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Sink or Swim Together: Citizenship, Sovereignty, and Free Movement in the European Union and the United States

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Sink or Swim Together:¹

Citizenship, Sovereignty, and Free Movement in the European Union and the United States

FRANCIS J. CONTE*

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I. INTRODUCTION

A. *General Perspectives*

In 1906, sixteen-year-old Francesco Conte and his two brothers, Nicolo and Giuseppe, trekked down from the hills of Grottaminarda with their donkey, cart, and bags to traverse the eighty miles to Naples. From there, the brothers boarded a ship that would take them thousands of miles away from their parents, sister, and three older brothers and toward a new life in America. The land of *la famiglia* Conte could not sustain the three boys, and there was no other work available. They had

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1. In determining that the Commerce Clause, Article I, Section 8, Clause 3, of the U.S. Constitution, prohibited the State of New York from passing legislation to protect its farmers and merchants from competition with out-of-state milk importers, Justice Benjamin Cardozo reasoned that to accept the state's argument as to the constitutionality of the legislation "would be to invite a speedy end to our national solidarity" and that the Constitution was framed "upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

no family in America, spoke no English, and had no formal education or skills other than what they had obtained working on the small family farm. But it was well-known that America was a land of great opportunity, and the brothers promised that they would send clothing, shoes, and whatever else they could to their family and friends back home.

Francesco lived a long life, but he would never again see his parents or the siblings he had left behind. After a few years working as a gardener, he would meet Bridget O'Brien. Bridget was a cook employed on the same estate as Francesco, and she had recently immigrated to New Jersey from County Meath, Ireland, in an effort to better her life. The two would fall in love, marry, and raise a large family together. Francesco would become a stone mason, a builder, and later help make jet engines for warplanes. Their family carried on through personal hardships, triumphs, tragedies, and war, and eventually generated many more families, each deeply embedded in American life.

More recently, Ahmed Nasir, a French national and a Muslim, traveled from the outskirts of Lyon, France, to Leeds, England,² to live with his cousin in the U.K. Ahmed hoped to learn English, find work, support his family in southern France, and eventually bring his impoverished parents and siblings to England to join him. During his first six months in the U.K., Ahmed sought work but was only able to find the occasional odd job. Members of the Muslim community of Leeds supported Ahmed, but his English skills developed slowly. When he eventually sought accommodation in a government-supported residence, he was told that without steady employment and medical insurance, U.K. immigration authorities would send him back to France. Six months later, Ahmed was officially notified that he could no longer remain in the U.K. and that he had to leave within two weeks.

Francesco and Ahmed's contrasting stories raise fundamental questions about the relationship between sovereignty and immigration. When people emigrate in search of a better life, should it matter that they are not citizens of the State or nation to which they are moving? Likewise, should it matter whether the place to which they are moving is connected to or united with the place from which they have come? Is

2. Leeds is in West Yorkshire in the north of England and is home to many British Muslims; the Beeston area of Leeds was home to two of the four Muslim men who carried out suicide bomb attacks killing 56 persons on three London subway trains and a bus on the morning of July 7, 2005. As a consequence of this and other terrorist attacks, fear, mistrust, and deep suspicion of cultural and religious differences are creating a fast-growing "virtual wall" between the 20 million Muslims living in Britain and Europe and non-Muslim Europeans. See *London Bombers 'Were All British,'* BBC News, July 12, 2005, http://news.bbc.co.uk/2/hi/uk_news/4676577.stm; Jim Maceda, *Learning Religious Tolerance in Luton*, NBC News, Mar. 10, 2006, <http://www.msnbc.msn.com/id/11767006>; *The Bombers*, BBC News, http://news.bbc.co.uk/2/shared/spl/hi/uk/05/london_blasts/investigation/html/bombers.stm (last visited Jan. 15, 2007).

the security and integrity of one's own community enhanced when it is bounded and separated from the strange and external? Do strong borders enhance the freedom to move, grow, and pursue happiness for those who reside within those borders? Do they preserve a community's culture and values and thereby allow a community to truly *be* a community?

These questions, in turn, lead to others about community identity. How great or small or politically autonomous must a community be to preserve its values, culture, and freedom? Should the boundaries of a culturally secure community be coterminous with those of a nation, or even a province or a state? If so, to what extent should a nation, province, or state restrict the admission of economic migrants in the name of preserving its unique identity? Or should the goal be to create expansive communities, perhaps spanning continents or even the world, which are more welcoming to foreigners, but possibly less secure?

Today,³ international legal norms assume that the free but bounded community is manifested in the nation-state. Drawing upon its sovereign power, the nation-state can protect its freedom and culture. This power, however, can have the opposite effect on outsiders – it can destroy their freedom and culture. Under most nations' laws and in the minds of most of their people, it matters a great deal when those who intend to reside in a particular land are neither citizens nor invited to reside there. Indeed, in most cases, a sovereign State can lawfully prevent non-citizens from entering its borders.⁴ Today it is unlikely that an individual facing dire economic circumstances like Francesco Conte could emigrate from Italy to the United States. In fact, as Ahmed Nasir's story illustrates, a European Union citizen might encounter more

3. In earlier times, of course, European settlers moving to North America did not consider the need for citizenship or an invitation from North America's existing societies, as the Western European concepts of sovereignty and citizenship were unknown to the native North Americans. In international law terms, one might argue that, at the time, North America was wholly or largely "*terra nullius*," the land of no one and no state, and that few if any societies in North America were sovereign in international legal terms, and hence the territory was open to discovery, occupation, and settlement. Still, the long-time native inhabitants had societies – cultures, values, freedom, and physical well-being, if not traditional political systems – before they were destroyed during the European conquest and settlement. Whether those European claims in the "new world" could be successfully asserted today is doubtful. According to the International Court of Justice, "territories inhabited by tribes or peoples having social and political organization [are] not regarded as *terra nullius*," and thus are not subject to occupation and acquisition by so-called discoverers. See *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, ¶¶ 79-80 (Oct. 16). Ironically, the new American society and the old European societies now rely upon concepts such as sovereignty, citizenship, and the essentialness of their cultures, values, and freedoms to protect them from "outsiders," a protection not accorded the territories and societies they conquered.

4. See, e.g., *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); see also *Chae Chan Ping v. United States*, 130 U.S. 581, 606-07 (1889).

difficulty migrating within the European Union than Francesco encountered migrating between sovereign States lacking such a union.

But are we better off in today's world? When people come from outside the community and are able to find a place to live and work, should a free society not welcome them as fully as citizens? Are we less rich or less complete without the Francescos and Ahmeds? Or are we simply more secure?

This Article is not intended to answer fully these questions; rather, I hope to suggest the free movement concerns that should stimulate more extensive discussion of policies on free movement and residence. In particular, this Article aims to compare the United States' freedom of movement principles, as set forth in the United States' Constitution and jurisprudence, with those of the European Union.

Within a sovereign federal State such as the United States, it is relatively easy for citizens of any state or political subdivision to travel, work, or reside in any other state or political subdivision. Nonetheless, even American citizens have occasionally encountered obstacles when seeking to migrate between constituent states. These obstacles have typically affected families and individuals needing social and economic assistance, children whose non-citizen parents entered the country without proper documents, university students, and persons temporarily engaged in less than essential activities such as recreational hunting or fishing.

In a treaty-based federal system, like the European Union, where the system's foundational purpose is economic integration, work-based travel and work-based migration from State to State is also substantially free from restrictions. Moreover, Member State citizens are deemed European Union citizens, which allows them to reside in, and travel between, other Member States with relative freedom. As Ahmed's story illustrates, however, there are some exceptions, limitations, and conditions to free movement within the European Union. There are also obstacles to free movement stemming from cultural and national identity as well as obstacles that relate to sovereignty and national citizenship, none of which are formally embedded in the European Union's laws and treaties.

While European Union freedom of movement principles have traditionally been predicated on economic integration, there is a contemporary movement to expand beyond a purely economic rationale. As this Article will discuss, the European Court of Justice's ("ECJ") decision in *Baumbast v. Secretary of State for the Home Department* typifies this

movement.⁵ But, is the European Union, and more specifically the ECJ, the proper body to espouse an expanded notion of freedom of movement amongst Member States? Should the ECJ narrowly construe legal restrictions on free movement and, as it seems to be doing, encourage eliminating those restrictions, thereby offering truly free movement to all within the Union?

Some might seek this very result – enhancement and advancement of absolute integration and free movement within the European Union. One could argue that any limitation on free movement within the European Union impedes the Union's efficacy – one cannot create a unified economic community when capital, including labor, cannot freely move within that supposedly unified community. There are social and cultural, as well as economic advantages of free movement. In addition to enabling individuals to better their lives, ensuring free movement for all European Union citizens has the potential to lead to a stronger, more thoroughly integrated and less discriminatory European Union. This view supports permitting phrases such as “sovereign State” and “national citizen” to evolve, becoming more limited as the federal system advances. Independence and sovereignty could arguably still be assured so long as Member States in the federal system had merely delegated modest portions of their powers over internal matters to the federal system and could withdraw from the treaty system at any time.⁶

On the other hand, others might argue that more traditional notions of Member State sovereignty and national citizenship should prevail to ensure greater security, the preservation of national and cultural identity, and economic and social stability. While the European Union's economic efficacy depends on a broad interpretation of free movement principles – implying less national control over who enters and resides in each Member State and who benefits from each Member State's social assistance – how much of this control can Member States relinquish and yet remain sovereign? Are the essentials of a State's integral sover-

5. Case C-413/99, *Baumbast v. Sec'y of State for the Home Dep't*, 2002 E.C.R. I-7091. The ECJ's decisions are available at http://europa.eu.int/eurlex/lex/SuiteJurisprudence.do?T1=V111&T3=V1&RechType=RECH_jurisprudence&Submit=search.

6. The current European Community treaties do not provide for Member State withdrawal from the European Union. However, voluntary withdrawal would be permitted under Article I-60 of the proposed, but as of yet unratified European Constitutional Treaty. Treaty Establishing a Constitution for Europe art. I-60, 2004 O.J. (C310) 40. For the time being, a Member State desiring to withdraw from the European Union would need to invoke Article 54 of the Vienna Convention on the Law of Treaties, whereby all contracting parties (all other Member States) would have to agree on the terms replacing the current framework after a complex set of negotiations. Vienna Convention on the Law of Treaties art. 54, May 23, 1969, 1155 U.N.T.S. 331.

eignty, independence, and destiny not degraded, even completely eviscerated, when the State is unable to limit immigration?

In light of these concerns, perhaps the ECJ's broad interpretation of free movement and European Union citizenship principles infringes on the Member States' retained sovereignty. The Member States may need more discretion in deciding who can reside within their borders. Perhaps this broad discretion includes the right to determine whether non-nationals threaten State security and the right to condition entry on the individual immigrant's ability to contribute to the State's economic and social vitality. Moreover, is it not possible that greater control fairly exercised by sovereign Member States would actually improve Europeans' confidence in their European Union institutions and enhance their European consciousness?

Limitations on free movement may also be rational and important in a system of independent States where each State maintains its own distinct national interests and cultural identities. Assuming this is the more sensible position, the ECJ and the relevant Member State courts and authorities should approach free movement issues in a manner that assures Member State citizens and political leaders that their economic well-being and national identity are secure. The idea is that if properly conceived and employed, these free movement limitations will sustain the citizens' confidence that they control their own destinies, a confidence that may free them to engage more readily in the European enterprise.

This Article's aim is two-fold. First, to properly consider the above-mentioned issues, the Article analyzes both the European Union and the United States' free movement principles and their relationship to national citizenship and sovereignty. Second, the Article offers a brief critique and a proposed direction for the development of free movement and residence principles in the European Union and the United States.

B. *Experience in the European Union and the United States*

1. EUROPEAN UNION

When participating in the 2005 referendums to ratify the European Union's proposed Constitution, French and Dutch citizens were likely motivated in part by serious concerns about mass immigration. Specifically, the French fear was often represented by the example of an unwarranted influx of "Polish plumbers" to France,⁷ and the Dutch

7. See JULIANNA TRASER, REPORT ON THE FREE MOVEMENT OF WORKERS IN THE EU-25: WHO'S AFRAID OF EU ENLARGEMENT 18 (Tony Venables ed., 2005); see also *infra* note 9.

feared increased Muslim immigration to the Netherlands.⁸ Both France⁹ and the Netherlands¹⁰ voted against ratification. Better empirical data regarding the reasons that voters rejected the European Union's Constitutional Treaty may be forthcoming, but it seems clear that many were concerned that the newly expanded,¹¹ and potentially expanding,¹² European Union would contribute to economic hardship and unemployment¹³

8. The Netherlands, known in recent times as a very open society, now has approximately 1 million Muslim immigrants amongst a population of just over 16.25 million people. A. Hanscom, *Allah's Socialists*, FrontPageMagazine.com, Sept. 20, 2006; *Muslims in Europe: Country Guide*, BBC NEWS, Dec. 23, 2005, <http://news.bbc.co.uk/2/hi/europe/4385768.stm>. The November 2, 2004 brutal assassination of filmmaker Theo Van Gogh, whose short film *Submission* challenged fundamentalist Muslims' treatment of women, sharply heightened Dutch citizens' concerns regarding the prospect of more Muslim immigration. Van Gogh, the great, great grandnephew of the artist Vincent Van Gogh, was murdered in the street by Mohammed Bouyeri, a radicalized Dutch-born Muslim of Moroccan descent. See Theodore Dalrymple, *Why Theo Van Gogh Was Murdered*, CITY JOURNAL, Nov. 11, 2004, <http://www.city-journal.org/printable.php?id=1719>; *Van Gogh Killer Jailed for Life*, BBC NEWS, July 26, 2005, <http://news.bbc.co.uk/2/hi/europe/4716909.stm>.

9. The French rejected the European Union's Constitutional Treaty with 54.8% voting against the measure. EUROPA, *A Constitution for Europe, Ratification and Referendum State of Play*, http://europa.eu/constitution/referendum_en.htm. The result of the vote was largely attributed to high unemployment in France and the perception that Polish and other Eastern European labor (the "Polish Plumber" stereotype) would further exacerbate the employment situation. This perception is reflected in a recent European Union survey entitled *The Future of Europe* in which seventy-two percent of the French surveyed claimed that further Union enlargement "would increase problems on their country's job market." *Commission White Paper on the Future of Europe, Special Eurobarometer 251*, at 4, 56-58 (May 2006), https://www.eurobarometer-conference.eu/pdf/future/ReportEBCommFutureofEuropeEN20060428_v7.pdf. Ironically, according to the French plumbing union, there is actually a shortage of 6,000 plumbers in France and a mere 150 Polish plumbers currently working in France. See Elaine Sciolino & Helen Fouquet, *Unlikely Hero in Europe's Spat: The Beckoning 'Polish Plumber'*, N.Y. TIMES, June 26, 2005, § 1, at 1.

10. The Netherlands rejected the Constitutional Treaty with 61.7% opposed. Immigration, particularly Muslim immigration (who already make up about six-percent of the population), has been a volatile issue, as reflected by the reaction to the murder of Theo Van Gogh. Economic concerns, as reflected in restrictive Dutch policies toward Eastern European – especially Polish – workers, may also have contributed to an "anti-expansionist" sentiment during the Dutch ratification vote. See Traser, *supra* note 7, at 17-18; *Van Gogh Killer Jailed for Life*, *supra* note 8.

11. On May 1, 2004, under a Treaty of Accession signed at Athens on April 16, 2003, the European Union expanded to include Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia. This was in addition to the Union's fifteen existing Member States (France, Germany, Belgium, the Netherlands, Luxembourg, Italy, the United Kingdom, Ireland, Denmark, Sweden, Finland, Austria, Greece, Portugal, and Spain). Treaty of Accession to the European Union, April 16, 2003, 46 O.J. (L 236) (Sept. 23, 2003) [hereinafter Treaty of Accession].

12. Bulgaria and Romania became members in 2007; and Turkey, a Muslim nation, remains in line for European Union membership.

13. Germany and France had in excess of ten-percent unemployment in 2005. See Traser, *supra* note 7, at 18. Nonetheless, this perception is surprising given that less than 1.5% of workers in pre-enlargement Member States are from other Member States. *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Report on the Functioning of the Transitional*

and would undermine the Member States' cultural and national identities.

While Member States have traditionally been quite homogeneous, and largely non-Muslim, present-day France and the Netherlands have substantial Muslim immigrant populations (approximately 5.5 million and 1 million respectively).¹⁴ Recent European Union terrorism incidents, the war in Iraq, and the Muslim world's stunning reaction to the Danish cartoons depicting the prophet Mohammed are likely to significantly reinforce concerns over a potential loss of cultural and national identity vis-à-vis Muslim populations. Most of the Muslims residing in Member States, however, did not come from other Member States, but rather from North Africa, South Asia, and Turkey.¹⁵ Thus, concerns about substantial Muslim migration from Member State to Member State is not entirely rational. Naturally, this would change if and when Turkey is admitted to the European Union.

Immediate fears of unemployment are also exaggerated. Even as the Union expands to include ten new Member States and, now in 2007, also Bulgaria and Romania, the Transitional Arrangements under the 2003 Accession Treaty permit Member States to take national measures to regulate and limit access to their labor markets for workers from most new States until April 30, 2011.¹⁶ France and the Netherlands have each taken advantage of the availability of restrictions during the transition period.¹⁷ Despite the anxiety concerning an influx of foreign workers, however, less than two-percent of the average Member State's working population comes from other Member States.¹⁸ Furthermore, in every country other than Ireland and Austria, the percentage coming from new

Arrangements Set Out in the 2003 Accession Treaty, at 3-11 COM (2006) 48 final (Aug. 2, 2006) [hereinafter *Communication from the Commission to the Council*].

14. *Muslims in Europe Country Guide*, *supra* note 8.

15. *European Muslims: Basic Information*, <http://www.Islamonline.net/English/EuropeanMuslims/basicinfo/index.shtml>.

16. Treaty of Accession, *supra* note 11, art. 3. See also *Communication from the Commission to the Council*, *supra* note 13, at 3-11.

17. *Communication from the Commission to the Council*, *supra* note 13, at 4. Between 2003 and 2005, less than one-tenth of one-percent of France and the Netherlands' working age population was comprised of nationals from the ten new enlargement states, and virtually no new work permits were issued to these nationals in France in 2004. *Id.* at 9. By contrast, in Ireland, which, like Sweden and the U.K, did not restrict labor flows from Eastern Europe, migrants from the new enlargement states comprised about two percent of the working age population in 2005 and were employed at a rate of eighty-five percent, the highest in Europe. *Id.* at 9-11. States like Ireland with larger migrant flows reported that increased migration was a welcome benefit to their national economies. Statistics also suggest that migration flows have had positive effects on the original European Union Member States. *Id.* at 14.

18. *Id.* at 9. See also P.R.S.F. MATHUSEN, A GUIDE TO EUROPEAN UNION LAW 194 (8th ed. Sweet & Maxwell 2004).

Member States is considerably lower.¹⁹

The economic and national identity concerns are not restricted to the working class. Some professionals and academics share similar sentiments. In a recent conversation about these issues, a German academic and business person explained to the author that while Polish workers and professionals are energetic and work well with non-Poles, Turkish workers in Germany keep to themselves, persist in their traditional customs, do not mix well, and do not learn German or adapt to German culture.²⁰ This individual attributed these characteristics to the Turks' different culture and religion, despite the fact that Turkish workers have been in Germany for many years.²¹ One academic commentator, discussing the resistance to free movement within the Member States, relates a conversation with a senior manager at a major Spanish university who "smilingly" told him that "his university had Spanish jobs for Spaniards only."²² A German lawyer from former West Germany, who was working on European Union-related matters in the former East Germany, was "troubled" because, in her view, East German workers had unrealistically high expectations for pay and social benefits, were not integrating well even within Germany, and were less productive than West Germans.²³

While these examples are anecdotal, they do represent the views of educated professionals familiar with the European Union's broad purposes. Nonetheless, these individuals harbor feelings that European free movement taints their cultural heritage, national identity, and national employment environment. Since the enlargement of the European Union from fifteen to twenty-five Member States, only the United Kingdom, Ireland, and Sweden have been receptive to workers from the new Eastern European Member States.²⁴ Approximately 450,000 Polish

19. *Id.*

20. Interview with anonymous German academic and businessperson in Dayton, Ohio (Mar. 27, 2005).

21. See e.g., Kemal Kirisci, *Immigration and Asylum Issues in EU-Turkish Relations: Assessing EU's Impact on Turkish Policy and Practice*, in *MIGRATION AND THE EXTERNALITIES OF EUROPEAN INTEGRATION* 125 (Sandra Lavenex & Emek M. Uçarer eds., Lexington Books 2002); William Hale and Gamze Avci, *Turkey and the European Union: The Long Road to Membership*, in *TURKEY IN WORLD POLITICS: AN EMERGING MULTIREGIONAL POWER* 31, 36 (Barry Rubin & Kemal Kirisci eds., Lynne Rienner Publishers 2001). See also Rachel Elbaum, *Integration Questions Stir Passions in Germany*, MSNBC NEWS, May 25, 2006, <http://www.msnbc.msn.com/id/12935103/>.

22. See Mark Jeffery, *The Free Movement of Persons Within the European Union: Moving from Employment Rights to Fundamental Rights?*, 23 COMP. LAB. L. & POL'Y J. 211, 231 (2002).

23. Interview with anonymous German attorney in Trier, Germany (June 23, 2005).

24. *Communication from the Commission to the Council*, *supra* note 13, at 9-11. See David Rennie, *EU Urged to Give British Welcome to Polish Plumbers*, TELEGRAPH, July 9, 2005, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2005/09/07/weu07.xml> (noting that "an influx of 100,000 Poles [into the U.K.] has only fuelled growth").

workers, by far the largest new Member State group, have been much less successful seeking work in other Member States.²⁵ Significant examples of resistance to Polish, Latvian, and other eastern European workers have been reported in France, Italy, and Spain.²⁶

As will be discussed throughout this Article, European Union institutions, particularly the ECJ,²⁷ actively seek to facilitate the free movement of persons to work and live in other Member States, and they have created a generous legal framework to support this goal. In contrast, Member State regulations often undermine this objective by creating residency time limits and requiring non-nationals to document their identity and obtain residency permits. These administrative hurdles represent only a fraction of the actual challenges free movement faces in the European Union. Migrants also face economic obstacles, linguistic and cultural challenges, and the xenophobic attitudes of many Member State citizens who are often intent on guarding their national identity and culture. Ironically, these hurdles may in some ways be the result of the European Union and the ECJ's lack of concern for Member State sovereignty and national citizenship. Either way, European Union citizens who attempt to migrate often encounter more difficulty than one might expect from simply reading the European Union institutions' pronouncements.²⁸

2. UNITED STATES

Historically, persons moving from one state to another within the United States have not always encountered warm welcomes. In fact, the supposed application of mobility and citizenship principles in the United States has often produced less than noble results. African-Americans fleeing slavery were captured and returned to southern states under the auspices of state law,²⁹ the laws and Constitution of the federal govern-

25. See Traser, *supra* note 7, at 17-19.

26. *Id.* at 18, 21.

27. See *infra*, Part III, Section A. The ECJ, along with the Court of First Instance, is generally responsible for ensuring "that in the interpretation and application of [The Treaty Establishing the European Community] the law is observed." Treaty Establishing the European Community (Nice consolidated version) art. 220, Dec. 24, 2002 O.J. (C235) 295 [hereinafter EC Treaty]. While the court does not have broad appellate and discretionary responsibilities like the United States Supreme Court, it does function much like the Supreme Court in terms of its power to interpret law for national courts, invalidate the actions and laws of national governments, and provide interpretative guidance to the Member States and the European Union's institutions. For a more extensive description, see Mathijsen, *supra* note 18, at 106-142; PAUL CRAIG & GRAINNE DE BURCA, EU LAW: TEXT, CASES AND MATERIALS 86-90, 96-102 (Oxford University Press 3d ed. 2003).

28. See Mathijsen, *supra* note 18, at 193-194; see also N.W. Barber, *Citizenship, Nationalism and the European Union*, 27 EUR. L. REV. 241 (2002).

29. For example, in 1847, the General Assembly of the State of Missouri passed a law

ment,³⁰ and the United States Supreme Court's decisional law.³¹ During World War II, the federal government expelled United States citizens of Japanese ancestry from their homes and sent them to detention camps.³² States have also erected barriers to out-of-state indigent persons³³ and others requesting social services.³⁴ From the 1860s and 1870s onward, American citizens from northern states supporting southern Reconstruction were characterized as "carpetbaggers." These so-called carpetbaggers and civil rights workers, both black and white, frequently faced expulsion and violence in southern states.³⁵

I recall as a young lawyer, a judge and local landlord in Massachusetts who referred to my client, a local resident, as "one of these 'darkies' come up here from the Carolinas and thereabouts just to get better welfare payments and other benefits. Even then," he continued, "they seldom make the rent payments on time, if they make them at all."³⁶ That same summer while representing an indigent person, a different judge in another Massachusetts county asked me, a member of the state bar, for my credentials and questioned why I thought I could practice law before him in "his county." These attitudes and obstacles, while usually based on race, gender, ethnic origin, sexual orientation, or disability, and not on state residence, persist today among *some* Americans and continue as obstacles to the freedom to work, to seek education, and to live as a citizen of equal self-worth.

Today, state and cultural identity rarely prevents Americans from moving to or engaging in economic activities in other states. Indeed,

banning the immigration of free African-Americans into Missouri. <http://www.sos.mo.gov/archives/education/aahi/earlyslavelaws/An%20Act%20Respecting%20Slaves,%201847.pdf> ("No free negro or mulatto shall, under any pretext, emigrate to this State, from any other State or territory.").

30. See U.S. CONST. art. IV, § 2, cl. 2. (the Fugitive Slave Clause), *repealed* by U.S. CONST. amend. XIII. See also Fugitive Slave Act of 1850, 9 Stat. 462 (1850); Fugitive Slave Act of 1793, ch. 7, 2 Stat. 302 (1793).

31. See *Dred Scott v. Sandford*, 60 U.S. 393, 411-13 (1857) (holding that a free African-American, whose ancestors were brought to the United States and sold as slaves, was not a "citizen" within the meaning of the United States Constitution).

32. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 215-220 (1944).

33. See, e.g., *Edwards v. California*, 314 U.S. 160, 171 (1941).

34. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 623 (1969) (a Connecticut statute prohibited individuals who had not resided in the state for a year from receiving aid), *overruled in part* by *Edelman v. Jordan*, 415 U.S. 651 (1974).

35. See ROY MORRIS JR., *FRAUD OF THE CENTURY* 37-45 (Simon & Schuster 2004).

36. This occurred in Fitchburg, Massachusetts, in the summer of 1971 during an *in camera* discussion regarding a plea arrangement between the judge, the prosecutor, and the author, a legal services lawyer. My two clients, one of whose parents had emigrated from the Cape Verde Islands to Massachusetts, had been leaders of a demonstration in favor of funding a community action center. In large part due to police tactics, my clients' demonstration became violent. They were charged with several counts of disorderly conduct and assault and battery.

Americans' interstate mobility is remarkable compared to what it was a mere generation ago. Personally, I have lived and worked in five states and the District of Columbia and worked and resided temporarily in three additional states without having to satisfy any general administrative or substantive requirements. Other than in-state and out-of-state university tuition differences and separate professional fitness and character investigations,³⁷ American citizens are generally free to work and move readily from state to state. While in the European Union, less than 1.5 percent of the average Member State's workers are citizens of other Member States,³⁸ many more United States citizens travel to work in one state while residing in another. Americans are free to obtain the benefits of state residency and are accepted not as New Yorkers, Virginians, or Texans,³⁹ but as Americans.

II. ANIMATING PURPOSES OF INTERSTATE MIGRATION PRINCIPLES IN THE EUROPEAN UNION AND THE UNITED STATES

A. *European Union*

In addition to horrific destruction of life and property, World War II produced desperate economic conditions. I recall the drab and depressing cinema news of German and other European displaced persons moving silently across scorched earth with vacant stares and little hope. To me, a six- or seven-year-old at the time, being European was synonymous with hunger and despair.

Shortly after World War II, European leaders⁴⁰ and thinkers⁴¹

37. See *Vlandis v. Kline*, 412 U.S. 441, 442 (1973) (students challenging higher tuition for out-of-state students); see also *Starns v. Malkeson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd without opinion*, *Starns v. Malkerson*, 401 U.S. 985 (1971).

38. CIA, *The World Fact Book*, <https://www.cia.gov/cia/publications/factbook/geos/ee.html> (last visited Sept. 17, 2006).

39. This is not to say that Americans are indistinguishable on the basis of colloquial accents and dialects. Quite the contrary, regional differences and stereotypes abound.

40. In 1946, Winston Churchill proposed a "closer political union" amongst European nations and called for the construction of a "United States of Europe." GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* 4 (West 1993). In 1949, a Treaty established the Council of Europe. *Id.* In the Schuman Declaration of May 9, 1950, French Foreign Minister Robert Schuman described actions that European States could take to move towards European unity, a first step being the formation of the European Coal and Steel Community ("ECSC"). The Schuman Declaration of May 9, 1950, *available at* <http://www.robert-schuman.org/gb/robert-schuman/declaration2an.htm> (last visited Sept. 17, 2006) [hereinafter Schuman Declaration]. Signed by France, Germany, Italy, Belgium, the Netherlands, and Luxemburg, the ECSC placed coal and steel production under a High Authority and promoted free trade within these sectors. Treaty Instituting the European Coal and Steel Community arts. 4, 8, Apr. 18, 1951, 261 U.N.T.S. 140.

41. Jean Monnet was a great proponent of European integration; he provided the inspirational philosophy behind European integration and was the first President of the ECSC's High Authority. Italians Spinelli and Rossi developed the Ventotene Manifesto "Calling for a Federal

began to turn away from the extreme nationalism that had wrought devastation and war and began to consider political structures that would promote peace and harmony, such as a federal European State.⁴² In a passionate drive for future peace in Europe and economic improvement through economic integration, European States adopted a number of treaties and conventions throughout the late 1940s and 1950s to foster both economic integration⁴³ and human rights.⁴⁴ The Schuman Declaration affirmed: "World peace cannot be safeguarded without the making of constructive efforts proportionate to the dangers which threaten it."⁴⁵

This drive for peace and economic integration was the purpose animating the first steps towards a European political union. The earliest efforts to unify culminated in the European Economic Community, which came into effect in France, Germany, Italy, Belgium, Luxemburg, and the Netherlands in 1958.⁴⁶ Since then, the Union has grown to include 27 Member States and currently functions under the consolidated Treaty of the European Union ("TEU")⁴⁷ and the Treaty Establishing the European Community ("EC Treaty").⁴⁸ Remarkably, with time and growth, Europe has transformed from a fragmented continent of displaced persons to the well-integrated European economic market that it is today. In light of this historical context, the genuine search for a European consciousness in political and social affairs we see today is a phenomenal achievement.⁴⁹

Unlike the United States Constitution,⁵⁰ the EC Treaty is quite explicit in protecting, encouraging, and facilitating the free movement of

Europe." See PAUL B. STEPHAN ET AL., *THE LAW AND ECONOMICS OF THE EUROPEAN UNION* 1-6 (LexisNexis 2003); see also ALAIN A. LEVASSEUR & RICHARD F. SCOTT, *THE LAW OF THE EUROPEAN UNION: A NEW CONSTITUTIONAL ORDER* 10-32 (Carolina Academic Press 2001).

42. Stephan, *supra* note 41, at 1-6.

43. In addition to the ECSE and the EC Treaty, the European Atomic Energy Community Treaty established "a common market for specialised materials and equipment, by free movement of capital for nuclear investment." Treaty Establishing the European Atomic Energy Community art. 2, Apr. 17, 1957, 298 U.N.T.S. 167. This treaty was followed by the Single European Act, Feb. 17, 1986, 1987 O.J. (L169) 1, and the Treaty on European Union, July 29, 1992, 1992 O.J. (C191) 1 [hereinafter TEU], each of which advanced a common European market.

44. In 1950, the Council of Europe drafted and signed the remarkable European Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention established a European Commission, which has now been eliminated, and the European Court of Human Rights, both of which have been instrumental in protecting and entrenching rights and freedoms in Europe and even fostering the constitutionalization of such rights in some Member States. See Bermann, *supra* note 40, at 4.

45. Schuman Declaration, *supra* note 40.

46. Bermann, *supra* note 40, at 6-7.

47. TEU, *supra* note 43.

48. EC Treaty, *supra* note 27.

49. See generally Stephan, *supra* note 41.

50. See e.g., *Saenz v. Roe*, 526 U.S. 489, 498-504 (1999); *Shapiro v. Thompson*, 394 U.S. 618, 630-631 (1969), *overruled in part by Edelman v. Jordán*, 415 U.S. 651 (1974).

persons in the European Union. In a chapter entitled "Workers," Article 39.1 of the Treaty states that, "[f]reedom of movement for workers shall be secured within the Community."⁵¹ Article 39 goes on to state that "such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment."⁵²

Moreover, the opening provision of the EC Treaty entitled "Principles," states that the Community's tasks include

establishing a common market and an economic and monetary union . . . to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection . . . a high degree of competitiveness and convergence of economic performance . . . and economic and social cohesion and solidarity among the Member States.⁵³

These provisions emphasize the union between Member States and their goal of creating a single European economic market. Furthermore, Article 39 of the EC Treaty characterizes "the free movement of workers" as an essential element of the means to achieving economic union.⁵⁴

European Union institutions, particularly the Council of Ministers,⁵⁵ have further recognized that it is critical for European workers to possess free movement. Accordingly, the Council has enacted legislation that supports the workers' right to travel with their families.⁵⁶ In the *Baumbast* case, the ECJ first identified

the importance for the worker, from a human point of view, of having his entire family with him, and secondly, the importance from all points of view, of the integration of the worker and his family into the host Member State without any difference in treatment in relation to nationals of that State.⁵⁷

The goal of completing and supporting the European Community's internal market profoundly animates free movement's meaning. Aspira-

51. EC Treaty, *supra* note 27, art. 39.1.

52. *Id.* art. 39.2.

53. *Id.* art. 2.

54. *Id.* art. 39.

55. The Council of Ministers functions as the primary legislature for the European Union (although more recently, it has been viewed as virtually co-equal in many legislative matters with the European Parliament). The Council of Ministers is made up of ministers from each of the Member States. *Id.* art. 202-210; see also Mathijsen, *supra* note 18, at 73-89; Craig & De Burca, *supra* note 27, at 65-71.

56. Council Regulation 1612/68, Freedom of Movement for Workers in the Community, art. 12, 1968 O.J. (L 257).

57. Case C-413/99, *Baumbast v. Sec'y of State for the Home Dep't*, 2002 E.C.R. I-7091, ¶ 68.

tions for a truly unified internal market began with the Single European Act of 1986 ("1986 Act") and in Article 14.2 of the EC Treaty.⁵⁸ Article 14.2 states, "[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, *persons*, services, and capital is ensured in accordance with the provisions of this Treaty."⁵⁹ It includes each Member State's territory and recognizes no boundaries between the Member States for internal market purposes. The 1986 Act and the EC Treaty also granted European Union institutions the ability to enact legislation facilitating the internal market by qualified majority voting, rather than by the more difficult unanimous voting required by the European Council.⁶⁰ As one European academic put it, "the core principle is that there should be no barriers to free movement – except under the narrow application of permitted exceptions – interpreted by the ECJ."⁶¹

As will be discussed later, the ECJ has been active and generous in interpreting and applying free movement principles. It has extended residency rights, benefits, and education to workers' spouses, former spouses, and children, even after the worker has ceased working. The ECJ has mandated that Member States provide a wide range of social benefits to non-national workers, trainees, part-time workers, and workers' children and spouses. This mandate has somewhat countered circumstances that formerly discouraged families from moving with their worker relatives to other Member States. The ECJ has also indicated "that the same principles underpin all of the Treaty provisions on freedom of movement,"⁶² whether the matter involves free movement of goods or workers,⁶³ the right of establishment,⁶⁴ or the freedom to provide services.⁶⁵

In addition to laws and doctrines that abolish obstacles to European

58. Single European Act art. 1, Feb. 17, 1986 O.J. (L169) 4; EC Treaty, *supra* note 27, art. 14.2.

59. EC Treaty, *supra* note 27, art. 14.2 (emphasis supplied).

60. Single European Act art. 1, Feb. 17, 1986 O.J. (L169) 5; EC Treaty, *supra* note 27, art. 14.3.

61. Patricia Conlan, Address, *Fundamental Principle of the Internal Market* (Trier, Germany, Jun. 23, 2005) (copy on file with the Academy of European Law).

62. Craig & De Burca, *supra* note 27, at 784.

63. See Case C-55/94, Gebhard v. Consiglio, 1995 E.C.R. I-4165.

64. The right of establishment is one of the four freedoms established by the EC Treaty, *supra* note 27, arts. 43-48. The right of establishment pertains to persons who pursue businesses or subsidiaries, whether trades, professions, or businesses, in another Member State. The right of establishment, as with worker free movement principles, allows a person to freely reside in a Member State in which the person establishes a business.

65. EC Treaty, *supra* note 27, arts. 49-55. The freedom to provide services relates to persons from a Member State providing commercial, industrial, professional, or craftsman services, temporarily or sporadically, in other Member States.

workers' free movement, Member States have added the complementary concept of European Union citizenship.

In 1993, the Maastricht Treaty on European Union made every Member State national a European Union citizen.⁶⁶ By adding Article 18 to the EC Treaty, every Union citizen was given "the right to move and reside freely within the territory of the Member States."⁶⁷ This grant of European citizenship extended European free movement rights to non-economic actors. By virtue of Article 12 of the EC Treaty, Member States are also prohibited from discriminating against Union citizens based on nationality. For example, discrimination against workers, their spouses, and their children is prohibited under the free movement of workers provisions.⁶⁸

Free movement principles, including non-discrimination, removal of obstacles to free movement, and the liberalizing trends facilitated by the ECJ's jurisprudence⁶⁹ have been concomitantly extended in a non-economic context to European Union citizens. At first blush, this suggests that a collective European political and social identity, represented by Union citizenship and a heightened European "consciousness" that embraces a "newly absolute right" to free movement and residence,⁷⁰ is the overarching purpose in the area of European interstate migration.

There are, however, limitations on that expansive notion. The People's Europe Program, endorsed by the European Council in 1985 and a precursor to the adoption of the treaty-based European citizenship, is subject to the limitation that persons who move to new Member States must have sufficient resources to avoid burdening the Member States' social assistance systems. This is a more significant limitation and more limited right to movement and residence than state citizens in the United State face.⁷¹ The European Council asserted that it was "adopting measures to strengthen and promote its identity and its image both for its

66. EC Treaty, *supra* note 27, art. 17.

67. *Id.* art. 18.

68. See Case C-85/86, *Martinez Sala v. Freistaat Bayern*, 1998 E.C.R. I-2691; see also Case C-224/98, *D'Hoop v. Office National de l'Emploi*, 2002 E.C.R. I-6191; Case C-184/99, *Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve*, 2001 E.C.R. I-6193.

69. Indeed, in Case C-413/99, *Baumbast v. Sec'y of State for the Home Dep't*, 2002 E.C.R. I-7091, ¶ 82, the ECJ stated that "[u]nion citizenship is destined to be the fundamental status of nationals of the Member States."

70. GEORGE BERMAN ET AL., 2004 SUPPLEMENT TO CASES AND MATERIALS ON EUROPEAN UNION LAW 162 (2004).

71. See Council Directive 90/364, 1993 O.J. (L 317) 59 (discussing residence rights for students; readopted under EC Treaty, *supra* note 27, art. 12, after the ECJ found the provision was invalidly adopted under Article 308 of the EC Treaty); Council Directive 90/365, 1990 O.J. (L 180) 28 (discussing residence rights for retired or disabled former workers); Council Directive 90/364, 1990 O.J. (L 180) 26 (discussing residence rights for other non-workers, including retired persons, self-employed, and students).

citizens and for the rest of the world.”⁷² In 1993, following this effort to create a “European Consciousness,” the Member States adopted European citizenship via the Maastricht Treaty. Thus, European citizenship adopted some of the People’s Europe Program’s goals. Indeed, a rousing purpose of the People’s Europe Program and the European citizenship treaty provisions is to eliminate all barriers to European Union citizens’ free movement rights, thereby creating a Europe without internal boundaries.

The accompanying limitations of European citizenship, though, belie this idea of “creating absolute free movement” within the European Union. Under the Union Citizenship provision, European Union citizenship complements but does not replace national citizenship.⁷³ As such, the EC Treaty recognizes the superior standing of national citizenship and subjects “the right to move and reside freely” to “the limitations and conditions laid down in [the EC] Treaty and by the measures adopted to give it effect.”⁷⁴ These characteristics sharply contrast with the freedoms of residence and movement of national citizens within a sovereign federal State like the U.S.

In addition, in interpreting the EC Treaty’s Article 18.1 on the right to free movement for European Union citizens, the ECJ determined that “students who are nationals of a different Member State and who wish to exercise the right of residency” must satisfy national authorities that they “have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during the period of residence . . . and that they be covered by sickness insurance in respect of all risks in the host Member State.” This would extend to restrictions upon other non-worker European citizens who seek Member State residency.⁷⁵ Although the ECJ construes residency restrictions in this respect narrowly,⁷⁶ older European Union citizens, retired Union citizens with little retirement income, Union citizens lacking health insurance, and young, unemployed Union citizens may constitute “a burden” on a Member State’s social assistance resources. Consequently, these parties may lack the freedom to move to and reside in a host Member State despite their acknowledged Union citizenship.

72. See Bermann, *supra* note 40, at 630-31.

73. EC Treaty, *supra* note 27, art. 17.1.

74. *Id.* art. 18.1.

75. Grzelczyk v. Centre Public d’Aide Sociale d’Ottignies-Louvain-la-Neuve, 2001 E.C.R. I-6193, ¶¶ 37-38; see Case C-413/99, Baumbast v. Sec’y of State for the Home Dep’t, 2002 E.C.R. I-7091, ¶¶ 81, 87; see also Council Directive 90/364, 1990 O.J. (L 180) (conditioning right of residence of non-economic actions on the possession of health insurance and sufficient resources to avoid burdening the state).

76. In *Baumbast*, the ECJ stated that any restrictions would have to be “necessary and appropriate to attain the objective pursued.” 2001 E.C.R. I-7091, ¶ 91.

Furthermore, the term “host” Member State – the language often used in European Union texts – and references to “the period of residence” further weaken Union citizens’ residency rights. This linguistic differentiation may belie the *Baumbast* court’s contention that European Union citizenship is destined to be the Member State national’s *fundamental* status.⁷⁷ In other words, it may belie that court’s vision that European citizens will eventually view themselves in much the same fashion as American citizens – Americans first and state citizens second.

In addition, under European Union law, other Member States’ nationals may be required to produce a valid identity card or passport and must obtain a Residence Permit for the host Member State.⁷⁸ And, as will be discussed below, under the EC Treaty, Article 39.3, workers and those who derive free movement rights from workers are subject to Member State limitations on public policy, public security, or public health grounds. The ECJ has narrowed these principles to restrictions that are necessary to achieve the exception’s legitimate objective. Additionally, the ECJ often applies these exceptions only when the individual’s personal conduct falls within the restriction.⁷⁹

Due to the Member States’ sovereign and independent character, one might expect that Member States would have extensive power to exclude non-nationals on national security or economic grounds. One might further expect Member States to have power to preserve their cultural identity as long as it was this legitimate public objective that was being served, particularly concerning the free movement of non-workers and their families. To date, however, the ECJ has chosen to carefully circumscribe the Member States’ discretion in these contexts. Nonetheless, when restrictions under these exceptions are carefully tailored, would-be host Member States can use them to restrict inter-Member State migration.

Article 39.4 of the EC Treaty poses further free movement limitations for European Union workers – through that provision, Members States are entitled to deny or restrict employment in the public service sector.⁸⁰ What constitutes public service employment, however, is not left solely to Member State discretion; rather, the ECJ generally interprets the term narrowly. The ECJ limits the public service restriction’s application to activities involving “the exercise of powers confined by public law to responsibility for safeguarding the general interests of the

77. *Id.* ¶ 82.

78. Council Regulation 68/360, 1968 O.J. (L 257) 13, arts. 1-4; *see also* Council Regulation 1612/68, 1968 O.J. (L 257) 2.

79. EC Treaty, *supra* note 27, art. 39.3; Council Regulation 64/221, 1964 O.J. (L 56) 850.

80. EC Treaty, *supra* note 27, art. 39.4.

State” or to positions involving participation “in official authority.”⁸¹ Though narrowly construed, these limitations restrict free movement in ways commonly associated with non-nationals in other societies. For example, the United States’ federal government may restrict non-citizens from public service employment.

In the contexts described above, European Union citizens are not host Member State citizens. Full Member State citizenship is limited to Member State nationals. Article 17 of the EC Treaty, which establishes Union citizenship, reinforces this notion by stating that Union citizenship “shall complement and not replace national citizenship.”⁸² While appearing generous and robust, ECJ decisions regarding the free movement rights bound up with Union citizenship are often opaque and unclear.⁸³ Those decisions seem to leave open the possibility that Member States may create more carefully constructed limitations, conditions, and exceptions to free movement rights.

Together, national administrative requirements, Article 18.1’s “limitations and conditions” clause, public health exceptions, public policy exceptions, security exceptions, the public service limitation, and national citizenship’s superior status within each Member State’s borders represent something less, perhaps much less, than an absolute right to European free movement. While those who advocate the European ideal strive toward a goal of “One Europe, One People” and a pervasive European consciousness, including the abolition of all barriers to free movement and residence, the EC Treaty’s provisions and the Union’s directives provide something less. This leaves the European Union’s “economic integration and internal market” as European free movement’s primary animating purpose. Advancing European “consciousness” is, at best, a secondary interest underlying European free movement principles.⁸⁴

B. *United States*

One of the Federal Republic’s foundational principles is “[t]he people of these United States constitute one nation [and that] [t]hey have a government in which all of them are deeply interested,”⁸⁵ that “the con-

81. Case 149/79, *Comm’n v. Belgium*, 1980 E.C.R. 3881, ¶ 7.

82. EC Treaty, *supra* note 27, art. 17.1.

83. See Jeffery, *supra* note 22, at 222.

84. This may be an ungenerous and troublesome characterization for the original proponents of a unified Europe and many of the European Union’s current supporters. It would be improper, however, if the aspirations of many individuals, including current European Union leaders and judges, would trump the free movement and citizenship concepts agreed to in the EC and TEU treaties.

85. *Crandall v. Nevada*, 73 U.S. 35, 43 (1867). Or as Justice Cardozo eloquently explained,

stitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union,”⁸⁶ and that “[f]or all the great purposes for which the Federal government was formed, we are one people, with one common country [and] are all citizens of the United States, and, as members of the same community must have the right to pass and repass through every part of it”⁸⁷ or “to reside in any other state.”⁸⁸ American citizens’ allegiance and service to the sovereign Federal State, and the sovereign people of the United States, are lynchpin elements of the unified federal state concept. *Gibbons v. Ogden*⁸⁹ identifies further elements of the federal sovereign’s overarching role. Therein, Chief Justice John Marshall observed that while the states, prior to ratifying the Constitution, may have been “sovereign, . . . completely independent, and . . . connected with each other only by a league. . . , when [they] converted their league into a government,” under the federal Constitution, “the whole character in which the States appear, underwent a change.”⁹⁰ And, in construing the federal power over “commerce . . . among the several States,” Marshall determined that such power would have to comprehend “every species of commercial intercourse”⁹¹ that became “intermingled with,”⁹² or introduced into, the interior of the states as long as it “extend[s] to or affect[s] other States.”⁹³ Justice Marshall found that the federal commerce power is complete and plenary within its domain and is “vested in Congress as absolutely as it would be in a single government.”⁹⁴

While Justice Marshall may not have chosen these words, the federal commerce power’s underlying principles – just like Americans’

“[t]he Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together” *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

86. *United States v. Guest*, 383 U.S. 745, 757 (1966). Justice Stewart provided an explanation for why the Framers chose not to explicitly mention this right in Constitution: it is “a right so elementary [that it] was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.” *Id.* at 758.

87. *The Passenger Cases*, 48 U.S. 283, 492 (1849) (statement of Chief Justice Taney, which was relied upon in *Guest*, *Crandall*, and *Shapiro*, amongst others).

88. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (E.D. Pa. 1823) (No. 3,230).

89. 22 U.S. (9 Wheat.) 1 (1824). Some of the Framers disagreed with the notion that the states were ever independent and sovereign. Elbridge Gerry, a member of the Federal Convention from Massachusetts and a member of Congress at the time the Articles of Confederation were formed, “urged that we were never independent States . . . even on the principle of the Confederation” and that “[t]he States [and] the advocates for them were intoxicated with the idea of their sovereignty.” James Madison, *The Debates in the Federal Convention of 1787*, June 29, 1787, <http://www.yale.edu/lawweb/avalon/debates/629.htm>.

90. *Gibbons*, 22 U.S. (9 Wheat.) at 187.

91. *Id.* at 193.

92. *Id.* at 194.

93. *Id.*

94. *Id.* at 197.

freedom to travel, work, and live – are bound up with the Federal Union’s sovereignty⁹⁵ and the American people’s sovereignty-based federal citizenship.⁹⁶ The most formidable expression of this combination of federal sovereignty and citizenship may be the federal government’s virtually exclusive power over foreign affairs through the Executive⁹⁷ and Congress.⁹⁸ This power is also reflected in the federal government’s control over American immigration⁹⁹ as “an inherent attribute of sovereignty.”¹⁰⁰ Federal citizenship’s advantages contrasted with non-citizenship’s disabilities – particularly within the context of political participation, social benefits, and employment – demonstrate this power’s importance.¹⁰¹ These American citizenship characteristics illustrate the significant difference between sovereignty-based federal citi-

95. In a federal republic like the United States, this “sovereignty” is a combination of self-government by the people, the sovereign people, referred to by Justice White in *Cabell v. Chavez-Salido*, 454 U.S. 432, 439-40 (1982), and the sovereign nature of the independent union of states represented by the federal government, whereby the people and their government together rule and exercise freedom within their nation, define the character of the national community, and shape its external relations.

96. This contrasts sharply with the non-sovereign character of the federal system of the European Union as opposed to the “true” sovereignty of its Member States, the not quite whole, though useful, nature of European citizenship, and the fuller national (Member State) citizenship that it complements.

97. See generally *United States v. Curtiss-Wright Exp. Co.*, 299 U.S. 304 (1936); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (Oxford University Press 2d ed. 1996).

98. This would be exercised through Congress’s power over foreign commerce and implied powers derived from the spending power, the power to declare war, the necessity of the Senate’s consent to Treaties, and the like. See *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); *United States v. Guy W. Copps, Inc.*, 204 F.2d 655, 658 (4th Cir. 1953), *aff’d*, 348 U.S. 296 (1955).

99. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (proclaiming the plenary power of the federal government to exclude foreigners); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (extending this plenary power to the power to deport non-citizens).

100. See *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 136 (1812) (Chief Justice Marshall stated that “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute”); see also *Fong Yue Ting*, 149 U.S. at 711.

101. Over the years, we have seen that Congress has exercised virtually plenary power over non-citizens by placing conditions on their right to remain in the country. See, e.g., *Immigration and Nationality Act*, 8 U.S.C. § 1227 (2000 & Supp. 2004) (section of U.S. federal immigration law describing conduct that will subject lawfully residing non-citizens to deportation); *Demore v. Hyung Joon Kim*, 538 U.S. 510 (2003); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). States also discriminate against non-citizens on the basis of alienage, particularly where alienage implicates “the political function” of the state. See *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (upholding limitation of probation officer positions to American citizens); *Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding a citizenship requirement for the state’s public school teachers); *Foley v. Connelie*, 435 U.S. 291 (1978) (upholding a requirement that state troopers be citizens). Where state positions or other jobs go to the heart of our democratic, political community or involve the making or exercise of public policy, states may discriminate against non-citizens; otherwise, the states would need to demonstrate a compelling state interest before limiting employment in an area to American citizens. See, e.g., *Sugarman v. Dougall*, 413 U.S. 634, 646-47 (1973) (holding that the discharge of aliens – amounting to a flat ban on aliens in civil service public employment – not limited to

zenship in the United States and treaty-based federal citizenship within the European Union. American citizens represent in fact what was aspirational for the ECJ in *Baumbast* – American citizenship, as opposed to state citizenship, is the average American's *fundamental* status.¹⁰²

Whereas economic integration is the primary and animating free movement purpose in the European context,¹⁰³ it is an important, but not primary, purpose in the American context. State laws providing debtor relief, creating proprietary paper money, establishing the inability of out-of-state creditors to protect their rights in state courts, and redistributing property protected by another state's laws all exemplified the period under the Articles of Confederation. Shay's Rebellion, during which farmers in western Massachusetts rose up in arms with the intent to march on Washington, D.C., further emphasized the need for a more unified sovereignty. The lack of federal control, Congress's inability to prevent economic discrimination against the citizens of other states, and restrictions on commerce by one state against the citizens of another state or foreign State, eventually led the way to the Philadelphia Convention in 1787, which produced the United States Constitution. Thus, the Confederation government's inability to fund itself and to create effective and non-discriminatory rules regarding interstate and foreign commerce were among the significant reasons for creating the new federal structure, which, in turn, altered the basic nature of the relationship among the federal government, the states, and the American people.¹⁰⁴

Thirty-five years after the Constitution's ratification, the United States Supreme Court emphasized federal power's critical nature in regulating interstate relationships. In *Gibbons v. Ogden*, Chief Justice Marshall held that "[t]he [federal] power over commerce is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations."¹⁰⁵ Much later, in addressing state efforts to regulate commerce in ways that burden or discriminate against interstate commerce, Justice Jackson elaborated upon the commerce power's significance:

This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud . . . and its lack of power to retard, burden or constrict the flow of such commerce for

those areas justifying the use of the political function exception, violates the Equal Protection Clause).

102. Cf. Case C-413/99, *Baumbast v. Sec'y of State for the Home Dep't*, 2002 E.C.R. I-7091.

103. See *infra* discussion accompanying notes 38-58.

104. See ROBERT RUTLAND, JAMES MADISON: THE FOUNDING FATHER 13-17 (Macmillan Pub. Co. 1987); Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 IOWA L. REV. 891, 893-94 (1990).

105. 22 U.S. 1, 196 (1824).

their economic advantage, is one deeply rooted in both our history and our law.¹⁰⁶

Justice Jackson continued by observing that “[t]he principle that *our economic unit is the Nation*, which alone has the gamut of powers necessary to control of the economy”¹⁰⁷ and that “[o]ur system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation.”¹⁰⁸

For citizens engaged in every sort of work, the nation would be truly unified. Moreover, the new Constitution purported to protect citizens from an ever broader area of disabilities or discrimination, largely under Article IV, Section 2, Clause 1, which reads, “[t]he Citizens of each State shall be entitled to all Privilege and Immunities of Citizens in the several States.”¹⁰⁹ This clause, also known as the Privileges and Immunities Clause, was meant as “a necessary concomitant of the stronger Union the Constitution created.”¹¹⁰ As was explicitly stated in the Articles of Confederation, “the people of each State shall have free ingress and regress to and from any other State.”¹¹¹

Early decisions identified the Privileges and Immunities Clause as the source for Americans’ residency rights and the rights to work or transact business in any other state.¹¹² One might surmise that pure economics engendered both the foundational principle of “one nation, one people” and the Supreme Court’s early interpretations of the Privileges

106. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949).

107. *Id.* at 537 (emphasis supplied).

108. *Id.* at 539.

109. U.S. CONST. art. IV, § 2, cl. 1.

110. *United States v. Guest*, 383 U.S. 745, 758 (1966).

111. ARTICLES OF CONFEDERATION art. IV (U.S. 1777). See also 3 MAX FARRAND, *RECORDS OF THE FEDERAL CONVENTION OF 1787*, 112 (rev. ed. 1937), in which Charles Pinckney of South Carolina states, “[t]he 4th article, respecting the extending [of] the rights of the Citizens of each State, throughout the United States . . . is formed exactly upon the principles of the 4th article of the present Confederation.” The article eventually adopted did not include the “free ingress and regress” language, despite the fact that Article IV of the Articles of Confederation included both a Privileges and Immunities Clause and a “Free Ingress and Regress” Clause. This suggests that the Article IV of the Constitution and Article IV of the Articles of Confederation do not embrace the same rights. The latter Article IV, in pertinent part, reads:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively

ARTICLES OF CONFEDERATION art. IV (U.S. 1777).

112. See, e.g., *Corfield v. Coryell*, 6 F. Cas. 546, 552 (E.D. Pa. 1823) (No. 3,230).

and Immunities Clause. Little was said at the time; perhaps, the Clause was thought to speak for itself.

In any event, through a combination of the Commerce and Privileges and Immunities Clauses, economic unity and the impermissibility of discrimination based on state citizenship have become elemental dimensions of the Federal Union. The European and American interstate migration principles, though, differ in this respect; while in the European Union economic unity is a fundamental end in itself, in the United States economic unity is only an essential *part* of national unity.

The foundational goals of American free movement and residence principles go beyond economic unity. Beginning with the Civil War and the widespread recognition that the states are not independent and sovereign States, Congress adopted the Civil War Amendments, particularly the Fourteenth Amendment, in which it recognized that “[a]ll persons born or naturalized in the United States . . . are citizens of the United States *and of the State wherein they reside*”¹¹³ and are entitled to all the “privileges or immunities of citizens of the United States.”¹¹⁴ In *Saenz v. Roe*,¹¹⁵ Justice Stevens addressed the protections a sovereign affords its citizens, including the absolute freedom of a national citizen to move to and reside in another constituent political unit. This principle relates to a unified federal State’s economic, social, and political integration – federal sovereignty and a constitutional citizenship-based freedom of movement permit federal citizens to live and work throughout the Federal Union free from constituent state discrimination. It creates a freedom to fully transfer constituent state citizenship, while retaining the same federal citizenship. The new state citizen is free to fully participate politically and socially and to stand on an equal basis with long-time state citizens. This freedom includes all the opportunities the constituent state offers its citizens, from educational to occupational prospects, from health and welfare security to environmental quality, cultural contributions, and the state’s tranquility and beauty. In sum, American free movement is more robust than that *currently* enjoyed within the European Union, and its animating purpose – social, economic, and political unity and national identity – is much broader than the European Union’s “economic integration” purpose.

113. U.S. CONST. amend. XIV, § 1 (emphasis supplied).

114. *Id.*

115. 526 U.S. 489, 500 (1999).

III. THE LAW AND CONTROLLING PRINCIPLES FOR FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION AND THE UNITED STATES

A. *European Union*

Over the years, the ECJ has expanded the meaning and reach of EC Treaty provisions by endowing European workers' freedom of movement,¹¹⁶ the right of establishment,¹¹⁷ the freedom to provide services,¹¹⁸ European Union Citizenship,¹¹⁹ and non-discrimination on the grounds of nationality, with purposeful life.¹²⁰ The ECJ's consistent tendency has been to enhance free movement principles, reaching toward absolute freedom for European Union citizens to migrate and establish residency within the Union's Member States. Furthermore, the ECJ has seemed to resist, and generally narrowly construes, Member State attempts to restrict free movement principles via treaty-based¹²¹ and sovereignty-based justifications.¹²²

The ECJ demonstrated this tendency in some of its earliest decisions. In a 1969 case, a referral from the Supreme German Labor Court, a German employer refused to treat its Italian worker's performance of compulsory military service in Italy as employment for the purpose of seniority and pension benefits, as it would have treated German military service for German workers.¹²³ Even though the distinction drawn by the German employer would have advanced Germany's national security interests by encouraging German military service, the ECJ determined that a Member State may not treat its own nationals more advantageously than nationals of other Member States in relation to employment benefits.¹²⁴ Doing so, even in connection to military obligations and national defense, would violate the European Union's equality of treatment laws.¹²⁵ The ECJ has also held that prohibiting discrimination

116. EC Treaty, *supra* note 27, art. 39.

117. *Id.* art. 43.

118. *Id.* art. 49.

119. *Id.* arts. 17-18.

120. *Id.* art. 12.

121. *Id.* arts. 39.3, 46 (concerning official Member State treatment of foreign nationals on grounds of public policy, public security, or public health); *id.* art. 39.4 (concerning the non-applicability of free movement to employment in the public service); *id.* art. 18.1 (subjecting European Union citizens' free movement and residency rights to limitations and conditions laid down by the EC Treaty and by measures adopted to give the Treaty effect).

122. *See* discussion accompanying notes 170-185.

123. Case 15/69 *Wurtembergische Milchverwertung-Sudmilch AG v. Ugliola*, 1969 E.C.R. 363 (decided under what is now Article 39 of the EC Treaty and European Union regulation 1612/68, concerning the equality of treatment of workers from other Member States).

124. *Id.* ¶ 3.

125. *Id.* ¶ 6.

on the basis of nationality is not limited to discrimination emanating from public authorities but may extend to other entities such as an international sports organization with activities located within the Union.¹²⁶

In *Groener v. Minister of Education*, the ECJ recognized that national language requirements that express national identity and culture, such as Gaelic in Ireland,¹²⁷ may be imposed upon non-nationals without violating the EC Treaty or European Union anti-discrimination measures so long as they are not disproportionate in light of the national objective they seek to achieve.¹²⁸ This is similar to the intermediate scrutiny standard of review under American Equal Protection jurisprudence, where the means to serve interests in the national and cultural identity must be "substantially related to an important governmental objective."¹²⁹

The ECJ has been generous in determining who may invoke workers' free movement rights. The ECJ extends free movement and residency rights to part-time, low-wage, and less than minimum wage workers as long as the work is genuine.¹³⁰ Even trainee-teachers benefit as workers under free movement principles, provided that the trainee-teacher "performs services for and under the direction of another person in return for which he receives remuneration."¹³¹

The European Union's Council of Ministers enacted Regulation 1612/68 to implement free movement treaty provisions and to enable migrant workers' family members to reside with European workers working and residing in a host Member State.¹³² Again, in this area the ECJ has extended free movement rights, compelling the distribution of significant benefits beyond mere residency to workers' families. In the *Casagrande* case, the ECJ considered whether a host Member State was required to subsidize workers' children by providing them monthly low-

126. Case 36/74, *Walrave v. Ass'n Union Cycliste Internationale*, 1974 E.C.R. 1405.

127. Gaelic is spoken regularly and fluently by approximately 55,000 Irish in the Republic of Ireland, which constitutes less than two-percent of the population, although forty-percent of the 3.9 million Irish population identify themselves as fluent in Gaelic. Gaelic's practice and the reinforcement of the language, however, is perceived as essential to the preservation of Irish culture, heritage, and identity. See *Gaelic Language Gets Official EU Status*, USA TODAY, June, 13, 2005, http://www.usatoday.com/news/world/2005-06-13-gaelic_x.htm.

128. Case 379/87 *Groener v. Minister of Educ.*, 1989 E.C.R. 3967, ¶ 24.

129. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

130. Case 53/81, *Levin v. Staatssecretaris van Justitie*, 1981 E.C.R. 1035, ¶¶ 16, 17. In Case 139/85, *Kempf v. Staatssecretaris van Justitie*, 1986 E.C.R. 1741, ¶¶ 9-12, the ECJ stated that workers' free movement rights apply to the pursuit of effective and genuine work for marginal and ancillary activities. Therein, the court used a residency rights analysis to protect a German national's ability to provide music lessons twelve times per week in the Netherlands.

131. Case 66/85, *Lawrie-Blum v. Land Baden-Wurttemberg*, 1986 E.C.R. 2121, ¶ 17.

132. Council Regulation 1612/68, 1968 O.J. (L 257) 2, art. 10.

income assistance grants under Article 12 of Regulation 1612/68.¹³³ The court recited that under Article 12, "the children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that state's general educational, apprenticeship and vocational training courses under the same consideration as the nationals of that state, if such children are residing in its territory."¹³⁴ The court found that free mobility standards require "[t]hat obstacles to the mobility of workers shall be eliminated," so the worker can "be joined by his family and . . . integrat[ed] . . . into the host country."¹³⁵ The ECJ held that to avoid discrimination in favor of the children of host Member State nationals, monthly assistance grants to secondary school students from low income families had to be provided to the children of migrant European workers.¹³⁶ In *Casagrande*, this meant providing grants within Germany to both Italian and German workers' children.¹³⁷ Neither the EC Treaty nor European Union legislation had addressed the availability of social assistance benefits to workers' family members,¹³⁸ although Regulation 1612/68's preamble states that "obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family *and the conditions for the integration of that family into the host country*."¹³⁹

In the 1985 *Hoeckx* case,¹⁴⁰ Belgium denied a Dutch national minimum assistance benefits because she had not lived in Belgium for at least five years. Under Belgian law, non-nationals were entitled to minimum assistance benefits on the condition that they "have actually resided in Belgium for at least the five years immediately preceding the date on which the minimum means of subsistence is awarded."¹⁴¹ The ECJ held that these benefits constitute a social advantage under Article 7.2 of Regulation 1612/68¹⁴² and that a durational residency requirement

133. Case 9/74, *Casagrande v. Landeshauptstadt Munchen*, 1974 E.C.R. 773, ¶ 2.

134. *Id.* ¶ 3.

135. *Id.* ¶ 4.

136. *Id.* ¶ 5.

137. *Id.*

138. But, Article 7.2 of Council Regulation 1612/68, 1968 O.J. (L 257) 2, does state that such workers "shall enjoy the same social and tax advantages as national workers." On the other hand, Article 3 of Council Regulation 93/96 (Oct. 29 1993), addressing students' residency rights, states that the directive "shall not establish any entitlement to the payment of maintenance grants by the host Member State on the part of students benefiting from the right of residence."

139. Case 9/74, *Casagrande v. Landeshauptstadt Munchen*, 1974 E.C.R. 773, ¶ 4 (emphasis supplied).

140. Case 249/83, *Hoeckx v. Openbaar Centrum voor Maatschappelijk Welzijn Kalmarhout*, 1985 E.C.R. 973; see also A.P. Van der Mei, *Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law*, 19 ARIZ. J. INT'L & COMP. L. 803, 829-849 (2002).

141. *Hoeckx*, 1985 E.C.R. 773, ¶ 5.

142. See Council Regulation 1612/68, 1968 O.J. (L 257), art. 7.2.

denying social assistance to a non-national improperly discriminates on the basis of nationality.¹⁴³ The ECJ also found that denying benefits to workers' dependents constitutes discrimination on the basis of nationality in violation of Articles 7.1, 7.2, and 10 of Regulation 1612/68.¹⁴⁴

Recent cases suggest a more liberal integrative approach to free movement principles. In the 1998 *Martinez Sala* case,¹⁴⁵ the court considered a Spanish national's claim for a German child-raising allowance. Despite having worked intermittently in Germany, the Spanish national had not worked for over three years and no longer possessed a residence permit.¹⁴⁶ The ECJ decided that the referring court had not furnished sufficient information to determine whether the Spanish national continued to be a worker under new Article 39 of the EC Treaty and Regulation 1612/68. The court did, however, determine that once a European Union citizen has been authorized to reside in a host Member State's territory, the host Member State cannot discriminate against the citizen for failure to possess a residency document.¹⁴⁷ The court in effect extended free movement rights and significant social assistance benefits to a non-national woman who had not worked in the host Member State for several years. Its decision implicates the right to residency's meaning as derived from European Union citizenship under Articles 17 and 18.1 of the EC Treaty, rather than Article 39's worker-based right to residence.¹⁴⁸

Article 17 of the EC Treaty establishes that "[e]very person holding the nationality of a Member State shall be a citizen of the Union."¹⁴⁹ Article 18.1 mandates the following: "Every citizen shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect."¹⁵⁰ Article 12 states that "within the scope of application of this Treaty . . . any discrimination on grounds

143. *Hoeckx*, 1985 E.C.R. 773, ¶¶ 24-25.

144. See Case 316/85, *Centre Public d'Aide Social de Courcelles v. Lebon*, 1987 E.C.R. 2811 (confirming the importance of equal treatment of non-national family members where benefits were deemed to constitute a social advantage to the worker and not to the non-dependent daughter who was "seeking employment"); Case 32/75, *Fiorini v. Société National des Chemins de Fer Français*, 1975 E.C.R. 1085.

145. Case C-85/96, *Martinez Sala v. Freistaat Bayern*, 1998 E.C.R. I-2691.

146. *Id.* ¶¶ 13, 14.

147. *Id.* It appears from the court's language that if Maria Martinez Sala were not a worker, then Article 39 of the EC Treaty and Article 7 of Council Regulation 1612/68 would not apply with respect to this social benefit. However, if she were a lawful resident, the Member State could not discriminate against her on the basis of nationality. The Spanish national's status as a lawful resident is not lost merely because of her failure to possess a residence permit.

148. EC Treaty, *supra* note 27, arts. 17, 18.1, 39.

149. *Id.* art. 17.1.

150. *Id.* art. 18.1.

of nationality shall be prohibited.”¹⁵¹ Taken together, these provisions prohibit nationality-based discrimination against European Union citizens regarding residency rights and free movement within the European Union.

Council Directive 93/96 further implements and recognizes students’ rights of free movement and residence. Students have to assure relevant national authorities that they have sufficient resources to avoid burdening the host Member State’s social assistance system, are enrolled in a recognized educational establishment, and are covered by health insurance for all visits in the host Member State.¹⁵² In the *Grzelczyk* case, a French national student in his fourth year at a Belgian University applied to the Belgian Centre for Public Social Assistance for the *minimex*, a form of Belgian social assistance usually available only to low income workers.¹⁵³ The Belgian authorities denied the student’s application because of his nationality.¹⁵⁴ The Belgium Labor Court recognized that denying the student social benefits would have constituted discrimination on the basis of nationality in violation of European Union law if the student were a worker; however, it was not clear that the student was entitled to the benefits based on his status as a European Union citizen-student.¹⁵⁵ The ECJ determined that while a host Member State may take measures to revoke a student’s right of residence due to insufficient resources under Directive 93/96, denial of non-contributory benefits, such as the *minimex*, to a lawfully residing student violates Article 12 of the EC Treaty and constitutes discrimination against a European citizen on the basis of nationality.¹⁵⁶

In *Baumbast*, European Union citizens and migrant workers had installed themselves, their spouses, and their children as U.K. residents.¹⁵⁷ The ECJ held that non-working children and spouses, including non-European spouses, have a continuing right of residence under Article 18.1 of the EC Treaty, even after the worker and spouse have divorced and the non-national worker has ceased working in the host Member State.¹⁵⁸ According to the ECJ, this right includes the chil-

151. *Id.* art. 12.

152. Council Directive 93/96, *The Right of Residence for Students*, 1993 O.J. (L 317) 59.

153. Case C-184/99, *Grzelczyk v. Centre Public d’Aide Sociale d’Ottignies-Louvainla-Neuve*, 2001 E.C.R. I-6193, ¶ 12.

154. *Id.* ¶¶ 29-31

155. *Id.* ¶ 14.

156. *Id.* ¶ 29-31.

157. Case C-413/99, *Baumbast v. Sec’y of State for the Home Dep’t*, 2002 E.C.R. I-7091, ¶ 18.

158. *Id.* ¶¶ 48-51, 63. In interpreting Article 12 of Council Directive 1612/68, the ECJ also stated that precluding children from continuing their education and terminating their right to remain in the host Member State “might dissuade that citizen from exercising rights of freedom of

dren's right to continue their general education in the host Member State and the right of the European citizen's former spouse and their children (even though non-Europeans) to continue to reside in the host Member States.¹⁵⁹ The court stated that these derivative rights to residency and education are essential to facilitate the integration of the migrant worker into the host Member State and to attain "the aim of Regulation No 1612/68, namely freedom of movement for workers, [that] requires, *for such freedom to be guaranteed in compliance with principles of liberty and dignity*, the best possible conditions for the integration of the Community worker's family in the society of the host Member State."¹⁶⁰ As a result of Mr. Baumbast's European Union citizenship under Articles 17 and 18 of the EC Treaty, the court held that Mr. Baumbast, no longer a Member State worker, his former spouse, and his children, all possessed continuing residency rights.¹⁶¹

Furthermore, the ECJ held that the children had the right to continue their general education in the host Member State, even though Mr. Baumbast did not meet the requirement under either European Union or British law that European Union citizens residing in a host Member State must carry sickness insurance, including coverage for emergency treatment provided in the host Member State.¹⁶² The ECJ explicitly recognized that European Union citizens' right of residency under Article 18.1 of the EC Treaty is subject to limitations and conditions provided by measures giving Article 18 effect and by European Union directive.¹⁶³ The ECJ also recognized that Member States can require out of State nationals to be "covered by sickness insurance *in respect of all risks in the host Member State* and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during the period of their residence."¹⁶⁴

But, despite Mr. Baumbast's failure to meet the emergency medical coverage requirement, the court determined that the U.K. requirement was a disproportionate interference with both residency rights and the derivative rights of residence and continued access to education.¹⁶⁵ In view of Mr. Baumbast's original work-based residency, his continuing work outside the host Member State, his carriage of comprehensive

movement laid down in Article 39 [of the EC Treaty] and would therefore create an obstacle to the effective exercise of the freedom thus guaranteed by the EC Treaty." *Id.* ¶ 52.

159. *Id.* ¶ 63.

160. *Id.* ¶ 50 (emphasis supplied).

161. *Id.* ¶¶ 82, 84.

162. *Id.* ¶¶ 93-94.

163. EC Treaty, *supra* note 27, art. 18; Council Directive 90/364, art. 1, 1990 O.J. (L 180) 26.

164. Council Directive 90/364, art. 1, 1990 O.J. (L 180) 26 (emphasis supplied).

165. Case C-413/99, *Baumbast v. Sec'y of State for the Home Dep't*, 2002 E.C.R. I-7091, ¶ 93.

medical insurance in his home Member State, and his financial well-being, the U.K.'s medical emergency requirement was broader than necessary to achieve the measure's general aim.¹⁶⁶ The ECJ decided that the measure was intended to ensure that the residing European Union citizen will not become a financial burden upon the host Member State.¹⁶⁷ The ECJ applied the principle of proportionality, requiring that Member State measures interfering with fundamental rights be no broader than necessary to achieve their legitimate objectives, regardless of whether the measure at issue falls within the "limitations and conditions" language of the Treaty text.¹⁶⁸ The ECJ has thus moved aggressively to protect free movement principles and enhanced European citizenship's meaning by: (1) generously construing free movement and residency principles; and (2) restrictively construing permissible limitations, thereby invigorating European free movement doctrine's purpose and facilitating European integration somewhat beyond a single internal market purpose.¹⁶⁹

When the text of Treaty and legislative measures derogate from the notion of absolute freedom, like Article 18's limitations and conditions clause and the health insurance requirement of Article 1.1 of Council Directive 90/364,¹⁷⁰ the ECJ narrowly construes the legislative text to achieve what it sees as free movement's true purpose. The ECJ has moved beyond European citizenship's initial limited character, perhaps ignoring the significance of national sovereignty and national citizenship in the process.

Baumbast's final important point involves the ECJ's narrow application of the limitations and conditions clause, which appears in Article 18 of the EC Treaty. This application raises the question of what is the court's proper role in interpreting Member States' treaty-based protections in support of economic security, national identity, and national security. In *Baumbast*, the court used the principle of proportionality to restrict the scope of the limitations and conditions clause, circumscribing the Member States' ability to exercise control over non-national European citizens' labor and residency within their borders. This is troubling for the Member States because this lack of control may hinder their abil-

166. *Id.* ¶ 92-93.

167. *Id.* ¶ 90.

168. EC Treaty, *supra* note 27, art. 18.1.

169. The ECJ characterized Union citizenship as being "destined to be the fundamental status of nationals of the Member States." *Baumbast*, 2002 E.C.R. I-7091, ¶ 82 (citing Case C-184/99, *Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve*, 2001 E.C.R. I-6193, ¶ 31).

170. Council Directive 90/364, art. 1.1, 1990 O.J. (L180) 26.

ity to safeguard the public interest.¹⁷¹ At the same time, however, the principle of proportionality enhances free movement's effectiveness.

This may be another example of the familiar freedom versus security quandary with which we are familiar in the United States. The ECJ is following a pattern of restraining Member State actions that tend to limit free movement's broad application, but at what cost? For example, the ECJ has stated that the notion of public policy must be interpreted strictly if the Member State justifies its action based on public policy or public security in derogation of "the fundamental principles of equality of treatment and freedom of movement of workers."¹⁷² Furthermore, the ECJ has stated that with respect to public security, "restrictions cannot be imposed on the right of a national of any Member State to enter the territory of another Member State . . . unless his presence or conduct constitutes a genuine and serious threat to public policy."¹⁷³ In sum, the Member States should not place restrictions on European citizens' fundamental rights, save for those that are "necessary for the protection" of national security or public safety.¹⁷⁴ Measures taken on public security grounds must be based exclusively on the personal conduct of the individual affected by the restriction.¹⁷⁵ Apparently, the Member States must now approach some security issues based on an individual non-national's characteristics, rather than based on broader class-based policy choices.

In *Baumbast*, the court used the proportionality principle to narrow the Member States' power to restrict free movement. The court examined the Member State's legislative objective, to circumscribe power that encroaches on fundamental European Union principles such as free movement. When the ECJ finds the legislative objective sufficiently important, it evaluates¹⁷⁶ whether the measure is necessary and

171. Some Treaty provisions explicitly reserve such power to the Member States. For example, Article 39.3 of the EC Treaty states that the right of free movement is "subject to limitations justified on grounds of public policy, public security or public health." EC Treaty, *supra* note 27, art. 39.3. Another example is Article 39.4, which states that the free movement principles "shall not apply to employment in the public service." *Id.* art. 39.4.

172. Case 36/75, *Rutili v. Ministre de l'Intérieur*, 1975 E.C.R. 1219, ¶ 27.

173. *Id.* ¶ 28.

174. *Id.* ¶ 32.

175. *See* Case 67/74, *Bonsignore v. Oberstadtdirektor der Stadt Köln*, 1975 E.C.R. 297; *see also* Case 115/81, *Adoui v. Belgian State and City of Liege*, 1982 E.C.R. 1665, § 2 ("Circumstances not related to the specific case may not be relied upon in respect of citizens of the community, as justification for measures intended to safeguard public policy and public security.").

176. As in *Baumbast*, the ECJ's "evaluation" is often rather limited. The court often points out that a measure interpreted in a way that interferes with a treaty-based right is disproportionate under the recited facts without undertaking a thorough evaluation. *See, e.g.,* Case C-413/99, *Baumbast v. Sec'y of State for the Home Dep't*, 2002 E.C.R. I-7091, ¶ 93.

appropriate to achieve the objective, or whether it sweeps too broadly, unnecessarily and disproportionately restricting free movement principles when a more limited restriction would do.¹⁷⁷ The ECJ, though, is often less than thorough when conducting the proportionality analysis:¹⁷⁸ once the court announces that it will apply the proportionality test, it moves directly to its conclusion that the law sweeps too broadly, virtually *presuming* a violation of the principle and the Treaty. The court applies the analytical framework in a fashion that in some ways resembles the application of the “strict scrutiny” standard of review the United States Supreme Court uses when state actors encroach upon Americans’ fundamental rights or discriminate against suspect classes of citizens.¹⁷⁹ In these cases, under the Equal Protection Clause or a fundamental rights provision, American courts *presume* that a state law encroaching upon a fundamental right is unconstitutional unless it is narrowly tailored to achieve a compelling state objective.¹⁸⁰ American courts, however, usually include a more thoroughgoing analysis, even with the presumption.

The right’s fundamental character justifies an American or European court’s searching analysis of the constituent state’s policy choices. As previously described, in *Baumbast*, Mr. Baumbast’s residency right, as a former worker and European citizen, and his spouse and children’s derivative rights, are explicitly subject to “limitations and conditions laid down by the Treaty and by measures adopted to give it effect.”¹⁸¹ Article 1.1 of Directive 90/364, the measure adopted to give the “limitations and conditions clause” effect, sets forth certain conditions that Member States may adopt to restrict residency, thus subordinating free movement principles to the Member States’ legitimate interests.¹⁸² As aforementioned, one of the permissible conditions is the medical insurance requirement for *all* risks occurring in the host Member State. The U.K. required medical emergency coverage for all care provided in the U.K. This seemed to fall quite clearly within the Directive’s “all risks” language. The ECJ rejected the treaty-based limitation as a meaningful part of European citizenship’s free movement principle. Additionally, the ECJ failed to appreciate the relationship between national sover-

177. *Id.* ¶ 91.

178. *Id.* ¶ 93.

179. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (stating the two prong examination under the strict scrutiny standard); see also *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (applying strict scrutiny analysis); *Cohen v. California*, 403 U.S. 15 (1971).

180. See *supra* note 171 and cases cited therein.

181. EC Treaty, *supra* note 27, art. 18.1; see also Council Directive 90/364, art 1.1, 1990 O.J. (L 180) 26.

182. Case C-413/99, *Baumbast v. Sec’y of State for the Home Dep’t*, 2002 E.C.R. I-7091, ¶ 90.

eignty and citizenship and the Member States' right to control a non-national's residency rights.

The ECJ did not even complete its own proportionality analysis. Without conducting a thorough inquiry, the ECJ simply concluded that the means chosen were not necessary and appropriate to attain the Member State's objective.¹⁸³ The court found that requiring non-national European citizens to carry medical emergency coverage specific to the host Member State prevented these citizens from claiming residency rights under Article 18.1 and was a disproportionate response in terms of seeking to avoid "an unreasonable burden on the public finances of the host Member State."¹⁸⁴ While the ECJ may have come to a just result regarding Mr. Baumbast's particular impact on U.K. finances, the decision's implications reach beyond its peculiar facts. The court's opinion deeply undermines the Member States' retained sovereignty to control non-nationals' residency rights and blurs the essential and legitimate differences between sovereignty-based citizenship and European Union citizenship, both of which can otherwise retain their vitality under the Treaty provisions. The court seemingly went beyond what was necessary to effectuate the European Union's "single internal market" purpose. None of the affected parties were working in the host Member State, nor did they necessarily intend to work there. What is more, all but Mr. Baumbast were not European Union citizens. The European Union's economic interest in narrowing the limitations and conditions clause is tenuous at best.

The ECJ's *Baumbast* decision encourages judicial second-guessing. It also reduces the limitations and conditions clause's reach to issues the court deems essential to effecting the Member State's legitimate objectives. This is a far cry from the Directive's guideline that plainly requires coverage of *all risks* in the host Member State.

These cases tend to demonstrate at least two trends. First, via its application of European Union Treaty law, the ECJ has made a serious attempt to provide all European Union citizens with nearly absolute free movement and residency rights. This remains true even in the face of Member States' sovereignty-based interests; for example, their right to protect their economic well-being. This flies in the face of treaty provisions that appear to subordinate free movement principles to the Member States' legitimate interests. Second, where fundamental European Union principles are at stake, the ECJ tends to narrow Member States' sovereignty-based powers. In this context, the court's scrutiny is akin to "strict scrutiny," even though Member States' sovereignty and national

183. *Id.*

184. *Id.*

citizenship principles are at stake. But, even though the court's interpretive attitude is in line with strict scrutiny, its actual analysis is often rather loose.¹⁸⁵

B. *United States*

Article IV, Section 2, Clause 1 of the United States Constitution states that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." While there was almost no discussion regarding the Clause's meaning during the Federal Convention of 1787, Charles Pinckney of South Carolina claimed to have introduced the Clause.¹⁸⁶ He introduced his observations of the Plan of Government to the Federal Convention on May 28, 1787; therein, Pinckney stated that the fourth article of his plan "is formed exactly upon the principles of the 4th article of the present Confederation"¹⁸⁷ In the Articles of Confederation, the fourth article provided that "the people of each state shall have free ingress and regress to and from any other state."¹⁸⁸ This "ingress and regress" component was not explicitly included in the constitutional text. This right may, however, be implicit in the Privileges and Immunities Clause or may have been "conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created."¹⁸⁹ Although the right to travel is often a subject of debate,¹⁹⁰ the United States Supreme Court has consistently affirmed it.¹⁹¹ Early on, Justice Bushrod Washington declared that "the right of a citizen of one state to pass through, or to reside in any other state," is one of the "fundamental" rights protected by the Privileges and Immunities Clause.¹⁹²

The Privileges and Immunities Clause¹⁹³ more explicitly protects the right to travel's second component.¹⁹⁴ Under the Clause, when entering into another state, an American citizen is entitled to many of the

185. The danger here is that citizens, national legislatures, and national courts will have little guidance regarding how to carefully design appropriate limitations on residency when legitimate Member State interests are at stake. The ECJ's policy judgments are subject to claims that the court is producing arbitrary and vague reasoning.

186. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 174 (Max Farrand ed., 1911).

187. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 112 (Max Farrand ed., 1911).

188. ARTICLES OF CONFEDERATION art. IV (U.S. 1777).

189. *United States v. Guest*, 383 U.S. 745, 758 (1966); *see also Saenz v. Roe*, 526 U.S. 489, 500-501 (1999).

190. *See Edwards v. California*, 314 U.S. 160, 177-181 (1941) (Douglas, J., concurring).

191. *Id.*; *see also Crandall v. Nevada*, 73 U.S. 35, 49 (1867).

192. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (E.D. Pa. 1823) (No. 3,230).

193. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

194. This analysis follows the "three component" framework for the right to travel described by Justice Stevens in *Saenz*, 526 U.S. at 500.

same benefits enjoyed by that state's residents. For example, a Pennsylvania resident entering New Jersey would be entitled to many of the same benefits enjoyed by New Jersey's residents. The questions left unanswered, however, are: (1) what are these protected Privileges and Immunities; and (2) are there any circumstances under which a state may limit them? As to limiting circumstances, the focus is on the "privileges and immunities" that a non-resident has when entering or engaging in activities in a state on a temporary, or perhaps intermittent, basis. The freedom to reside in another state is not involved in this second component.¹⁹⁵

Justice Washington included in the activities embraced by the Privileges and Immunities Clause the "[p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety."¹⁹⁶ Despite these enumerated principles, the Court once found that Pennsylvania residents, who were harvesting oysters in New Jersey, were not protected by the Privileges and Immunities Clause against a New Jersey law banning non-resident oyster harvesting. Today, however, these activities would likely be protected.¹⁹⁷

Members of Congress, while introducing and debating the Privileges or Immunities Clause present in the proposed Fourteenth Amendment, largely endorsed Justice Washington's view that "Privileges and Immunities" meant fundamental rights, rather than merely public benefits of all sorts.¹⁹⁸ Recently, however, the Clause's meaning, and perhaps the meaning of "fundamental rights," too, have expanded to include important economic activities and the right to earn a livelihood.¹⁹⁹ In *Baldwin v. Montana Fish & Game Commission*, Justice Blackmun recognized this right to earn a livelihood or pursue a common calling as "bearing upon the vitality of the Nation as a single entity," but distin-

195. This freedom to enjoy Privileges and Immunities on a temporary or intermittent basis upon entering or conducting activities in another state is akin to the freedom to provide services under Articles 49-55 of the EC Treaty, *supra* note 27, which largely focuses on the right to engage in business activities, trades, professional work, and the like on a temporary or intermittent basis, as opposed to doing so on a permanent or indefinite basis under the freedom of establishment in Articles 43-48 or the free movement of workers in Articles 39-42.

196. *Corfield*, 6 F. Cas. at 551-52.

197. See *Toomer v. Witsell*, 334 U.S. 385 (1948) (applying the Privileges and Immunities Clause to invalidate South Carolina's higher license fees for non-resident-owned commercial shrimping boats).

198. See CONG. GLOBE, 39th Cong., 1st Sess., 476, 2545, 2765, 2767 (1866); see generally DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 433-51 (West 1990); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1418 (1992).

199. *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 383 (1978); see generally Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981).

guished it from mere elk hunting by a non-state citizen in Montana, which when granted on more favorable terms to Montana citizens did not threaten any basic right.²⁰⁰ Justice Blackmun, however, may not have considered the discrimination's impact on the ability of guides, outfitters, lodges, and other businesses, supporting hunters and fishermen, to earn a livelihood.

In *Toomer v. Witsell*, the Court held that South Carolina could not charge prohibitively large license fees to out-of-state commercial shrimpers while charging very low fees to state resident shrimpers.²⁰¹ This discrimination, even though put in place to conserve the shrimp supply and to curb excessive trawling, was not a justifiable interference with the right of non-resident commercial fishers to earn a livelihood.²⁰² In *Hughes v. Oklahoma*,²⁰³ the Court again rejected a state's position that discrimination was necessary to preserve the state's wildlife and natural resources. The Court invalidated Oklahoma's ban on transporting minnows out of Oklahoma as interfering with interstate commerce and as discriminating on the basis of state residency in violation of the Privileges and Immunities Clause.²⁰⁴ The Court has also found that a municipal law that allocated public construction contracts on the basis of municipal residency discriminated against non-New Jersey residents, as well as against non-Camden County residents, in relation to the pursuit of public works construction jobs.²⁰⁵ The Court characterized this as the pursuit of a "common calling" and a "basic and essential activity" wherein individuals would be put at a disadvantage due to state citizenship, and therefore, such pursuits "fall within the purview of the Privileges and Immunities Clause."²⁰⁶ In *Supreme Court of New Hampshire v. Piper*, the Court determined that because the practice of law is "important to the national economy" and "fundamental" in that its practitioners often represent persons with unpopular claims in federal court, it is a "privilege" under Article IV, Section 2, Clause 1.²⁰⁷

On the other hand, the Privileges and Immunities Clause does not protect all non-resident activities from discrimination on the basis of residency. The Court has held that certain recreational activities, such as elk hunting in Montana, are not the kind of activities that are sufficiently important to the national economy and have no "bearing upon the vital-

200. *Baldwin*, 436 U.S. at 383.

201. *Toomer*, 334 U.S. at 403.

202. *Id.*

203. 441 U.S. 322 (1979).

204. *Id.* at 325-36.

205. *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 221 (1984).

206. *Id.* at 218-19.

207. 470 U.S. 274, 281 (1985).

ity of the Nation as a single entity.”²⁰⁸ Thus, some such activities are not deemed to be a basic right or privilege under the clause.²⁰⁹

The *Piper* Court addressed the issue of when, if at all, discrimination against non-residents exercising a privilege or immunity is justifiable.²¹⁰ The Court stated that the “Clause does not preclude discrimination against nonresidents where (i) there is substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State’s objective.”²¹¹ In this analytical framework, a substantial reason could be that non-residents “constitute a peculiar source of evil at which the [discriminatory] statute is aimed.”²¹² Moreover, the discrimination’s breadth and nature must be close or substantially related to the particular evil that it is intended to remedy. In this “close or substantial relationship” context, courts will look to see if there are any less restrictive means of achieving the state’s objective.²¹³ This analytical framework, while not characterized as strict scrutiny, is similar to a strict scrutiny analysis. It is also analogous to the proportionality framework the ECJ uses to determine whether a Member State’s limitation on free movement principles is valid.²¹⁴

In American constitutional law, the right to travel’s third component encompasses non-residents’ right to move from one state to another to reside, work, and share in the benefits of that state’s citizenship and residency. It is a right to establish a home, to work, attend schools, and participate in the state’s political life. In this aspect, the right to travel is at its apex. This subset of rights plainly distinguishes citizens’, particularly American citizens’, rights and benefits from those of non-citizens. According to Justice Stevens, this aspect of the right to travel is protected “not only by the new arrival’s status as a state citizen, but also by her status as a citizen of the United States.”²¹⁵ The Fourteenth Amendment’s Privileges or Immunities Clause precludes states from depriving

208. *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 385 (1978) (also recognizing that voting and state elective office candidacy are activities in which a state may prohibit non-residents from engaging).

209. *Id.* at 388.

210. *Piper*, 470 U.S. at 284.

211. *Id.*

212. *Toomer v. Witsell*, 334 U.S. 385, 398 (1948).

213. *Piper*, 470 U.S. at 284.

214. See Case C-413/99, *Baumbast v. Sec’y of State for the Home Dep’t*, 2002 E.C.R. I-7091, ¶¶ 92-93 (holding that a Member State’s differential treatment of a non-national must be aimed at a legitimate Member State objective and must be no broader than necessary to achieve that objective).

215. *Saenz v. Roe*, 526 U.S. 489, 502-03 (1999).

American citizens of privileges or immunities, whereas Article IV protects privileges and immunities of *state citizenship*.

While Justice Washington in *Corfield v. Coryell* declared that the Privileges and Immunities Clause protected a citizen's right "to reside in any other state, for the purposes of trade, agriculture, professional pursuits or otherwise," other courts have not seen fit to rest the right of residency and the right to the benefits of state citizenship on Article IV.²¹⁶ In *Edwards v. California*, the Court held that a state's prohibition of bringing a non-resident indigent person into the state constituted an unconstitutional barrier to interstate commerce in violation of the Commerce Clause.²¹⁷ The Court found that transporting people constituted "commerce" under the Commerce Clause's meaning.²¹⁸ In an eloquent concurrence, Justice Douglas, joined by two Justices, insisted that "the free movement of persons throughout this nation is a right of national citizenship."²¹⁹

In *Shapiro v. Thompson*, two states and the District of Columbia denied welfare benefits to residents who had not resided in the states or the District for at least one year before applying for assistance.²²⁰ Without explicitly citing a source for the result, the Court found that the durational residency requirement for welfare benefits implicated the right to travel interstate.²²¹ It also stated that the right "occupies a position fundamental to the concept of our Federal Union."²²² Since each statute or statutory provision created two classes of residents, each treated differently, the Court evaluated the issue under the Equal Protection Clause and declared that "any classification which serves to penalize the exercise of [the right to travel and reside in another state], unless shown to be necessary to promote a compelling governmental interest, is

216. 6 F. Cas. 546, 552 (E.D. Pa. 1823) (No. 3,230).

217. 314 U.S. 160, 173 (1941).

218. *Id.* at 172.

219. *Id.* at 178-180. While this case involved discrimination against non-residents, the discrimination at issue also seemed to constitute a prohibition or penalty against obtaining California *residency*. If the case was viewed in this light, the Court should probably not have relied on a Commerce Clause analysis. The fact that *Edwards* could be viewed in these two separate, but perhaps complementary lights underscores the uncertainty surrounding the source of Americans' free movement rights. Is the source the Commerce Clause, the Privileges or Immunities Clause, the Privileges and Immunities Clause, or some combination of each?

220. 394 U.S. 618 (1969), *overruled in part by* *Edelman v. Jordan*, 415 U.S. 651 (1974).

221. *Id.* at 630. The Court did, however, reference *Corfield*, 6 F. Cas. at 546, 552, *Paul v. Virginia*, 75 U.S. 168, 180 (1868), and the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-12 (1976), which grounded the durational residency requirement in the Privileges and Immunities Clause of Article IV, Section 2. *See also* *Edwards*, 314 U.S. at 177-80 (Douglas, J., concurring) (relying on the Privileges or Immunities Clause of the Fourteenth Amendment); *Edwards*, 314 U.S. at 172-73 (relying on Article I's Commerce Clause); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908).

222. *Shapiro*, 394 U.S. at 630 (quoting *United States v. Guest*, 383 U.S. 745, 757-58 (1966)).

unconstitutional."²²³

Not all durational residency requirements, however, have been struck down. Some are closely tied to the determination of the genuineness of a new arrival's purported residency. For example, creating an irrebuttable presumption that out-of-state students cannot establish residency to avoid paying out-of-state university tuition is unconstitutional as a violation of the Due Process Clause.²²⁴ A state, however, can require out-of-state students to reside in the state for a year and pay the higher non-resident tuition before qualifying for in-state residence tuition. Presumably because out-of-state students often leave the state after graduation, one year is a reasonable period in which to establish the genuineness or good faith of residency and state citizenship.²²⁵ In *Sosna v. Iowa*, the Court also upheld a one-year requirement for establishing residency in the state for the purpose of obtaining a divorce.²²⁶ This residency requirement was acceptable because the state had a legitimate interest in restricting those seeking to use its courts to change fundamental family relationships.²²⁷ But in *Dunn v. Blumstein*, the Court determined that a one-year state-residency requirement and a three-month county-residency requirement for voting registration were unconstitutional.²²⁸ And in *Memorial Hospital v. Maricopa County*, the Court found that a one-year county-residency requirement for new Arizona residents to obtain non-emergency hospitalization or medical care at public expense was unconstitutional.²²⁹ The Court determined that denying medical care, "a basic necessity of life," to indigents constituted a severe penalty on their right to travel, and that economic burdens and administrative efficiency, among other reasons cited, were not the "compelling state interest[s]" needed to meet the strict scrutiny applied to right-to-travel impingements.²³⁰

223. *Id.* at 634.

224. *Vlandis v. Kline*, 412 U.S. 441, 453 (1973).

225. *Starns v. Malkerson*, 326 F. Supp. 234, 240 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971). With university students who have moved from out-of-state, there may also be a presumption that the students remain permanent residents of another state, reflected by their ties to and dependency on their out-of-state resident parents. Under the presumption, that residence, where the students may spend substantial non-school time, can be viewed as a continuation of their pre-university residency.

226. *Sosna v. Iowa*, 419 U.S. 393, 409-10 (1975).

227. *Id.* at 406-08.

228. *Dunn v. Blumstein*, 405 U.S. 330 (1972). Subsequent cases established that fifty days is a reasonable period of time in which to properly register new residents, and, therefore, it is a fitting durational residency requirement for voting. *See, e.g., Marston v. Lewis*, 410 U.S. 679, 681 (1973); *Burns v. Fortson*, 410 U.S. 686, 686-87 (1973).

229. *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 269 (1974).

230. *Id.* at 259 (quoting H. COMM. ON WAYS & MEANS, 86TH CONG., DEP'T OF HEALTH, EDUC., AND WELFARE REPORT ON MED. RESOURCES AVAILABLE TO MEET THE NEEDS OF PUB. ASSISTANCE RECIPIENTS 74 (Comm. Print 1961)). *Id.* at 267-69.

It may have been difficult for the Court to invalidate one-year durational residency requirements in some contexts – for example, divorce and in-state tuition – at the time these decisions were made. However, today one might ask whether these judgments are truly compatible with the notion of “one nation, one people.” It certainly need not take more than a couple of months, if that, to establish the genuineness of one’s residency. Once a citizen establishes state residency, there does not appear to be a legitimate reason to deny the benefits of state residency. Assuming “good faith” and genuineness,²³¹ recent arrivals’ residency intentions should be no more suspect than those of long-term state citizens.

Requiring assurance that a person seeking palpable benefits has established state residency in good faith is compatible with the concept of a full right to interstate migration – the right to travel embedded in the “one nation, one people” principle. This recognition aside, American courts, perhaps reflecting a historic American – or perhaps human – wariness of strangers, have not yet been as willing to accept the “one nation, one people” principle in its full flowering, as its essence demands.

Roberto Morales – who was born in 1969 in McAllen, Texas, to Mexican parents – left Reynosa, Mexico, in 1977 to live with his sister and attend school in Texas, but state law denied him the tuition-free education available to other Texas-resident children.²³² He was denied these benefits because he lived apart from a “parent, guardian, or other person having lawful control of him under an order of a court” and was living in the school district “for the primary purpose of attending the public free schools.”²³³ Texas law would have admitted Roberto if he resided with his parent or legal guardian within the school district.²³⁴ His sister was neither.²³⁵ The Supreme Court characterized the Texas law as a “bona fide residence requirement,” simply requiring that one establish residence before demanding services that are provided for residents, thus assuring the state that such services – here, free public education – be enjoyed only by state residents.²³⁶ According to the

231. States will likely take the determination of what constitutes genuine good faith residency quite seriously. States may well require clear and objective demonstrations of one’s new residence, including showing an intent to remain indefinitely. For example, states might presume that students who remain dependent on their parents in relation to income, tuition, housing payments, and auto and health insurance payments have not sufficiently severed their connection to their parents’ residence to have genuinely established residency in their new state.

232. *Martinez v. Bynum*, 461 U.S. 321, 322-23 (1983).

233. *Id.*

234. *Id.* at 323.

235. *Id.*

236. *Id.* at 333.

Court, because the "living apart" limitation was merely part of the definition of residency, satisfying that bona fide residence definition does not at all interfere with the constitutional right of interstate travel.²³⁷ As such, the Court did not apply the "strict scrutiny" standard of review.²³⁸ Ordinarily, state residency, which is the equivalent of state citizenship,²³⁹ requires: (1) physical presence in the state; and (2) intention to remain indefinitely.²⁴⁰ The Court has also approved a more rigorous standard for "domicile," sometimes, though not always, the equivalent of "residence."²⁴¹ Specifically, the Court has required a showing that an individual have a "true, fixed and permanent home and place of habitation" to which, whenever she leaves, she has the intention of returning.²⁴² While it is unlikely that having a true, fixed, permanent home is required under most residency definitions, mere transient lodging is not enough. Intent to remain does not preclude planning to live in another place in the future, so long as there is a present intent to remain for some indefinite length of time. Intent to remain would ordinarily be "inferred from an actual presence accompanied with such circumstances as usually surround a home."²⁴³

Surely, in today's extraordinarily mobile society, the character or purported length of one's intent to remain at one's present abode requires flexibility. A logical step might be a presumption in favor of intent to remain, unless proven otherwise. The *Martinez* Court largely focused on the Petitioner's facial challenge to the Texas law and, concomitantly, on the law's residency definition. The Court did not place enough emphasis on Roberto Morales's American citizenship. He was an American citizen living in Texas with his biological sister, seeking to attend a local school.²⁴⁴

In terms of free movement rights, *Martinez* does not compare favorably with the ECJ's *Baumbast* decision. Recall that in *Baumbast*, Mr. Baumbast's children were not British but were given continued access to British schools. In contrast in *Martinez*, the United States

237. *Id.* at 322, 333.

238. *Id.* at 328.

239. U.S. CONST. amend. XIV, § 1.

240. *Martinez v. Bynum*, 461 U.S. 321, 330 (1983).

241. *See Penfield v. Chesapeake, Ohio & Sw. R.R. Co.*, 134 U.S. 351 (1890); *Mitchell v. United States*, 88 U.S. 350 (1874).

242. *Vlandis v. Kline*, 412 U.S. 441, 454 (1973) (quoting *Op. Att'y Gen.* (1972) (unreported)).

243. *North Yarmouth v. West Gardiner*, 58 Me. 207, 211 (1870); *see also Inhabitants of Warren v. Inhabitants of Thomaston*, 43 Me. 406, 418 (1857) (cited in Justice Marshall's dissent in *Martinez*, 461 U.S. at 339).

244. As Justice Brennan suggested in his *Martinez* concurrence, Roberto Morales's residency in the United States and Texas, as well as his American citizenship, may compel another conclusion: under the Privileges or Immunities Clause of the Fourteenth Amendment, Morales must be a citizen, and therefore a resident, of Texas. *See Martinez*, 461 U.S. at 333.

Supreme Court was unnecessarily grudging in upholding Texas' denial of public school access to an American child living with a biological family member within a Texas school district. Unlike the ECJ, the Supreme Court's application of free movement and residency principles was unduly rigid. It seems that requiring the child's parent or guardian to reside within the school district is more restrictive than necessary to serve the state's legitimate interests. Providing public education to a child who was born in Texas, is an American citizen, and lives with his sister in the relevant Texas school district does not undermine Texas' interests in preserving the benefits of state citizenship for state residents. Like other similarly situated individuals, Roberto might remain in Texas for postsecondary education or work and perhaps raise a family there.

Beyond these points, even though the Roberto Moraleses of our world are not moving from another state, but from another nation, the foundational "one nation, one people" principle is best served by presuming that state obstacles to free movement embedded in technical residency definitions violate free movement principles when applied to American citizens. Under these circumstances, the state should shoulder the burden of affirmatively demonstrating that its residency requirement is carefully designed to advance a compelling state interest.

In the most recent American right-to-interstate-migration case, *Saenz v. Roe*, Justice Stevens re-categorized free movement cases, breaking "the right to travel" into three components. The third component – the right of an American citizen to travel to, reside in, and enjoy the full benefits of citizenship in another state – provides new arrivals the same privileges and immunities that other state citizens enjoy.²⁴⁵ In *Saenz*, the Court considered the constitutional validity of a California law that limited the amount of public assistance benefits available to families that had resided in the state for less than twelve months. Specifically, the law limited the available benefits to the amount for which

245. *Saenz v. Roe*, 526 U.S. 489, 500 (1999). The first component is the right to cross state borders, the right of free ingress and regress. This right's source has varied, but it originally stemmed from Article IV of the Articles of Confederation, which was the forerunner of Article IV, Section 2, of the United States Constitution. See *Edwards v. California*, 314 U.S. 160, 172-73 (1941). The second, the right of citizens to travel to other states to engage in business or a trade or other livelihood, to obtain health care, to buy property, or to go to court – basic and essential activities bearing upon the vitality of the nation as a single entity – is expressly protected by Article IV, Section 2's text. See, e.g., *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279-80 (1985); *Toomer v. Witsell*, 334 U.S. 385, 401 (1948); *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (E.D. Pa. 1823) (No. 3,230). And finally, the third component is the right to move to another state, to reside and share fully in the benefits of state citizenship. See, e.g., *Zobel v. Williams*, 457 U.S. 55, 65 (1982); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969), *overruled in part by Edelman v. Jordan*, 415 U.S. 651 (1974). This right's source has been debated and was not settled until Justice Stevens' *Saenz* opinion discussed herein.

those families would have qualified in their prior state of residence.²⁴⁶ The benefit differential for some of the new citizen claimants was less than a third of the monthly amount that similarly situated Californians would have received.²⁴⁷ California's purpose was to reduce its welfare budget by approximately \$10.9 million.²⁴⁸ At the time, California's benefits were among the most generous in the nation.²⁴⁹

Although the Fourteenth Amendment's Privileges or Immunities Clause, coupled with its sister Citizenship Clause, has been rarely utilized since the *Slaughter-House*²⁵⁰ decisions virtually eviscerated its significance, Justice Stevens rekindled its doctrinal utility. Under the "one nation, one people" principle, American citizens are citizens of the state in which they reside, on an equal basis with all other citizens of that state.

The Court, by a 7-2 margin, struck down the California law on the grounds that it created unequal classes of citizens and erected an impermissible obstacle to free interstate migration.²⁵¹ The California law's purpose of preserving state revenues was undoubtedly a legitimate interest, but it was not sufficiently compelling to justify the fundamental inequality it created.²⁵² Using the Fourteenth Amendment's Privileges and Immunities Clause, coupled with the Citizenship Clause, makes legal sense and creates sound policy. The Citizenship Clause's guarantees of American citizenship for those born or naturalized in the United States and state citizenship to all American citizens residing in any state, coupled with the Privileges or Immunities Clause's prohibition against state abridgement of Americans' privileges or immunities, connects the "one nation, one people" principle to both American citizenship and state residency.²⁵³ According to Justice Stevens, equal residency rights are the logical result of an individual's "status as a citizen of the United States[.]" as well as their "status as a state citizen."²⁵⁴ This resulting

246. *Saenz*, 526 U.S. at 492.

247. *Id.* at 494.

248. *Id.* at 497.

249. *Id.* at 492.

250. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 80-81 (1872), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *United States v. Ruiz*, 961 F. Supp. 1524 (D. Utah 1997), where the Court, when considering the application of the new Privileges or Immunities Clause to a difference in treatment of New Orleans slaughterhouses and the creation of a monopoly by one of them, determined that the Amendment meant very little, certainly little more than what protections were then available under Article IV, Section 2.

251. *Saenz v. Roe*, 526 U.S. 489, 505-07 (1999).

252. *Id.* at 504. There, the Court somewhat cryptically stated, "[n]either mere rationality nor some intermediate standard of review should be used. . . . The appropriate standard may be more categorical than that articulated in *Shapiro* . . . but it is surely no less strict."

253. U.S. CONST. amend. XIV, § 1.

254. *Saenz*, 526 U.S. at 502.

status is also

plainly identified in the opening words of the Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;²⁵⁵

Justice Stevens could have easily relied on Article IV, Section 2's Privileges and Immunities Clause, which prevents states from discriminating against residents of other states.²⁵⁶ But, as Justice Stevens may have recognized, characterizing the discrimination as between residents of the same state based upon time of arrival, rather than as discrimination against former residents of another state, is a better rationale for upholding an affirmative citizenship-based right. Under Article IV, the constitutional violation would have been more an incidental burden on the rights of former non-residents, rather than a collision between the discriminatory restriction and the clear right to reside as newly arrived residents under the Fourteenth Amendment.²⁵⁷

As a consequence of *Saenz*, American case law and free movement principles reflect the close connection between citizenship – particularly national citizenship and state citizenship through national citizenship – and “the one nation, one people” principle. In our modern, highly mobile society, the march towards absolutely free interstate migration within our sovereign federal nation is inexorable.

IV. REFLECTIONS ON SOVEREIGNTY AND CITIZENSHIP

Years ago my wife, Kathy, and I visited Fogo Island off the coast of Newfoundland. We visited the island's eastern edge, a windswept expanse jutting into the North Atlantic. We passed through Tilting Harbour, a small village filled with wood-frame homes and Irish surnames, before arriving at the village of Joe Batt's Arm. Our hosts viewed us and our canoe-adorned station wagon with apparent skepticism until we assured them that we were not “Greenpeacers.” We were invited in, but our initial conversation proved stilted. Except for our common language and their daughter's affinity for television advertisement jingles, we had little in common. Did an American-Canadian couple and a Canadian island family really lack any common ground? The husband, attempting to find one, tantalized us with tales of his gastrointestinal afflictions.

255. *Id.* at 503 (quoting U.S. CONST. amend. XIV, § 1).

256. U.S. CONST. art. IV, § 2.

257. *See Saenz v. Roe*, 526 U.S. 489, 504-05 (1999).

After sharing that unqualified delight, our host inquired as to why we had visited the Catholics in Tilting. God-fearing fundamentalists like our hosts, had not – and never would – visit Tilting. Never mind that Tilting was the only other town with which they shared this small, remote island. For all intents and purposes, Fogo Island contained the spatial, identity, and security characteristics of a sovereign land. Only the daughter desired to visit the mainland and experience the outside world.

We continued to talk about our travels and lives. But we were as strange to them as they were to us. They were secure in Joe Batt's Arm, and its values, but nowhere else. There they found freedom and happiness in fishing, hunting, and enjoying an undisturbed family, church, and village life – all without "Greenpeacers," Catholics, and other outsiders gumming up the works.

Years before, I had visited Brittany on France's Channel coast. I traveled with a friend whose family had migrated to Paris from Brittany. His Breton cousins lived well off the beaten path in a small village on the bluffs overlooking the Channel. They did not technically live on an island, but they might as well have. They spoke no French, fished and collected seaweed from the coast, wore wooden shoes, drove oxcarts with spoke-less wooden wheels, and offered us warm, unprocessed milk and a moist, dark concoction we could hardly stomach. The toothless women smiled at us. We spoke to each other and to them without understanding a word the other offered. The men were all drunk on hard cider, coming in from the day's fishing. Their lives and their community were not ours, but they were as secure in their world as we were in ours. We provided a bit of novelty, but they were likely relieved when we left. Was there free movement between this community and the rest of Europe, or the rest of France for that matter? More importantly, did these people care one way or the other? The answer is probably no on both accounts.

All communities face boundaries in one form or another, be it water, sand, a deep cultural divide, or national borders. People often find security and freedom in the sea, in the hills, or in sheer distance – borders that separate them from cultures and values that would clash with their own. Ironically, people sometimes long to be free from difference, from strangeness. Hannah Arendt has said:

Freedom, where it existed as a tangible reality, has always been spatially limited. This is especially clear for the greatest and most elementary of all negative liberties, the freedom of movement; the borders of national territory or the walls of the citystate comprehended and protected a space in which men could move freely What is true for freedom of movement is, to a large extent, valid for

freedom in general. Freedom in a positive sense is possible only among equals, and equality itself is by no means a universally valid principle but, again, applicable only with limitations and even within spatial limits.²⁵⁸

She sees these communities as spaces of freedom and in the political realm “as islands in a sea or as oases in a desert.”²⁵⁹ The security isolated communities can provide contrasts with the hopelessness outsiders, lacking their own community, often experience.²⁶⁰

Some would argue that this view is, at least in part, outdated, viewing borders more “as arbitrary from a moral point of view.”²⁶¹ From this latter view, sovereignty somewhat arbitrarily compartmentalizes the planet, makes self-determination by national peoples difficult, and permits sovereign states to use powerful force against peoples within a sovereign state, whether Kurds, Chechens, or Aborigines.²⁶² These are critical concerns crying out for principled discussion in a world in which power often counts for more than right or justice. In this world of “globalization,” some would also assert that our sense of community and place is changing, that the “either-or” character of state sovereignty and human plight, which feeds on and reinforces the importance of “strangeness” and “familiarity,” is being replaced by transnational dimensions and structure that expand familiarity beyond the nation-state and welcome difference, even strangeness.²⁶³

A less sovereignty-intensive system – perhaps one including constituent nation-state parts similar to the European Union – may be able to impart a greater sense of freedom and security within an ever larger community by welcoming neighbors from faraway places, whether distant in terms of geography or culture, to live and work together. The European Union of the not-so-distant future may be the emerging blueprint for the larger-than-nation-state system, capable of protecting peoples who represent disparate national communities.

258. Hans Lindahl, *Finding a Place for Freedom, Security and Justice: The European Union's Claim to Territorial Unity*, 29 EUR. L. REV. 461, 462 (2004) (quoting HANNAH ARENDT, *ON REVOLUTION* 275 (Penguin Books 1990) (1963)). Perhaps this explains the fighting and tension in places like Croatia, Bosnia, Serbia, Kosovo, Montenegro, Iraq, Chechnya, Basque country, and Ireland.

259. *Id.* at 463.

260. *Id.* (quoting HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 286 (Harcourt Brace 1951)).

261. See JULES L. COLEMAN & SARAH K. HARDING, *Citizenship, the Demands of Justice, and the Moral Relevance of Political Borders*, in *JUSTICE IN IMMIGRATION* 18 (Warren F. Schwartz ed., 1995).

262. See, e.g., LAWRENCE T. FARLEY, *PLEBISCITES AND SOVEREIGNTY: THE CRISIS OF POLITICAL LEGITIMACY* 6-20 (Westview Press 1986).

263. See Lindahl, *supra* note 258, at 463-64 (citing ULRICH BECK, *WHAT IS GLOBALISATION?* 74 (Cambridge Polity Press 2000)).

An enlarging European federal system, guided by the ECJ's imperfect, yet principled decisions, could create a transnational community offering truly free movement. Ideally, over time, this beyond-sovereignty logic could also extend to other continent-wide areas, and, in time, a worldwide community, peopled by world citizens, possessing universal equality – at least, equality in terms of those values selected as worthy of legal protection or viewed as otherwise necessary.²⁶⁴

Borders and traditional notions of sovereignty and citizenship, though, may have more moral significance in today's world of sharpening cultural, ethnic, religious, and political difference. Security may be a competing rather than a complementary objective. The security, social and cultural protections, and the effective distribution of resources needed for a community to thrive are often better served on a smaller scale. The full freedoms that facilitate a people's capacity to thrive, including the freedom from fear, are more likely nourished in a discrete, spatially bounded political community that is based upon a consensus of values, including a cultural ethos. A world of Fogo Islanders, Bretons, Basques, Kurds, French, Japanese, and many others is probably not yet ready for "blended" communities consisting of the strange and unfamiliar. The European Union, represented by European citizenship, free movement within the internal market, and an emerging federal system of justice, may improve Europeans' lives, but even the European Union faces cohesiveness limits, as evidenced by its aforementioned failure to ratify the European Constitution. The European Union is not yet the primary guarantor and provider of Europeans' basic security and cultural identity.

In the United States, the notion of dual sovereignty – a federal sovereignty, combined with a residual state sovereignty embodied by the Tenth Amendment – persists today and is perhaps most identified with more conservative legal minds, like Justice Scalia, for example.²⁶⁵ As applied to the states, however, Justice Scalia's broad use of the term "sovereignty" is an understandable, though perhaps mistaken, use of the term.²⁶⁶ It is an understandable use because since the Republic's beginning, the American states have often been labeled sovereign. James Madison referred to them under the Articles of Confederation as "the distinct and independent states" and noted that the Anti-Federalists, who feared that the national government and the new Constitution posed a distinct threat to the states, preferred a confederacy of sovereign

264. Lindahl, *supra* note 258, at 472-74.

265. See, e.g., *Printz v. United States*, 521 U.S. 898, 918 (1997) (holding that while the states gave up a portion of their sovereignty in ratifying the Federal Constitution, they retained "a residuary and inviolable sovereignty" protected by the Tenth Amendment).

266. *Id.*

states.²⁶⁷

Others tried to disabuse the Framers of the broad notion of state sovereignty. For example, Charles Pinckney of South Carolina declared:

I apprehend the true intention of the States in uniting, is to have a firm national Government, capable of effectually executing its acts, and dispensing its benefits and protection. In it alone can be vested those powers and prerogatives which more particularly distinguish a sovereign State. . . . The idea which has been so long and falsely entertained of each [State] being a sovereign State, must be given up; for it is absurd to suppose there can be more than one sovereignty within a Government.²⁶⁸

Elbridge Gerry of Massachusetts, a member of Congress during the Confederation period, “urged that we never were independent States, were not such now, [and] never could be even on the principles of the Confederation.”²⁶⁹ William Pierce of Georgia agreed and said, “distinctions must be sacrificed . . . without, however, destroying them altogether” and though he was “from a small state,” he considered himself “a citizen of the United States, whose general interest [he would] always support.”²⁷⁰ Even after the Federalists succeeded in ratifying the Constitution, and even after 1819 when Chief Justice Marshall narrowed state sovereignty’s scope in *McCulloch v. Maryland*,²⁷¹ the notion of broad state sovereignty persisted.

A concept of residual state sovereignty, supported by the Tenth Amendment’s explicit reservation of state power, prevailed as the rule throughout much of the nineteenth century.²⁷² The ordinary activities of life for people across the nation were home-based, local, and closest to the states. In the Republic’s early days, the seat of federal power was

267. THE FEDERALIST No. 39, at 379 (James Madison) (Robert A. Rutland et al., eds., Univ. of Chi. Press 1977). Madison wrote that “[e]ach state in ratifying the constitution, is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act.” *Id.* at 380; see also Brutus I (1787), reprinted in *FEDERALISTS AND ANTIFEDERALISTS: THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION* 4-13 (John P. Kaminski and Richard Leffler eds., 2d ed., Madison House 1998); Robert Yates & John Lansing, *Reasons of Dissent*, N.Y. J., Jan. 14, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 15-18 (Herbert J. Storing ed., Univ. of Chicago Press 1981).

268. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 112 (Max Farrand ed., 1966).

269. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 467 (Max Farrand ed., 1966).

270. *Id.* at 474. There were also practical issues, according to Nathaniel Gorham of Massachusetts: could smaller states exist as independent sovereigns, or would they be oppressed and absorbed by the more powerful states surrounding them? *Id.* at 462-63.

271. 17 U.S. (4 Wheat.) 316 (1819).

272. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918), overruled by *Darby v. United States*, 312 U.S. 657 (1941) (progressive federal antitrust and labor laws overturned because they interfered with the powers of the states to protect their citizens’ health, welfare, and morals); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

distant and remote from most citizens and leaders.²⁷³ From the time of the Federal Convention²⁷⁴ to the time of the Civil War, "the state governments were primarily responsible for meeting the basic needs of American citizens. The national government had little impact on the daily lives of most Americans. Consequently, before the war, state citizenship [and allegiance to the state] was paramount."²⁷⁵

During the Civil War, the seceding southern states' assertions of state sovereignty marked the high watermark for unbridled states' rights advocates. In beginning the discussion on the Thirteenth Amendment in 1865, Representative Ashley expressed the counter position well when he said, "[i]t is past comprehension how any man with the Constitution before him, and the history of the convention . . . within his reach, together with the repeated decisions of the Supreme Court against the assumption of the State rights pretensions, can be found at this late day defending the State sovereignty dogmas."²⁷⁶ Congress's guarantee to the states of a republican form of government, coupled with the supreme power lodged in the national government, forcibly impressed upon them "the utter indefensibility of the State sovereignty dogmas."²⁷⁷ While these dogmas persist today, they are mere vestiges of what they once were; limited mainly to prohibiting the federal government from eviscerating the power and capacity of the state governments to function as state governments.²⁷⁸ Today, Justice Sutherland's statement in *United*

273. See generally RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (Univ. of Okla. Press 1987); see also DOUGLAS W. KMEC & STEPHEN B. PRESSER, *THE HISTORY, PHILOSOPHY, AND STRUCTURE OF THE AMERICAN CONSTITUTION* 341 (Anderson 1998). Ninety-five-percent of the populace lived in rural areas at great distances from urban centers and the national capital, so the town and county councils were supreme. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 67-94, 100, 300, 331 (Arthur Goldhammer trans., The Library of America 2004); *THE FIFTY STATES AND THEIR LOCAL GOVERNMENTS* 43, 45, 54-62 (James W. Fesler ed., Alfred A. Knopf 1967).

274. In arguing against the likelihood that the proposed Constitution would endanger the "several States[']" local authority, Madison pointed out that the People will look largely to the states for their protection and governance, and that the state governments' powers under the proposed Constitution, unlike the "few and defined" powers given to the federal government, are "numerous and indefinite, . . . extend[ing] to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people." *THE FEDERALIST* No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

275. Farber, *supra* note 198, at 427.

276. CONG. GLOBE, 38th Cong., 2d Sess. 139 (1865).

277. *Id.*

278. See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). Justice Thomas, among others, persists in propounding a notion of broad retained state sovereignty. For example, when concurring in *United States v. Lopez*, 514 U.S. 549, 590 (1995), he stated, "[t]he Founding Fathers confirmed that most areas of life . . . would remain outside the reach of the Federal Government. Such affairs would continue to be under the exclusive control of the States." The federal government would only possess the limited powers enumerated in the Constitution. *Id.* at 584. Even assuming Justice Thomas is correct, his

States v. Curtiss-Wright Export Corp., addressing the United States' foreign relations power, epitomizes what should be recognized as the United States' federal sovereignty, whether domestic or foreign in scope. He stated that upon separation from Great Britain by her "colonies, acting as a unit, the powers of external sovereignty passed from the Crown . . . to the colonies *in their collective and corporate capacity as the United States of America*. . . . Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere."²⁷⁹

National sovereignty, which Justice Sutherland described as "external sovereignty,"²⁸⁰ has been recognized in international law for over 350 years. International law's concept of State sovereignty largely dates to two philosophers – Thomas Hobbes, an Englishman in the seventeenth century, and Jean Bodin, a Frenchman in the sixteenth century – and "the Peace of Westphalia," which ended the Thirty Years War between a number of European powers.²⁸¹ In the Peace of Westphalia treaty, the European States agreed to limit their sovereignty, while at the same time settling their boundaries and grievances, to clearly establish their respective sphere's sovereignty.²⁸² In his case for the "sovereign state" in *Leviathan*, Hobbes claimed that all humankind required "a common power to keep them in awe and to direct their actions to the common benefit."²⁸³ Bodin viewed the sovereign as absolutely superior within its territory, which included its unchallenged power to promul-

observations would not make states "sovereign." In *Lopez and United States v. Morrison*, 529 U.S. 598 (2000), the Court saw fit to limit the Commerce Clause's scope vis-à-vis retained state sovereignty, particularly with respect to the regulation of non-economic/non-commercial activities. In this context, the Court addressed the breadth of the residuum of state legislative power, which some describe as an aspect of internal sovereignty, as opposed to state sovereignty in the sense recognized by international law (i.e. capital "S" State sovereignty). See 2 THE COMPLETE ANTI-FEDERALIST 15-18 (Herbert J. Storing ed., Univ. of Chi. Press 1981).

279. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316-17 (1936) (emphasis supplied). In *Curtiss-Wright*, Justice Sutherland cited *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893), in which Justice Gray relied on his opinion in *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892), for the proposition that the power to exclude *foreigners* is "inherent in sovereignty" and "essential to self-preservation." In *Nishimura Ekiu*, Justice Gray cited *Chae Chan Ping v. United States*, 130 U.S. 581, 603-04 (1889), wherein Justice Field emphasized the power to exclude aliens as an incident of sovereignty and as essential to preserving the State's independence and the security of its citizens. While the Court linked sovereignty to the goal of preserving national citizens' well-being in shameful racial contexts, this linkage nonetheless reflects a critical connective dimension between sovereignty and national citizenship.

280. *Curtiss-Wright Exp. Corp.*, 299 U.S. at 316.

281. See The Peace of Westphalia, Oct. 24, 1648, 1 Consolidated Treaty Series 198 (reprinted in MARK W. JANIS & JOHN E. NOYES, CASES AND COMMENTARY ON INTERNATIONAL LAW 24-28 (1st ed., West Publishing Co. 1997)).

282. See Janis, *supra* note 281, at 26-27.

283. THOMAS HOBBS, *LEVIATHAN: PARTS I AND II* 128 (Aloysius P. Martinich ed., Broadview Editions 2005) (1651).

gate laws, but “unified in one body or person, like the monarch in France.”²⁸⁴ In time, absolute sovereignty would face limitations – such as prohibitions on the use of force and the recognition of universal human rights – under principles of international law, beginning with the Westphalian treaties and continuing over the next several centuries in the treaties, conventions, international institutions, customs, and international legal principles that would follow.²⁸⁵

Today under international law, sovereignty remains the “cornerstone” of “state independence and freedom of action,” and the term is often equated with state independence.²⁸⁶ It is generally agreed that “sovereignty is an attribute of statehood, and that only states can be sovereign.”²⁸⁷ In international law, sovereign States must possess the attributes of: “a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.”²⁸⁸

The effective government of a sovereign State must be able to exercise virtually complete control through its legal system – some would say “complete autonomy”²⁸⁹ – to act as it will over its territory and people.²⁹⁰ Today, such internal control, external independence, and equality among States is coupled with the recognition that significant interdependence with other international actors, as in the case of the European Union Member States, may be consistent with State sovereignty.²⁹¹

Unlike the United States’ constituent states, each European Union Member State remains a sovereign in the international sense. It is not unusual, however, to hear mention of European Community institutions exercising international sovereignty within limits.²⁹² The Europeans recognize internal and external sovereignty as well as the delegation of *delimited* sovereign powers from Member States to the European Union,

284. See JEAN BODIN, *THE SIX BOOKES OF A COMMONWEALE* (Kenneth Douglas McRae ed., Harvard Univ. Press 1962) (1576).

285. See HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 14-23 (rev. ed., Univ. of Pa. Press 1996); J.L. BRIERLY, *THE LAW OF NATIONS* 1, 44-55 (Sir Humphrey Waldock ed., Oxford Univ. Press, 6th ed. 1963).

286. Hannum, *supra* note 289, at 14-15.

287. *Id.* at 15.

288. Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097.

289. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* 26 (Harvard Univ. Press 1995).

290. See Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44, 64 (1941). See also Hannum, *supra* note 289, at 14-15; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (Clarendon Press 1979); MALCOLM N. SHAW, *INTERNATIONAL LAW* 177-85 (Cambridge Univ. Press 2005).

291. See Chayes, *supra* note 289, at 26-28, 128, 273.

292. RALPH H. FOLSOM, *PRINCIPLES OF EUROPEAN UNION LAW* 4-5 (Thomson West 2005).

with the sovereign State's ultimate authority remaining with the Member States.²⁹³ This is not the American system, however, where the federal government and the people remain sovereign.

The ECJ's use of the European Union's supremacy or primacy doctrine and coupled with the possible preemption of fundamental Member State constitutional principles could constitute an encroachment on the Member States' capacity to provide effective governments. Would such preemption rob the Member States of the autonomy necessary to control and protect their people and territory? Preempting Member State law could even encroach on the Member States' external sovereignty.²⁹⁴ Preempting Member State constitutional principles would represent an even greater encroachment. The Member States could view such preemption as a hostile intrusion into the Member States' non-delegated capacity to control their territory, protect their citizens' rights and freedoms, and preserve their political institutions.²⁹⁵ The potential for the "loss of sovereign power and autonomy effectuated by the extension of European policies to almost all areas of public concern," through the process of European integration, raises concerns in many parts of the European Union, especially in Germany, the United Kingdom, France, Denmark, and the Netherlands.²⁹⁶

To retain effective State sovereignty, some would require that the Member States be able to exercise complete autonomy to protect and exert their will over their people, thus embracing the fundamental constitutional character of the relationship between a government and its people. The Member States' loss of autonomy under European Union primacy and preemption doctrines in the domain of fundamental constitutional rights, a unified foreign policy, along with absolute free movement of persons, could blur the conceptual distinction between sovereign States in a federal system and mere constituent political units existing

293. Anneli Albi & Peter Van Elsuwege, *The EU Constitution, National Constitutions and Sovereignty: An Assessment of a "European Constitutional Order,"* 29 EUR. L. REV. 741, 743-44 (2004). Much of the concern surrounding transfer of so-called sovereign powers has occurred within the context of applying the European Union's supremacy, or primacy, doctrine. This doctrine applies when Member State laws, including fundamental constitutional principles, conflict with or stand as an obstacle to the achievement of the European Union's objectives as articulated in the EC Treaty or other European Union law. In the event of a conflict between them, or when state laws or conduct stand as an obstacle to the achievement of EU Treaty objectives, European Union law or Treaty provisions are deemed to preempt Member State laws or even Member State constitutional principles. See also Francis J. Conte, *Reinforcing Democracy, Sovereignty and Union Efficacy: Supremacy and Subsidiarity in the European Union*, 26 DUBLIN U. L.J. 1 (2004).

294. See *Brunner v. The European Union Treaty*, [1994] 1 C.M.L.R. 57, 77.

295. See generally, *id.*; see also Ingolf Pernice, *Multilevel Constitutionalism in the European Union*, 27 EUR. L. REV. 511, 513 (2002).

296. Pernice, *supra* note 295, at 511, 513.

within a federal European nation. The Member States' obligation to facilitate the enforcement of superseding European Union law adds further confusion.²⁹⁷

These observations may be unwarranted for the moment, as most would likely agree that the Member States have not relinquished their sovereignty in the external, international sense. The Member States have independently agreed through their own democratic institutions, however, to confer on the European Union a substantial number of delimited competences. This conferral leaves the great reservoir of power in the Member States' hands, unlike in the United States where federal powers are derived from the people. Because the Member States have themselves granted the European Union competence to act in limited areas for the well-being of their citizens, individual State autonomy and sovereignty still exist. Furthermore, the EC Treaty designates Member States as key actors in the European Union's legislative process. By acting through their government representatives, Member States have not relinquished all legislative control, even in the fair number of areas of European Union competence.²⁹⁸

The European Union's very nature – its establishment by treaties *among* sovereign nations – allows Member States to withdraw with virtual impunity at any time, thereby abandoning their limited subservience. This ability is qualified with the adjective “virtual” because the

297. Treaty Establishing the European Community art. 10, Oct. 11, 1997, 1997 O.J. (C 340) 183. Article 10 states that “Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the community's tasks.”

In the United States, it is clear that state institutions are obliged to obey federal law, sometimes even in terms of state governmental actors' activities. *See Reno v. Condon*, 528 U.S. 141 (2000). In *Reno*, the Court held that a federal law prohibiting persons and entities, including state governments, from divulging personal identification information applied to personal identification information obtained from motor vehicle records. The Court concluded that the federal law was a valid exercise of Congress's commerce power. The federal law neither interfered with the states' reserved powers under the Tenth Amendment nor did it violate principles of federalism.

Presumably, the non-sovereign European Union institutions could do as much, perhaps under Article 10. On the other hand, under the Tenth Amendment and principles of federalism, the American Congress can neither compel a state legislature to enact a particular law nor enlist state executive officials to carry out federal regulatory programs. *See, e.g., New York v. United States*, 505 U.S. 144, 162 (1992); *see also Printz v. United States*, 521 U.S. 898, 935 (1997). Wouldn't it likewise be a violation of the Member States' “sovereign state” status if European Union institutions commandeered the Member States' legislative and executive organs? The ECJ could not enforce such a measure under the auspices of the supremacy doctrine and Article 10, could it?

298. EC Treaty, *supra* note 27, art. 5. Article 5 states that the “Community shall act within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it therein.” The Treaty is an agreement entered into by each Member State, which, in effect, confers certain powers upon the European Union.

EC Treaty does not contain a withdrawal provision; the proposed Constitutional Treaty, however, did include a withdrawal provision.²⁹⁹ Ordinarily, under international law as expressed in the Vienna Convention on the Law of Treaties, termination of treaties or withdrawal of parties is done in accordance with the terms of the negotiated treaty.³⁰⁰ Without a party's material breach of the treaty's essential conditions³⁰¹ or a fundamental change of circumstances,³⁰² withdrawal would ordinarily require the other parties consent³⁰³ or would have to be deemed "implied by the nature of the treaty."³⁰⁴ The EC Treaty's nature³⁰⁵ may be such that anything less than an implicit right of withdrawal would be tantamount to eviscerating a non-consenting Member State's sovereignty. While there may be some difficulty in articulating a clear right to withdraw under the EC Treaty, "as a matter of practice treaties are regularly denounced by states unilaterally."³⁰⁶

The ultimate surrender of State sovereignty in a system like the European Union can probably only ultimately occur when the Member States' foreign affairs officers *join* to make European policy as a group binding upon dissenting states. Essentially, this would result in a de facto ceding of foreign policy-making to the European Union, in effect subordinating the Member States to the collective, corporate whole.³⁰⁷

In implementing the European Council's general guidelines, the Council of Ministers³⁰⁸ is expected to take joint action binding on non-abstaining Member States³⁰⁹ and to develop and adopt common posi-

299. Treaty Establishing a Constitution for Europe art. I-60, 2004 O.J. (C 310) 40. The as yet unratified treaty provides a process by which "[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements."

300. Vienna Convention on the Law of Treaties art. 54, May 23, 1969, 1155 U.N.T.S. 331. (effective Jan. 27, 1980).

301. *Id.* art. 60.

302. *Id.* art. 62.

303. *Id.* art. 57.

304. *Id.* art. 56; see also MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 36-39 (4th ed., Aspen Pub. 2003).

305. The EC Treaty is characterized by economic integration, incipient political integration, delegation of certain state powers to the European Union, a robust supremacy doctrine, and broad free movement principles. The EC Treaty comes strikingly close to altering the nature of a Member State's political community. See Conte, *supra* note 293.

306. Janis, *supra* note 281, at 37 (citing ARIE E. DAVID, THE STRATEGY OF TREATY TERMINATION, at ix (Yale Univ. Press 1975)).

307. Pernice, *supra* note 295, at 522-23.

308. The Council of Ministers is a working institution which possesses a primary and extensive legislative role as well as an executive function. It is made up of ministers from the participating Member States' governments.

309. When a Member State abstains from voting on a common foreign or security policy decision, it may qualify its abstention with a formal declaration. The Member State is not bound to apply the decision, though it must accept the European Union's commitment to the decision. See TEU, *supra* note 43, art. 23.1.

tions on foreign and security policy. As a practical matter, however, unanimity is required; a single Member State can oppose a decision, all but precluding its adoption unless the European Council reaches unanimity.³¹⁰ In the Treaty on European Union, which both established a Union Minister of Foreign Affairs and facilitated a common foreign and security policy, the Member States' external sovereignty was preserved – collective policy “shall not prejudice the specific character of the security and defense policy of certain Member States.”³¹¹ When one considers the disparities between Member State views on foreign policy issues – for example, on the Iraq War – carrying out a common European Union foreign policy is unlikely for the time being.³¹²

Though seen as more centralizing and “Europeanizing,” the proposed Constitutional Treaty actually called for greater involvement from Member State parliaments and a heightened role for subsidiary principles³¹³ in the legislative process, along with a higher profile for the European Union executive (including a Foreign Minister). In effect, the Constitutional Treaty was checking the EU's centralizing tendencies with institutional protections for Member State competences, and, thus, was also protecting their sovereignty. But, the Member States did not ratify the European Constitution. This was quite possibly a rejection of ceding further aspects of State sovereignty to the European Union without sufficient understanding of the Member State competences protections. In October 2000, a similar sense of popular notions may have compelled British Prime Minister Tony Blair to say: “Europe can, in its economic and political strength, be a superpower, not a superstate.”³¹⁴

On the other hand, more extensive European Union competences and an even more Europeanized power to execute European Union foreign policy³¹⁵ may reemerge under a new constitutional treaty or subse-

310. *Id.* art. 23.2.

311. *Id.* art. 17.

312. The French and German governments' contra-American Iraq policies contrasted with the British, Italian, and Polish governments' pro-American Iraq policies (in this regard “contra-American” and “pro-American” should be read as contra- or pro-Bush Administration).

313. See Treaty Establishing a Constitution for Europe art. I-3, 2004 O.J. (C 310) 11-12.

314. *Blair Attacks Two-Tier Europe*, BBC News, Oct. 6, 2000, <http://news.bbc.co.uk/1/hi/world/europe/959202.stm> (last visited Aug. 26, 2006).

315. In the midst of the Orange Revolution, culminating in the reversal of an electoral result favoring the Yushchenko government, Secretary-General Javier Solana took rather strong European Union foreign policy positions in support of Yushchenko. This occurred without much consultation or involvement of the Dutch Presidency or of the major European Union powers. This suggests very affirmatively a collective Europeanist viewpoint. It is doubtful, though, that European Union foreign policy will develop in the future in many areas using this somewhat precipitous approach. See Grzegorz Gromadzki, Oleksandr Sushko, Marius Vahl, Katarzyna Wolczuk & Roman Walczuk, *Will the Orange Revolution Bear Fruit? EU – Ukraine Relations in 2005 and the Beginning of 2006*, (Stefan Batory Foundation, Warsaw 2005), available at <http://www.batory.org.pl/doc/orange.pdf> (last visited Aug. 26, 2006).

quent agreements. For now, however, the European Union's power primarily relates to limited aspects of so-called *internal* sovereignty. The European Union's institutions, including the ECJ, are applying law in the realm of competences delegated to the European Union. Under-scoring this perspective, Article I-5.1³¹⁶ of the proposed Constitutional Treaty asserted: "The Union shall respect the equality of each Member State before the Constitution *as well as their national identities, inherent in their fundamental structures. . . . It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.*"³¹⁷

European Union Member State citizenship, like U.S. citizenship, is based on State sovereignty, while European Union citizenship is treaty-based.³¹⁸ Article 17 of the EC Treaty, establishing Union citizenship for Member States citizens, states that "[c]itizenship of the Union shall complement and not replace national citizenship."³¹⁹ In the United States, citizenship is granted to all people born or naturalized in the United States as well as those born to United States citizens outside of the country;³²⁰ by virtue of their American citizenship, these people are also citizens of the state in which they reside.³²¹ The European Union's situation is the reverse, a person is a European Union citizen by virtue of his or her Member State citizenship.

In the United States, it is *federal* citizenship that counts most fully in the context of sovereignty-based rights. Unfortunately, a case demonstrating American xenophobia, *Nishimura Ekiu v. United States*, may best illustrate this point. In *Nishimura Ekiu*, the Court stated, "[i]t is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them

316. Though unratified, each Member State's head of state has agreed to this article.

317. Treaty Establishing a Constitution for Europe art. I-5, 2004 O.J. (C 310) 12 (emphasis supplied).

318. The People, who form the sovereign State's heart, lungs, blood, and mind, are its citizens. In republican democracies, the citizens, the people, and the sovereign State are one. In fact, it has been observed that in the United States' constitutional system, it is the People, and not the embodiment of the state, who are sovereign. Justice Field in his *Fong Yue Ting* dissent, went so far as to say that "[s]overeignty . . . is in this country vested in the people, and only in the people." *Fong Yue Ting v. United States*, 149 U.S. 698, 758 (1893) (Field, J., dissenting).

In the context of *popular sovereignty*, the citizens and the State are one (or at the very least bound to each other), owing each other allegiance and support. The *sovereign* owes its *citizens* freedom, equality, rights, rules, social benefits, good order, protection, beneficial relations with other States, and security. The *citizens*, in turn, are obliged to provide the *sovereign* their allegiance, service, and participation in the State's political, social, and economic life. The right of virtually absolute free movement within a sovereign State would be one of these rights.

319. EC Treaty, *supra* note 27, art. 17.

320. Immigration and Nationality Act, 8 U.S.C. § 1401.

321. U.S. CONST. amend. XIV.

only in such cases upon such conditions as it may see fit to prescribe."³²² The case remains a dramatic example of the sovereign's power to this day.

In the United States, individual states cannot wholly exclude citizens from other states, but the United States as *the* sovereign may wholly exclude those who do not hold American citizenship. An American citizen cannot be expelled and is guaranteed full protection from the sovereign. It is also largely by virtue of one's status as a American citizen that the Fourteenth Amendment's Privileges or Immunities Clause provides protection of the right to reside in another state as well as the right to obtain that state's benefits.³²³

This is not to say that non-nationals are deprived of constitutional protection in the United States. For example, the Fourteenth Amendment's Equal Protection Clause has been interpreted to mean that a state may not discriminate against a lawful resident alien on the basis of his or her non-citizenship in relation to trade, profession, or employment, unless the position involves a governmental function or lies "at the heart of our political institutions."³²⁴ Yet, despite the broad constitutional protections afforded to non-citizens, the United States Supreme Court continues to underscore the differences between aliens and citizens. This is evidenced by the power to exclude non-citizens from a range of political activities: participating in the states' and the nation's democratic political institutions, voting, holding office, and engaging in public work that entails broad policy-related functions. The rationale for these exclusions is the sovereign's need to preserve its political community.³²⁵

Some scholars disagree with the notion that national citizens should be accorded greater protections and privileges than non-citizen residents; instead they argue that permanent resident aliens should be afforded all the rights of mobility, residency, work, and benefits afforded American citizens.³²⁶ Under this view, there is neither sufficient reason to preserve this sort of discrete American community nor to discriminate against non-citizens. However, the consensus is that an American politi-

322. 142 U.S. 651, 659 (1892).

323. *Saenz v. Roe*, 526 U.S. 489, 501-03 (1999).

324. *Foley v. Connelie*, 435 U.S. 291, 295-97 (1978); *see also* *Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding under the public function exception a New York law that precluded non-citizens who did not intend to apply for U.S. citizenship from employment as public school teachers); *Graham v. Richardson*, 403 U.S. 365 (1971) (striking down, as a denial of equal protection, a state law that denied non-citizen permanent residents the ability to receive welfare benefits).

325. *See* *Sugarman v. Dougall*, 413 U.S. 634, 647-48 (1973).

326. *See, e.g.*, T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9 (1990).

cal community exists. Furthermore, most agree that aggregate membership in a political community shapes that community;³²⁷ citizenship in a sovereign state is a vital matter of self-definition and self-government. Justice Byron White expressed a similar sentiment in *Cabell v. Chavez-Salido*:

The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the government as well: Aliens are by definition those outside of this community.³²⁸

By virtue of treaty-based and constitutional principles, the European Union and the United States offer different notions of citizenship. Both largely protect residency rights and free movement principles. However, and probably as it should be, persons claiming rights under non-national citizenship face greater limitations and are not as fully protected as they would be under a sovereignty-based citizenship because the body granting their rights is not the sovereign. The sovereign retains its self-defining political community and the concomitant power to protect that community and its resources, security, and national consciousness.

V. CONCLUSIONS

In cases like *Baumbast*, the ECJ advanced European notions of free movement and furthered the European Union's goal of economic integration, but also appeared to move *beyond* mere economic integration, the animating purpose of the Union's free movement principles. Somewhat similarly, in *Saenz v. Roe* the United States Supreme Court advanced the "one nation, one people" principle under the Privileges or Immunities Clause of the Fourteenth Amendment. In the context of economic integration, each court has addressed the right to practice a trade, profession, or livelihood or to obtain social benefits as a new resident; furthermore, each has applied similar analytical frameworks to determine whether a state or Member State's free movement restrictions are justifiable.

For example, the ECJ required that, to be valid, the state restriction must both relate to a serious threat to security, health, or other public

327. MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 32 (Basic Books 1983).

328. *Cabell v. Chavez-Salido*, 454 U.S. 432, 439-40 (1982) (holding that a state could require that deputy probation officers be American citizens because the position involves policy execution, which substantially affects members of the political community).

interest and be necessary to achieve that important interest.³²⁹ Otherwise stated, the state restriction imposing an obstacle to free movement must not be disproportionate to the aim pursued.³³⁰ This close scrutiny is warranted because Member States have conferred some power on the European Union concerning free movement of workers as well as internal market powers. These principles are among the European Union's driving forces, and countervailing issues of national sovereignty and citizenship are not as important in this "internal market" context. To further the economic integration animating purpose of freedom of movement in the European Union, the ECJ should closely scrutinize free movement restrictions. In the United States, the Supreme Court often asks whether non-state citizens are a peculiar source of evil at which a restrictive statute is aimed³³¹ and whether the discrimination against the non-citizens is closely related to the statute's legitimate aim.³³² When in the U.S., however, the rights to travel and residency implicate *national* citizenship more fully, the "one nation, one people" animating purpose compels a higher degree of scrutiny.

Free movement under European Union citizenship, however, is different. As Hannah Arendt puts it, "freedom . . . as a tangible reality . . . is spatially limited."³³³ Despite globalization and the ensuing need for adjustments to our understanding of the sovereign State, freedom, though flawed in the case of some minorities in some states, still flourishes within functioning nation-state borders. Freedom occurs as a result of national security and self-identification within a political community that promotes freedom. Maintaining sovereignty's essentials, especially among States that have delegated some of their powers to international entities like the European Union, is critical to maintaining freedom.

In the European Union, these critical aspects of sovereignty and national citizenship are most clearly implicated when free movement and residency principles are applied as rights under European Union citizenship provisions.

Recent American jurisprudence, *Saenz v. Roe*, for example, is encouraging because it establishes that American citizens have an absolute right to reside – to be free as well as secure – wherever they choose within the United States' territorial boundaries. This freedom is only subject to a genuineness inquiry regarding state residency. *Saenz v. Roe*

329. See, e.g., Case 36/75, *Rutili v. Ministre de l'Interieur*, 1975 E.C.R. 1219, ¶¶ 27-28, 32.

330. See Case C-379/87, *Groener v. Minister for Educ.*, 1989 E.C.R. 3967, ¶ 11; see also Case 118/75, *Watson & Belmann*, 1976 E.C.R. 1185, ¶ 21.

331. See, e.g., *Toomer v. Witsell*, 334 U.S. 385, 398 (1948).

332. *Id.* at 396.

333. HANNAH ARENDT, *ON REVOLUTION* 279 (Viking Press 1965).

reinforced the “one nation, one people” notion by recognizing and reinforcing free movement principles under the Fourteenth Amendment. Furthermore, the Court demanded strict scrutiny concerning state limitations on free movement and freedom to reside. This jurisprudence clearly reflects the notion that national citizens should be free to thrive within their nationwide community in terms of security, social and health protection, and societal identification. To further enhance the United States’ sovereignty-based citizenship, the Supreme Court could require even greater scrutiny of supposed state justification – for example, over technical residency definitions that place undue restrictions on individuals who are both recognized American citizens and state residents.

In Europe, however, Italians will be Italians,³³⁴ as Danes will be Danes, Irish will be Irish, Dutch will be Dutch, French will be French, Poles will be Poles, and when they come, Croatians will be Croatians. The European Union and the ECJ have proclaimed and trumpeted European citizenship as if it ushered in the European state.³³⁵ However, because “political unity” and national identity are not animating purposes of the freedom of movement in the European Union, European citizenship stands for, or should stand for, nothing more than the incremental extension of free movement rights to non-workers whose movement and residency is not overly burdensome to the economic well-being and security and national identity of the Member States.

The ECJ has supported expanding free movement beyond a mere economic linkage and has encouraged a notion of European “consciousness.”³³⁶ The ECJ’s silence regarding the Member States’ continued role and significance as sovereigns is, however, disconcerting. This eloquence on the one hand and silence on the other undermines the delicate balance between national sovereignty and European integration.

Rather than impose a heavy burden on Member States to justify, under the European Union’s citizenship provisions, any limitation on the freedom of non-nationals to reside and obtain residency benefits equal to nationals, the ECJ should acknowledge that vital national sovereignty concerns are implicated. Instead of compelling the Member State to

334. In fall 2004, during a conversation between the author and an Italian political science graduate student regarding European Union doctrines, the student insisted that Italy was Italy, and Italians were Italians, not “Europeans.” It was Italian laws and rights that counted, despite both the European Union’s supremacy doctrine and European citizenship. Rarely outside the European Union institutions does one hear nationals self-identifying as “Europeans” rather than Frenchmen, Germans, and Spaniards, for example. Interview with Italian political science graduate student at the University of Dayton in Dayton, Ohio (Oct. 29, 2004).

335. See *generally* Case C-413/99, *Baumbast v. Sec’y of State for the Home Dep’t*, 2002 E.C.R. I-7091.

336. *Id.*

demonstrate that the limitation or condition is both supported by European Union legislation and necessary to the Member State's objective, the court should be more deferential to exercises of retained Member State sovereignty. The host Member State might even be more welcoming than required. In fact, a number of Member States have been more receptive to immigrants from the new Eastern European Member States than the enlargement transition rules require.³³⁷ Yet, this receptiveness ought to be the Member State's prerogative, made while considering its citizens' needs and interests.

Instead, in situations implicating free movement principles based on European Union citizenship, rather than economically-linked free movement, the ECJ could begin with the presumption that a Member State's limitation upon or condition for the non-economically linked freedom to reside is valid. To overcome this presumption of validity, the petitioner would have to demonstrate that the limitation is unrelated or not rationally related to a legitimate objective.³³⁸

By increasing deference to the Member States' retained sovereignty, this alternative approach to free movement would in effect recognize that Union citizenship, although beneficial, is inferior to and does not replace national citizenship. This approach would also acknowledge and alleviate the fear that national identity, economic stability, and security are being sacrificed – a fear that may have contributed to the Members States' failure to ratify the recently proposed European Union Constitution. American and European approaches to free movement should recognize the inherent differences between national citizenship and the freedom of movement it animates, the distinctions between non-sovereignty based citizenship and economically-linked free movement, and the freedom of movement principles that best serve these concepts.

337. See *Communication from the Commission to the Council*, *supra* note 13, at 4. Under the Transitional Arrangements for enlargement, the fifteen older Member States are permitted to maintain entry and residency restrictions regarding workers from eight of the ten newest Member States. These restrictions are permitted during a transitional period that will terminate in 2011. Even though they could be more restrictive, Ireland, Sweden, and the U.K. will not apply restrictions on access to their labor markets. These Member States have emphasized "the positive contribution made by workers from the EU 8 to their national economies." *Id.* at 5.

338. For example, protecting public health, the environment, national security, safety, economic stability, and national and cultural identity are all potential legitimate objectives.