1996.

¹⁰⁶Available funds for the period from November 2000 to April 2001 consist of 32, 226 euro, with an additional potential reserve of 12,394 euro. Litigating a case to its ultimate conclusion in the United Kingdom can cost upwards of 40,000 pounds, which are worth more than euros.

¹⁰⁷Organization for Economic Cooperation and Development, *Trends in International Migration: Annual Report 1994* (Paris: OECD, 1995), 40, 85.

¹⁰⁸OECD 1995, 126.

¹⁰⁹OECD 1995, 37-38, 40-41.

¹¹⁰Commission 1995b, 69.

¹¹¹OECD 1995, 89-90.

¹¹²OECD 1995, 43-45.

¹¹³OECD 1995, 89-90.

¹¹⁴ Virginie Guiraudon, "European Integration and Migration Policy: Vertical Policy-making as Venue Shopping," *Journal of Common Market Studies* 38 (June 2000), 260.



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