



The Creation of European Citizenship: Constitutional Miracle or Myopia?

Catherine BARNARD * and Emilija LEINARTE 
University of Cambridge

Abstract

EU citizenship, now so central to the European Union's project, remains a highly contested concept in respect of its meaning, its scope, and its purpose. By considering the large body of legal texts and their *travaux préparatoires* from the 1972 Paris European Council until the adoption of the Maastricht Treaty in 1992, we have explored what the original drafters had in mind in developing the concept of EU citizenship and, crucially, what they did not. The article argues that the notion of European citizenship was seen as a *tool* to define European identity, and thus to continue the building of the European Union as a whole. European citizenship was thus viewed through a constitutional prism from the outset. The constitutional approach to the concept of European citizenship fed into the wider constitutionalisation project under the Maastricht Treaty and, later, permeated the case law of the Court of Justice of the European Union. We wish to argue that this focus on the constitutional nature of EU citizenship overlooked the more practical implications of citizenship, such as how to manage immigration flows or the infrastructure changes needed in the host state to accommodate a significant number of arrivals of EU citizens (in particular in respect of housing and social welfare benefits). It took more than 20 years after the introduction of EU citizenship for the Court of Justice to become aware of the practical, as opposed to constitutional, implications of the direction of travel it had pursued. By that time, it was too late for the United Kingdom, one of the countries which had received the largest number of EU citizens; the UK voted by a narrow margin to leave the European Union.

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I. INTRODUCTION

The notion of European citizenship has far-reaching implications for the lives of (migrant) EU nationals.¹ Citizenship of the Union, established at Maastricht in

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¹ J Shaw, 'The Interpretation of European Union Citizenship' (1998) 61 *Modern Law Review* 3, p 302. See also B Wilkinson, 'Towards European Citizenship? Nationality, Discrimination and Free Movement of Workers in the European Union' (1995) 1(3) *European Public Law* 417.

1992 by Article 20(1) of the Treaty on the Functioning of the European Union ('TFEU'), is additional to national citizenship and carries a separate list of rights—including the right to move and reside freely in another Member State, and to vote and stand as a candidate in municipal elections in the host EU country and European Parliament elections. European citizens and their non-EU family members are also entitled to equal treatment with nationals of the host state, a principle which has broad implications, especially in the field of social rights. Of the rights conferred on EU citizens, the right to free movement has been the core and the right most fully articulated by the Court of Justice of the European Union and subsequently the Citizens' Rights Directive 2004/38.² The effect of these rights has limited Member States' sovereign power to control both numbers of EU citizens coming to their countries and to manage the effect of migration on the costs of their social policies.³

Despite its legal and practical significance, the topic of EU citizenship remains highly contested. There is an existential debate about whether EU citizenship can and should exist. Views differ, too, regarding its function. Proponents of a constructivist approach see European citizenship as a construct beyond the nation-state which is a tool to address wider problems facing the EU.⁴ An integrationist approach regards European citizenship as a tool to improve the functioning of the markets, without having a wider constitutional function. Others adhere to a more restrictive interpretation, seeing European citizenship merely as having a symbolic or decorative role.⁵

It is against the backcloth of these broader debates that we wanted to trace the origins of the citizenship provisions in the EU Treaties with a view to understanding the role and function of EU citizenship. Through a careful analysis of the large body of legal texts and their *travaux préparatoires* from the 1972 Paris European Council until the adoption of the Maastricht Treaty in 1992, we have explored what the original drafters had in mind in developing the concept of EU citizenship and, crucially, what they did not. We argue that the notion of European citizenship, was not, as commonly thought, an idea developed by the Spanish government at Maastricht, but was in fact born at the same time as the initiatives to create a European *Union* (as opposed to the European Community) in the early 1970s. This historical context is important because it enables us to see what the proponents of EU citizenship had in mind: it was a *tool* to define European identity, a lack of which—both internally and

² OJ [2004] L158/77.

³ See further C Barnard and S Fraser Butlin, 'Ceding Control and Taking It Back: The Origins of Free Movement in EU Law' (2022) 51(3) *Industrial Law Journal* 643.

⁴ For example, see D Kostakopoulou, 'Towards a Theory of Constructive Citizenship in Europe' (1996) 4(4) *The Journal of Political Philosophy* 337; A Wiener, *Building Institutions: The Developing Practice of European Citizenship* (Westview, 1998); D Kostakopoulou, 'European Union Citizenship: Writing the Future' (2007) 13(5) *European Law Journal* 623.

⁵ For example, U d'Oliveira, 'Union Citizenship: Pie in the Sky?' in A Rosas and E Antola (eds), *A Citizens' Europe: In Search of a New Order* (Sage, 1995); M Everson, 'The Legacy of the Market Citizen' in J Shaw and G More (eds), *New Legal Dynamics of European Union* (Oxford University Press, 1995).

externally—was regarded, at a minimum, as an obstacle for further integration, and possibly existential for the existence of the EU as a whole (Part II).

Understanding that the creation of EU citizenship was a response to the identity issues surrounding the EU helps to locate the debates about EU citizenship firmly within the developing constitutional framework of the EU. EU citizenship both contributed to the creation of the EU as body which was more than an international organisation, as well as legitimising the purpose and the activities of that body (Part III). The constitutional approach to the development of the concept of European citizenship fed into the wider constitutionalisation project under the Maastricht Treaty and, later, permeated the case law of the Court of Justice of the European Union. The constitutional debate was also used as the main framework of analysis by academics in this period to understand and explain developments taking place in the EU. For many, EU citizenship was a triumph of the EU project—even a miracle (Part IV).

We wish to argue that developing EU citizenship was a project led largely by institutional actors who considered European citizenship a constitutional concept. The focus on the constitutional dimension of EU citizenship during the 1970s and 1980s meant that the debate occurred at a high level of abstraction. We find no evidence that those who understood some of the more practical implications of citizenship, particularly in the fields of immigration and the welfare state, were involved in the project. The debate regarding the introduction of measures, such as abolition of immigration checks and the granting of the right to vote and stand for elections in another Member State, was focused on whether they would help answer ‘the European identity’ question. Little or no account was taken of practical considerations, such as how to manage immigration flows nor was there any real discussion of the infrastructure changes needed (for example, in respect of the building of more schools and accommodation). In particular, there was no discussion of the extensive societal changes that such migration might precipitate. This myopia has led to a number of unforeseen consequences, most importantly a growing hostility towards the EU project by some, and in the case of the UK, a vote to leave the European Union (Part V). However, we begin our story by looking at the foundation phase of EU citizenship.

II. ORIGINS OF EUROPEAN CITIZENSHIP

Although it is often thought that EU citizenship was a Spanish project of the pre-Maastricht period, in fact the genesis of European citizenship dates back two decades earlier. The institutional actors of the 1970s and 1980s determined that, for the European project to succeed, it was necessary for citizens of the Member States to be, and to feel, *European* in the Union’s multinational context. So the EU institutions proposed the introduction of various measures, which can be grouped under two headings: (1) the passport union (Section III.B); and (2) the granting of special rights, the totality of which were referred to as ‘European citizenship’ (Section II.B). These measures were thus seen as a *tool* to define European identity, a lack of which—was regarded as an obstacle for further integration and, possibly, existential for the EU

project as a whole: without continued support from its people the EU project risked being significantly weakened before it could deliver some of the benefits of integration.

A. *The Need for the Creation of an EU Identity*

In the wake of the so-called ‘Heroic period’ of the 1960s, with the Court’s recognition of the four fundamental doctrines (direct effect, supremacy, implied powers, and human rights), and the 1973 accession of Great Britain, Ireland, and Denmark, the mid-1970s to the mid-1980s was seen as a stagnant epoch in European integration.⁶ The lack of European identity, both external and internal, was seen as the cause of this sluggish development. Europe’s inability to effectively respond to the Soviet-Afghan war and the Oil Crisis of late 1973 weakened the EU’s image as a global actor (the external dimension of the identity issue). Internally, too, there was a quest for a clearly discernible purpose for the Union.⁷ Shaw notes that the sense of remoteness from European political institutions led to widespread discontent and alienation in many Member States.⁸

Given this background, it is not surprising that questions concerning the ‘personality’ of the Communities became prominent in the early 1970s when the plans to create a new polity of European Union were first discussed. For example, in its 1975 report on European Union, the Commission noted a retreat in the process of European construction, stemming from the economic crisis and the changes in international affairs.⁹ According to the Commission, ‘public opinion, while still generally in favour of Europe as a unity, has gradually ceased to regard the Community as a political venture in its own right and has become increasingly sceptical’.¹⁰ The first priority, according to the Commission, was to restore credibility and relevance to this common venture. Identity problems were also emphasized in the Report by Leo Tindemans, Prime Minister of Belgium, on the European Union in 1976 which noted that the European idea became partly a victim of its own success, since after the reconciliation between formerly hostile countries and a period of economic prosperity, the Union seemed to have achieved its purpose and ‘lost its air of adventure’.¹¹

⁶ J H H Weiler, ‘The Transformation of Europe’ (1991) 100 *Yale Law Journal* 2403.

⁷ See eg ‘Editorial Comments: An Ever Closer Union. . . ?’ (1983) 20(4) *Common Market Law Review* 637; E Stein, ‘The European Community in 1983: A Less Perfect Union?’ (1983) 20(4) *Common Market Law Review* 641; ‘Editorial Comments: Where Do we Stand after Fontainebleau?’ (1984) 21(3) *Common Market Law Review* 477; G Federico Mancini, ‘The Making of A Constitution For Europe’ (1989) 26(4) *Common Market Law Review* 595.

⁸ Shaw, note 1 above, p 295.

⁹ COM (75) 400 final, *Commission Report on European Union*, Bulletin of the European Communities, Supplement 5/75.

¹⁰ *Ibid*, p 38, para 131.

¹¹ European Union, Report by Leo Tindemans to the European Council, Bulletin of the European Communities, Supplement 1/76, p 11.

A way out of the identity crisis was by renewing the European project through the creation of a European Union.¹² At the first Summit Conference of the Enlarged Community held in October 1972, Member States ‘set themselves the major objective of transforming, before the end of the present decade ... the whole complex of the relations of Member States into a European Union’.¹³ The Statement by the Danish delegation to the Paris European Council in 1974 noted that the Heads of Government had ‘to agree as soon as possible on an overall concept of the European Union’.¹⁴ Accordingly, at the Conference of Heads of Government, Tindemans was asked to submit, by the end of 1975, a comprehensive report which would define what was meant by the term ‘European Union’.¹⁵

One of the major obstacles in the newly launched European Union initiative was the democratic legitimisation dilemma which had dogged the Communities throughout the 1970s and 1980s.¹⁶ If it was to solve the European identity crisis,¹⁷ the development of a European Union was to be *about* the people: ‘A People’s Europe’.¹⁸ The European Commission, responding to the growing need to define and strengthen ‘European’ identity, articulated that ‘complete assimilation with nationals as regards political rights is desirable in the long term from the point of view of a *European Union*’.¹⁹

The idea of ‘A People’s Europe’, as a central building block of a European Union, continued to resonate throughout the 1980s.²⁰ The European Council concluded that European integration could continue successfully only if it secured a more tangible presence in everyday life of Europeans.²¹ In his 21 March 1988 proposal, Rapporteur Bru Puron noted that mobilisation of European citizens was necessary to give the political union a democratic dimension.²²

¹² Though, Tindemans noted that some were suggesting that it was inappropriate to draw up a report on European Union at a time when the European concept was passing through a crisis. See *ibid*.

¹³ Meeting of the Heads of State or Government, Paris, 19–21 Oct 1972, The First Summit Conference of the Enlarged Community, reproduced from the Bulletin of the European Communities, No 10, 1972, Bull, EC 10-1972.

¹⁴ Final Communiqué of the Paris Summit (9 and 10 Dec 1974), Bulletin of the European Communities, December 1974, No 12 (Office for Official Publications of the European Communities).

¹⁵ Report by Leo Tindemans, note 11 above.

¹⁶ U Tulli, ‘The Search for a European Identity in the Long 1970s: External Relations and Institutional Evolution in the European Community’ (2016) 25(3) *Contemporary European History* 293.

¹⁷ COM (88) 331 final, *Europe des Citoyens (Communication de la Commission au Parlement européen)*, para 1.1.

¹⁸ In French versions of the documents, the title reads as ‘Europe des Citoyens’ (‘A Citizen’s Europe’) and therefore some English translations refer to ‘A Citizen’s Europe’ rather than ‘A People’s Europe’.

¹⁹ COM (75) 321 final, *Towards European Citizenship*, point 3.1, <http://aei.pitt.edu/5572/01/002205-2.pdf> (emphasis added).

²⁰ COM(84) 446, see also COM(84) 446/3, *A People’s Europe Implementing the Conclusions of the Fontainebleau European Council* (Memorandum from Mr Narjes and Mr Richard).

²¹ COM(84) 446/3, note 20 above.

²² Proposition de Resolution sur les modalités d’une consultation des citoyens européens sur L’Union politique européenne, Le Parlement européen, 21 March 1988, Rapporteur: M. Carlos Maria Bru Puron, W6(3)/8781F, PE 121.356, Or. Es.

So in the early days of the EU, the institutional actors of the Communities took note of the unifying quality of citizenship. European citizenship was to help define the European identity by giving its people the sense of belonging to a collective endeavour but it was also about legitimizing that endeavour.

B. The Response: The Birth of the Concept of European Citizenship

The first official call for the creation of European citizenship appeared in the early 1970s when, during the 1972 Paris European Council, the Italian delegation asked for an examination of the conditions under which, and the timetable according to which, 'European citizenship could be granted to citizens of the nine Member States'.²³ In July 1975 the Commission issued two reports, both entitled 'Towards European Citizenship'.²⁴ The documents indicate, albeit implicitly, that citizenship of the Union would begin to resolve the external identity problem by requiring non-member countries 'to agree to regard the Nine as a single entity and European citizenship as a reality'.²⁵ Further, the Commission acknowledged that European citizenship would 'take the first step towards becoming a reality only with the election of the European Parliament on the basis of universal suffrage and the implementation of Point 11 concerning special rights'. Point 11 of the Paris communiqué said that a working party would be instructed 'to study the conditions and the timing under which the citizens of the nine Member States could be given special rights as members of the Community'.²⁶ The Paris communiqué did not define what special rights were to be granted. However, the Commission concluded that the origin of Point 11 was the idea of European citizenship²⁷ and the intention behind it was the conferral of political rights, namely the right to vote and stand for election.²⁸

The European Parliament's December 1977 resolution instructed the Commission to draw up proposals relating to 'special rights', the aim of which was 'strengthening the ties of solidarity among its citizens'.²⁹ In this document, however, the European Parliament provided a list of civil and political rights which included the right for individuals to appeal to the Court of Justice, the right to submit petitions, the right

²³ Commission, 1975: 28.

²⁴ COM(75) 322, *Towards European Citizenship. A Passport Union*, Supp 7/75; COM(75) 321, *Towards European Citizenship. The Granting of Special Rights*, Supp 7/75. In some documents the English translation differs in that the phrase 'Towards the European Citizenship' is replaced by 'Towards a Citizens' Europe', see, for example, the European Parliament's resolution on the granting of special rights to the citizens of the European Community in implementation of the decision of the Paris Summit of December 1974 (point 11 of the final communiqué), OJ 12 Dec 1977, No C 299/26.

²⁵ Para 3.5

²⁶ Final Communiqué of the Paris Summit, note 14 above.

²⁷ COM(75) 321, *Towards European Citizenship. The Granting of Special Rights*, note 24 above, para 2.2.4.

²⁸ Ibid.

²⁹ European Parliament's resolution on the granting of special rights to the citizens of the European Community in implementation of the decision of the Paris Summit of December 1974, note 24 above.

to stand and vote at elections and to hold any public office in a Member State in which they have been resident for at least ten years.

However, it was understood throughout this early period, as well as into the early post-Maastricht era, that social rights were not part of the special rights introduced under the European citizenship umbrella. For example, the Report of the European Parliament on the conclusions of the 1992 intergovernmental conference noted with regret that the introduction of the European citizenship was limited to civil rights and did not include social rights.³⁰ Member States, too, interpreted European citizenship as a legal concept which did not include social rights. For example, Denmark noted that citizenship of the Union contained no privileges with regard to the right of residence or access to social security schemes and that the new rules on citizenship did not confer any new social rights.³¹

The other component of EU citizenship being examined in this period was the idea of a Passport Union. This stems from Point 10 of the final communiqué of the Paris Summit held on 9 and 10 December 1974, which called for a working party to study the possibility of establishing a passport union and, in anticipation of this, the introduction of a uniform passport.³² In its 1974 communication ‘Towards the European Citizenship. A Passport Union’, the Commission set out guidelines for its establishment. Progress was slow and a decade later, at the Fontainebleau European Council, the heads of government reiterated this objective. The creation of a Passport Union was considered to be a tool of bringing ‘home the reality of the Community of the European citizens’ necessary for the successful development of the European Union project.³³ The Passport Union is considered further below.

Thus, the discussion of European citizenship in this early period was tied to the idea of creating a sense of belonging. The main focus was on political, not social, rights. It therefore constituted only one part of the canonical tripartite grouping of citizenship rights developed by the sociologist Marshall which consists of civic, political and social rights.³⁴ The initial form of European citizenship could not have been regarded as ‘full membership’ on Marshall’s definition and may be described as a unique post-national *political* citizenship.³⁵

The exclusively political nature of this new construct was noted by the Member States. For example, Denmark said that ‘Citizenship of the Union is a political and legal concept which is entirely different from the concept of citizenship within the meaning of the constitution of the Kingdom of Denmark’.³⁶ Commentators, too,

³⁰ Rapport de la commission institutionnelle sur les résultats des Conférences intergouvernementales, Rapporteurs: M David Martin et M Fernand Herman, en ce qui concerne l’Union économique et monétaire, Parlement, Document de Séance, 26 mars 1992, A3-0123/92/PARTIE II.

³¹ White Paper on Denmark and the Maastricht Treaty, Oct 1992, SN 4364/92.

³² Final Communiqué of the Paris Summit, note 14 above.

³³ Press release No 28/1974, 12 Dec 1974.

³⁴ TH Marshall, *Citizenship and Social Class* (Cambridge University Press, 1950), pp 28–29.

³⁵ E Meehan, ‘Citizenship and the European Community’ (1993) 54 *The Political Quarterly* 177.

³⁶ Unilateral Declaration of Denmark, to be Associated to the Danish Act of Ratification of the Treaty on European Union and of which the Eleven Other Member States Will Take Cognizance, Annex 3 to

agreed that the concept of EU citizenship being proposed was unique. For example, Jo Shaw said Union citizenship was ‘an institutional innovation in itself’ which ‘can only be fully understood by reference to *both* the broader theory of citizenship, *and* situation-specific ideas about European integration’.³⁷

So what we see in this period is that the incipient form of European citizenship contained the ‘constitutional essentials’ (the granting of ‘special rights’ and a passport union) necessary to create a feeling of belonging to the Union which, in turn, would provide democratic legitimation for European constitutionalisation. Our analysis, however, reveals a paradox in the institutional approach of the time. On the one hand, in order to fulfil the role of bringing Union citizens closer to the Communities, rights considered under the ‘European citizenship’ umbrella had to be—and were—practical and tangible. On the other hand, they were introduced as symbols of the new European constitutional order and were not assessed as immigration or (later) welfare policies. We shall return to this issue in Part V. First, we will consider the increasingly constitutional approach of the debate.

III. THE CONSTITUTIONAL TURN OF THE DEBATE

As we have shown, given the EU’s perceived need to create a European identity, European citizenship, specifically the creation of special rights and a passport union, was seen through a constitutional prism from the outset. So what does the term constitutionalisation mean for these purposes (Section III.A)? Three preliminary points must be made before we do so. Firstly, we find almost nothing in the pre-Maastricht literature on the question of constitutionalisation and so we turn to the intense scholarly debate of 1990s and early 2000s on whether Europe should—and more importantly whether it *can*—have a constitution. Thus, we refer to the post-Maastricht scholarly debates to define European constitutionalisation processes of 1970s and 1980s. Secondly, while the idea of the European supranational structure as a constitutional entity began to attract serious consideration in academic and political circles in the early 1990s, the processes of European constitutionalisation date back (at least) two decades before, and the genesis of European citizenship is part of this story. We therefore agree with Joseph Weiler’s transformation thesis which argues that 1992 constitutionalisation breakthrough was preceded by ‘deeper, and hence far less visible, profound mutations of the very foundational strata of the Community’, namely the decisions of the Court of Justice from the ‘heroic period’. Thirdly, we use the case of the Passport Union to illustrate the constitutional turn of the debate (Section III.B) before looking at some of the academic literature from the period (Section III.C).

(*F*note continued)

the Conclusions of the Presidency, European Council, 1992, SN 456/92, Edinburgh, December 12, 1992, Part B Denmark and the Treaty on European Union, SN 456/92.

³⁷ Shaw, note 1 above.

A. *European Constitutionalisation*

In its broad sense, constitutionalism refers to the philosophical questions of legitimacy of a constitution.³⁸ While the post-1992 debate reveals a diverse understanding of the issues surrounding the existence of constitutional orders it is possible to distil one element that is at the centre of most discussions—*demos*. There cannot be a constitution without constitutionalism and constitutionalism depends on the perception of the people of a Community as a constitutional, rather than an international, order.³⁹ Weiler suggests that ‘if political Messianism is not rapidly anchored in the legitimation that comes from popular ownership, it rapidly becomes alienating and, like the Golem, turns on its creators’.⁴⁰

What scholars do not, however, agree on is if, and how, popular support may be conveyed to legitimise a supranational body. For Grimm,⁴¹ there must *first* exist the will of the people because any effort to constitutionalise the European order must stem from that will. Grimm argues that there is no collective identity within the people which comprise the EU because the European public power does not derive from the people but is instead mediated through the states. This is the (in)famous ‘no demos thesis’. Grimm therefore argues that because there is no will of the people, European constitutionalisation is not possible.

However, those who question the ‘no demos thesis’ are not convinced that constitutionalism can only originate from an act of the people. Craig, for example, contests the claim that a European collective identity does not exist.⁴² He is not persuaded that constitutionalisation through an act of the people ‘is a necessary normative prerequisite of a true constitution, more especially one that might be adopted at the supranational level’.⁴³ Weiler’s transformation thesis similarly reflects the idea that the European constitutional order has developed gradually from a legal relationship binding upon the states *qua* states, to an integrated legal order that confers rights and obligations on private parties—a thesis which in itself denies a proposition that European *demos* must necessarily precipitate the creation of a European constitutional order.⁴⁴ His views are a variant of ‘freestanding constitutionalism’. ‘Freestanding constitutionalists’ reject the premise that constitutional authority

³⁸ L Alexander, ‘Introduction’ in L Alexander (ed), *Constitutionalism* (Cambridge University Press, 1998).

³⁹ J H H Weiler, ‘Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision, 1(3) *European Law Journal* 219, pp 219–220; A Stone Sweet, ‘Constitutional Dialogues in the European Community’ in A-M Slaughter, A Stone Sweet, and J H H Weiler (eds), *The European Court and National Courts, Doctrine and Jurisprudence* (Hart Publishing, 1998).

⁴⁰ JHH Weiler, ‘Editorial, 60 Years since the First European Community – Reflections on Political Messianism’, (2011) 22 *European Journal of International Law* 303.

⁴¹ D Grimm, ‘Does Europe Need a Constitution?’ (1995) 1 *European Law Journal* 282. Some, including Weiler, attribute this thesis to Paul Kirchhof.

⁴² P Craig, ‘Constitutions, Constitutionalism, and the European Union’ (2001) 7 *European Law Journal* 2.

⁴³ *Ibid*, p 138.

⁴⁴ J H H Weiler, ‘The Transformation of Europe’ (1991) 100 *Yale Law Journal* 2403.

is based on the will of the constituent power, or ‘the people’, as a collective entity.⁴⁵ Instead, it may be based on the more constructed ground of ‘reasonable’ conceptions of shared ‘constitutional essentials’ generated from a freestanding agreement or ‘overlapping consensus’ amongst reasonable individuals.⁴⁶

If it is accepted that there can be a collective European identity which does not pre-date the creation of the order but emerges over time, then the following definition of European constitutionalisation can be used: *a process of legitimisation of a transformation of an international order into a constitutional order which does not necessarily stem from an act of the people but which must nevertheless derive its support from the public by providing to it shared constitutional essentials.*

We use this definition to explain, *ex post facto*, how the institutional actors of 1970s and 1980s regarded the transformation of the European project from an international order to a constitutional one. Our analysis of the *travaux préparatoires* on the European Union project dating back to 1972 shows that the key institutional actors did not doubt that a European *demos* existed. Rather, they could be regarded as pure freestanding constitutionalists who saw European citizenship as a ‘constitutional essential’ that would help attract the support of the people and thereby legitimise European constitutionalisation. In the next Section we shall look at the one of the central initiatives mentioned above—the creation of a Passport Union—as a case study of how the rhetoric focused on the constitutional dimension of the policy. However, we will argue that the focus on constitutionalisation meant that the advocates for a Passport Union (and special rights discussed above in Section II.B) gave insufficient attention to the practical and sovereignty implications of the creation of EU citizenship.

B. Passport Union

It will be recalled that the idea of Passport Union stemmed from Point 10 of the final communiqué of the December 1974 summit. On the one hand, the creation of a Passport Union was seen as a symbolic measure aimed at signalling unity within the Communities, in line with Tindemans reference to ‘external *signs* of solidarity’. The Commission downplayed the legal and practical dimension of its initiatives, saying that a ‘Passport Union is not essential to achievement of the objectives of the EEC Treaty as it stands at present’.⁴⁷ In its 1988 report, the Commission listed a European passport in the category of ‘Symbols’ alongside the Union flag and anthem.⁴⁸ The use of the terms ‘sign’ and ‘symbols’ call into question whether the EU institutions actually regarded a Passport Union to be a substantive internal policy. Rather, in keeping with the rhetoric about the need for the EU to have an external identity,

⁴⁵ M A Wilkinson, ‘Political Constitutionalism and the European Union’ (2013) 76(2) *The Modern Law Review* 200.

⁴⁶ *Ibid.*

⁴⁷ COM(75) 322, *Towards European Citizenship. A Passport Union*, note 24 above, p 17, para 4.1.

⁴⁸ COM(88) 331, note 17 above.

the Passport Union was seen as sending a message ‘confirming the Community as an entity vis-à-vis the rest of the world’.⁴⁹ Almost incidentally, the Commission added that ‘there is an aspect concerned with internal relations, which involves ... the abolition of passport control within the Community. The actual scope of this may be discerned stage by stage...’.⁵⁰ This focus on the external rather than internal effects of a Passport Union, as well as competence issues, led the Commission to consider establishing it by an international law treaty rather than via an EEC Treaty amendment.⁵¹

Despite the symbolic nature of the Passport Union, by mid-1985 the project was extended to cover: (1) the abolition of all customs and police formalities at internal Communities frontiers; and (2) freedom of movement for Community citizens. The institutional language surrounding these far-reaching measures, however, continued to emphasise their constitutional purpose, leaving aside the extent of their potential practical impact on national immigration and social policies. For example, in its November 1988 communication on ‘A People’s Europe’, the Commission described its proposals for the simplification of border controls and the right of residence as aimed at bringing Europe closer to its citizen.⁵²

The abolition of all police and customs formalities for people crossing intra-Community frontiers⁵³ was identified in the conclusions of the 1984 Fontainebleau European Council as a measure ‘to strengthen and promote the [EU’s] identity and its image both for its citizens and for the rest of the world’.⁵⁴ In its communication the Commission again emphasised the symbolic, rather than practical, meaning of the abolition of border checks, suggesting that border controls give the ‘European citizen an impression of a non-finished or even non-existent community’.⁵⁵ The ‘Europe without borders’ objective was set out with the aim of bringing awareness of European identity. The socio-economic dimension of this policy was not addressed,⁵⁶ nor were the security implications, despite the fact that the Commission envisaged that a second phase of the free-border regime would lead to the complete elimination of existing police formalities—a highly significant measure in the context of national immigration policies.

A similar asymmetry between rhetoric and consequences can be observed in the context of free movement of persons, the second strand of 1985 agenda. By mid-1985, freedom of movement for workers had already been established. In

⁴⁹ COM(75) 322, *Towards European Citizenship. A Passport Union*, note 24 above, p 12, para 2.5.

⁵⁰ *Ibid.*, p 10, para 2.2.3.

⁵¹ *Ibid.*, p 16, para 4.

⁵² COM(85) 640 final, *Communication de la Commission au Conseil sur L’Europe des Citoyens*.

⁵³ At the time of the Fontainebleau European Council, an agreement between the French and German governments concerning the progressive elimination of controls at the Franco-German frontier has been notified to the Commission, see COM(84) 446/5, OJ 749, *L’Europe des Citoyens suites a donner aux conclusions de Fontainebleau* (Communication de M Tugendhat), Point 13 c.

⁵⁴ Conclusions of the Fontainebleau European Council (25 and 26 June 1984), Bulletin of the European Communities. June 1984, No 6, pp 11–12.

⁵⁵ COM(84) 446, note 53 above.

⁵⁶ Commission, COM(88) 331, note 17 above.

addition, in 1980 the Commission had presented proposals concerning residence rights for students and other persons who opted for long-term or permanent residence in a Member State other than their own. Finally, in its 1985 resolution on 'A People's Europe', the European Parliament requested the right of general residence be granted to *all* citizens of the Community on the grounds that it constituted an essential element of the right to free movement.⁵⁷ A political consensus was achieved on this issue by the end of 1990.⁵⁸ Alongside these developments, the Fontainebleau European Council called for a general system for ensuring the equivalence of university diplomas in order to bring about effective freedom of establishment. The Commission, in turn, called for mutual recognition to be afforded to a large number of sectors.⁵⁹ Most of these objectives were achieved with the adoption of three residence rights directives: Directive on the right of residence,⁶⁰ Directive on the right of residence for employees and self-employed who have ceased their occupational activity⁶¹ and Directive on the right of residence for students⁶² (now been replaced by the Citizens' Rights Directive 2004/38).

C. *The Approach of the Academic Literature*

In line with the constitutional approach of the institutional actors, the early scholarly debate on the formal recognition of European citizenship also focused on the constitutional justification for such an endeavour. Our survey of the two leading European law journals, the *Common Market Law Review* and the *European Law Review*, suggests that while welfare and immigration issues were addressed by a limited number of authors during the 1970s and 1980s,⁶³ there were no articles discussing the concept of European citizenship during this time. Several studies on European citizenship were, however, published in the early 1990s by constitutional lawyers, most notably by Carlos Closa.⁶⁴ Only in the late 1990s and early 2000s did the legal

⁵⁷ Resolution sur l'Europe des citoyens, 13 Nov 1985, Doc A2-133/85, para 38.

⁵⁸ Irish Presidency Programme, Address by the Minister for Foreign Affairs Mr Gerard Collins TD, to the European Parliament, 16 Jan 1990, Doc 23 Jan 1990 HO/cd/91, SEC(90) 167.

⁵⁹ Commission, COM(88) 446/3, note 53 above, para 6.1.

⁶⁰ Council Directive 90/364/EEC of 28 June 1990 on the Right of Residence, OJ L180/26.

⁶¹ Council Directive 90/365/EEC of 28 June 1990 on the Right of Residence for Employees and Self-Employed Who Have Ceased Their Occupational Activity OJ L180/28.

⁶² Council Directive 93/96/EEC of 29 October 1993 on the Right of Residence for Students, OJ L317/59.

⁶³ Eg, D Wyatt, 'The Social Security Rights of Migrant Workers and their Families' (1977) 14(4) *Common Market Law Review* 411; D Duyssens, 'Migrant Workers From Third Countries in the European Community' (1977) 14(4) *Common Market Law Review* 501; H Knorpel, 'Social Security Cases in the Court of Justice of the European Communities, 1978–1980, Part II' (1982) 19(1) *Common Market Law Review* 105; H Knorpel, 'Social Security Cases in the Court of Justice of the European Communities, 1982' (1984) 21(1) *Common Market Law Review* 241; JG Monroe, 'A Review of the Case Law of the Court of Justice on Migrant Workers and Social Security, July 1987 to July 1989' (1990) 27(3) *Common Market Law Review* 547.

⁶⁴ C Closa, 'The Concept of Citizenship in the Treaty on European Union' (1992) 29(6) *Common Market Law Review* 1137; C Closa, 'Citizenship of the Union and Nationality of Member States'

community start debating the content of European citizenship from the policy perspective, coinciding with the Court's expansive interpretation of European citizenship which we shall address below.⁶⁵ The domination of constitutional lawyers in the academic literature is reflective of the institutional perspective on the concept of European citizenship. Many regarded European citizenship as a vehicle to add a significant layer of rights, alongside the internal market provisions,⁶⁶ for individuals, especially the right to equal treatment and human rights more generally. However, scholarly debates leading up to the introduction of European citizenship and its interpretation post-Maastricht were mainly analysed through a constitutional, rather than a social or immigration policy, prism.

In summary, the institutional discourse regarding the adoption of measures which formed the concept of European citizenship reveal a constitutional approach to European citizenship aimed at enhancing Europe's identity, home and abroad, and bringing the citizen closer to the Union. This constitutional debate inspired academic writers who in turn fed into the constitutional narrative of the institutions and certain Member States about the role and function of EU citizens. This ultimately led to the inclusion of European citizenship in the Maastricht Treaty, as we shall see in the next Part. It sat alongside monetary union, the provisions on the division of competences, and the introduction of the subsidiarity principle. Together they made the newly renamed EU more of a constitutional entity and the Treaties more of a constitutional text. For the purposes of this article, the inclusion of the citizenship provisions was both an input into this process of constitutionalisation and the result of this constitutionalisation.

(*F'note continued*)

(1995) 32(2) *Common Market Law Review* 487; S O'Leary, 'The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law' (1995) 32(2) *Common Market Law Review* 519; S Hall, 'Loss of Union Citizenship in Breach of Fundamental Rights' (1996) 21(2) *European Law Review* 129; J Shaw, 'The Many Pasts and Futures of Citizenship in the European Union' (1997) 22(6) *European Law Review* 554; CELS (Cambridge) EC Treaty Project: Part 2: Citizenship of the Union (1997) 22(5) *European Law Review* 436.

⁶⁵ Eg R Whittle and M Bell, 'Between Social Policy and Union Citizenship: The Framework Directive on Equal Treatment in Employment' (2002) 27(6) *European Law Review* 677; C Jacqueson, 'Union Citizenship and the Court of Justice: Something New under the Sun? Towards Social Citizenship' (2002) 27(3) *European Law Review* 260; O Golyner, 'Citizenship, Identity and Immigration in the European Union: Between Past and Future (Publication Review)' 2002 27(3) *European Law Review* 367; À Castro Oliveira, 'Workers and Other Persons: Step-by-Step From Movement to Citizenship – Case Law 1995–2001' (2002) 39(1) *Common Market Law Review* 77; N Reich and S Harbacevica, 'Citizenship and Family on Trial: A Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons (2003) 40(3) *Common Market Law Review* 615; K Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42(5) *Common Market Law Review* 1245.

⁶⁶ For example, C Barnard, 'Free Movement of Natural Persons and Citizenship of the Union' in C Barnard and S Peers (eds) *European Union Law*, 3rd ed (Oxford University Press, 2020, and earlier editions).

IV. EUROPEAN CITIZENSHIP AS AN INPUT INTO THE CONSTITUTIONALISATION PROCESS

A. The Inclusion of the Citizenship Title at Maastricht

In a letter of 9 May 1990 to Charles Haughey, the Prime Minister of Ireland,⁶⁷ the Spanish Prime Minister Felipe González Márquez said that the Political Union consisted of transforming a space, up until now largely of an essentially economic character, into a common integrated space.⁶⁸ He suggested basing the construction of the European Union on three main pillars: (1) economic and monetary union; (2) common foreign and security policy; and (3) common citizenship. In its follow-up memoranda the Spanish delegation defined European citizenship as:

The personal and indivisible status of nationals of the Member States whose membership of the Union means that they have special rights and duties that are specific to the nature of the Union and are exercised and safeguarded specifically within its boundaries, without dismissing the possibility that such a status of European citizen may also extend beyond those boundaries.

Thus, the language used by the Spanish government reflected the long history of the evolution of EU citizenship, outlined in the previous Parts of this Article: the need for a definable European identity, both internal and external ('common integrated space') and that this would be manifested in the creation of three policy strands but of particular interest for our purposes was European citizenship with 'special rights'.

Following the Spanish proposals, a consensus was reached on the need to include a provision on European citizenship in the draft Maastricht Treaty. The Commission suggested that the substance of the principle of citizenship of the Union be expressed through the formulation of specific rights including civic, economic and social. By mid-1991, the introduction of the European citizenship was becoming a reality, as evidenced by the Council President Jacques Poos's suggestion that the Community was very close to an agreement on citizenship.⁶⁹ The Maastricht Treaty, signed on 7 November 1992, included Article 8:

1. Citizenship of the Union is hereby established.

Every person holding the nationality of a Member State shall be a citizen of the Union.

⁶⁷ The letter reproduced in R Mesa Garrido, 'Europa, la comunidad y los cambios en el este. Una perspectiva desde las relaciones internacionales' in *Revista de Instituciones Europeas* (1990) No 17-3, p 745.

⁶⁸ *Ibid*, para 3.

⁶⁹ Discours du Président Delors Lors de La session plénière du Parlement européen de juin 1991, 12 June 1991, p 199.

2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

European citizenship was thus formally introduced into the primary law of the Union. Reference in Article 8 to the ‘rights conferred by this Treaty’ was not, however, clearly defined, perhaps due to the fact that European citizenship was intended to be a dynamic concept likely to evolve with the European project.

Just over a decade later, the Citizens’ Rights Directive (‘CRD’) 2004/38 was adopted. Surprisingly unheralded and undiscussed at the time, this Directive contained the most detailed elaboration of the ‘special rights’, specifically the right to equal treatment for EU citizens and nationals in respect of all matters, with the exception of social assistance in the first three months and student grants and loans in the first five years. Most importantly for the purposes of this article, it tied the rights of free movement to the right of *citizens*, not just those who were economically active.

The introduction of the European citizenship in the Maastricht Treaty, and its subsequent elaboration in the CRD, arose from and fed into the project of European constitutionalisation. In the following Section we will argue that the constitutional approach to the new legal European citizenship also permeated the early case-law of the Court of Justice of the European Union throughout the 1990s and early 2000s.

B. The Role of the Court of Justice

As we have shown, the notion of European citizenship when finally introduced at Maastricht, was not pre-defined. A question which dominated the discourse throughout the 1990s was: what is the exact content of the European citizenship? Some commentators expressed their frustration at the limited scope of the new supranational citizenship and called for a significant expansion of the list of rights.⁷⁰ Many wanted the Court to fill the void, as it had done back in the heroic period of the EU. After a period of hesitation, the Court finally addressed the issue, first with *Martinez Sala*,⁷¹ where the Court ruled that an impecunious EU citizen lawfully resident in the territory of a host Member State, could rely on the principle of non-discrimination in all situations falling within the scope *ratione materiae* of Union law,⁷² and then, most importantly with *Grzelczyk*,⁷³ a case about an impecunious French migrant student living in Belgium being denied the Belgian minimex on the ground he was neither Belgian nor an EU migrant worker. The Court declared that ‘Union citizenship is

⁷⁰ Joseph Weiler 1996.

⁷¹ *María Martínez Sala v Freistaat Bayern*, C-85/96, [1998] ECR I-2691. According to Menéndez, most of the structural and substantive changes claimed to have been brought about by the Court’s judgments at the turn of the century were already under way in the pre-Maastricht case-law. See A José Menéndez, ‘European Citizenship after *Martinez Sala* and *Baumbast*: Has European Law Become More Human and Less Social?’ in M Maduro and L Azoulay (eds), *The Past and Future of EU Law* (Hart Publishing, 2010).

⁷² *María Martínez Sala v Freistaat Bayern*, note 71 above, para 63.

⁷³ *Grzelczyk v Centre Public d’Aide Sociale d’Ottignes-Louvain-la-Neuve*, C-184/99, [2001] ECR I-6193.

destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment as nationals of another Member State'.⁷⁴ The Court insisted that Member States had to afford equal treatment with respect to social advantages to all Union citizens, not only workers. *Grzelczyk* therefore reflected the institutional discourse of the 1970s and 1980s when European citizenship was regarded as paramount to the European project (Part II) and the language of 'fundamental status' reflected the constitutional lens through which the Court viewed EU citizenship.

The Court's approach to the European citizenship as a fundamental status under EU law paved the way for the Court to expand the reach of Union citizenship rights further. For example, in *Baumbast* (2002), the Court cut the link between free movement and economic activity by ruling that Union citizens are not required to pursue a professional or trade activity in order to enjoy free movement rights.⁷⁵ Reaching further, in *Chen* (2004) the Court extended the right to move and reside to third country nationals who were parents of a baby born in the EU due to him being a Union citizen.⁷⁶

It is of course true that the Court's case law does acknowledge that Union citizenship rights are subject to such exceptions as are expressly provided in the Treaties and secondary law.⁷⁷ After all, European citizenship was not an unconditional status. A number of limitations were imposed through, primarily, the Citizens' Rights Directive, such as conditions for EU citizens' right of residence and access to welfare (eg the requirement to be economically active or not to become an unreasonable burden to the social welfare systems of the Member States). However, the Court often found such limitations to be disproportionate⁷⁸ or could not be justified on the grounds of a 'certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States'.⁷⁹

The Court's constitutional approach to European citizenship fits neatly into the famous observation made by Eric Stein in 1981:

Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type

⁷⁴ *Ibid*, para 31.

⁷⁵ *Baumbast and R v Secretary of State for the Home Department* C-413/99, [2002] ECR I-7091, para 83.

⁷⁶ *Chen v Secretary of State for the Home Department*, C-200/02, [2004] ECR I-9925.

⁷⁷ For example, the Court does recognise in *Grzelczyk* that Directive 93/96 allows Member States to require students who are nationals of another Member State and who wish to exercise a right of residence on their territory, that they have sufficient resources. *Grzelczyk v Centre Public d'Aide Sociale d'Ottignes-Louvain-la-Neuve*, note 73 above, para 38.

⁷⁸ See eg *Baumbast and R v Secretary of State for the Home Department*, note 75 above.

⁷⁹ *Grzelczyk v Centre Public d'Aide Sociale d'Ottignes-Louvain-la-Neuve*, note 73 above, para. 44.

structure in Europe. From its inception a mere quarter of a century ago, the Court has construed the European Community Treaties in a constitutional mode rather than employing the traditional international law methodology.⁸⁰

This relentless focus on the creation of a ‘constitutional framework for a federal-type structure in Europe’, while wholly justified in the eyes of its creators, overlooked one key factor: the greater the commitments offered by the EU under the banner of EU citizenship, the less Member States’ were able to control their ‘borders’ (or more accurately the numbers of EU nationals coming into their country) and the impact this would have on their social welfare systems.

V. THE IMPLICATIONS OF THE CONSTITUTIONAL APPROACH

The narrative presented in the previous Parts shows that the creation of EU citizenship was considered essential to ensure the secure development of the European Union project and its continued legitimacy. A report prepared by the European Parliament made this clear: it noted that the institution of citizenship of the Union is a ‘milestone of evolution towards federal Europe’.⁸¹ Those fully committed to the EU project believed that EU citizenship was good for all.

However, we argue that there are striking features of what is missing from this narrative: the voices of those who would have to operate these policies in practice and the voices of those who were critical of the project. It is, of course, difficult to prove a negative (ie what is missing). It is, however, possible to pull together some threads. For example, there is nothing in the legal documents which would indicate that any kind of impact assessment of the Passport Union measures was carried out, even after the 1985 enlargement of the Union. This was so despite the fact that the issue of unemployment was a major issue identified by the EC institutions at the time. For example, in 1986 Jacques Delors noted that unemployment was a long-lasting problem of exceptional gravity, with the proportion of long-term unemployment rising from 17%–46% in 1980 to 27%–59% in 1984.⁸² We did not find evidence which would indicate that questions were being raised at the Union’s institutional level as to whether and how the far-reaching measures introduced under the Passport Union initiative could affect national economies and their social policies.

It was precisely because European citizenship carried a political, even ideological, meaning associated with European identity, that the discourse on the introduction of the Union citizenship did not include a specialist assessment of its impact on the national policies of the Member States. The focus on the constitutional dimension

⁸⁰ E Stein, ‘Lawyers, Judges, and the Making of a Transnational Constitution’ (1981) 75(1) *The American Journal of International Law* 1, p 1.

⁸¹ Rapport de la commission institutionnelle sur les résultats des Conférences intergouvernementales, note 30 above.

⁸² See verbatim report proceedings, European Parliament, 7 August 1986, Address by Delors. The Presidency Conclusions of Dublin European Council, 25–26 June 1990, SN 60/1/90 stated that long-term unemployment among adults and young people remains a major problem.

of free movement also avoided any difficult discussions about what this meant for border and immigration control. There is no evidence that those involved in operationalising these policies had a seat at the table. Willem Maas suggests that the effort to entrench a set of supranational rights, thereby creating European citizens, reflects the will to create a community of people rather than simply a free market area.⁸³ The results of our analysis call into question whether the Union institutions regarded the idea of granting the supranational rights as having anything to do all with the concept of free market *at all*. We observed no reference to the potential social or economic implications of an expansive approach to EU citizenship in the institutional discussions on the citizens' rights to residence on, for example, housing or welfare benefits (although there had been discussions in the 1950s on the implications of free movement of *workers* on domestic housing and welfare policy⁸⁴). Nor did we find an assessment of this right by immigration policy experts. In fact, free movement of people other than workers was considered by some to be unrelated to the internal market.⁸⁵

It was in the midst of this discourse that the Court of Justice of the European Union took on the leading role in expanding the concept of European citizenship in its *Grzelczyk* line of case law, re-shaping the regulatory powers of Member States with respect to one of their most fundamental prerogatives: the right to decide who can enter their territory and who can benefit from their social policies. While the Court, as has been mentioned above, does place certain statutory limits on citizenship rights, there is nothing in its analysis which would attest that the Court had engaged in an assessment of the practical effects of such expansive interpretation of Union citizenship. The Court appeared detached from the realities which its far-reaching conclusions would have on the welfare and immigration policies of the nation-States.

It was not just the voices of those who needed to operationalize the policies which were not heard, it was also those who did not agree with the policy, and who felt they had lost out from the policy, especially people in deprived towns and cities who saw EU migrants as a threat.⁸⁶ This was particular acute in the UK. In the midst of a growing discontent in some quarters with the 2004 enlargement and the significant migration of EU citizens from Central and Eastern Europe,⁸⁷ the British government was

⁸³ W Maas, *Creating European Citizens* (Rowman & Littlefield Publishers, Inc, 2007), p 7.

⁸⁴ C Barnard and S Fraser Butlin, 'Free movement: A Case Study in State Autonomy and EU Control' in M Dawson and M Jachtenfuchs, *Autonomy without Collapse* (Oxford University Press, 2022), p 164.

⁸⁵ See, for example, the position of the Irish representative, Commission Note a l'attention de MM, les Membres de la Commission, Compte rendu succinct de la deuxième réunion de la conférence des gouvernements des états membres, Luxembourg, les 21–22 October 1985, Doc SI(85) 715, 25 October 1985; also point c) of Note de la Présidence du Groupe préparatoire a la Conférence des Représentants des Gouvernements des états membres, 16 October 1985, Doc CONF-RGEM 41/85.

⁸⁶ C Barnard and F Costello, 'When EU Migration Came to Great Yarmouth', *Contemporary Issues in Social Science* forthcoming <https://doi.org/10.1080/21582041.2023.2188486>.

⁸⁷ The numbers of nationals of Members States which joined the EU in 2004 have increased significantly—from just 125,000 in 2004 to over 1m by 2012. HM Government, Review of the Balance of Competences between the United Kingdom and European Union: Single Market: Free Movement of

looking for ways to curb immigration. In 2013 the then-Prime Minister David Cameron said:

Britain has always been an open and welcoming economy, but it isn't right if our systems are being abused. We're going to look at every single one of our systems: housing, health and benefits, and make sure we're not a soft touch for those that want to come here.⁸⁸

While the 2014 Review of the balance of competence between the UK and the EU Single Market concluded that the effects of free movement were largely positive, the Report noted that the findings from public opinion surveys indicated declining levels of public support.⁸⁹ According to the Report, the Court's case-law had the effect of limiting the ability of Member States to control immigration from within the EU.⁹⁰

For a number of years the Court's constitutional approach to EU citizenship, however, did not draw much attention because migration was rather low in the EU. As was noted by the then-Director of Demos, David Goodhart, prior to the 2004 enlargement, free movement was 'a largely symbolic right used mainly by multinational companies, spouses, senior professionals and a small but growing group of retirees—with only 0.1% of EU nationals living in another EU Member State'.⁹¹ The 2004 enlargement of the Union changed the scene dramatically and demonstrated a significant asymmetry between on the one hand, the constitutional meaning that was given to the Union citizenship by, first, the institutional actors of 1970s and 1980s and, later, by the Court, and, on the other, the practical reality of unrestricted immigration, mainly under Article 45 TFEU on free movement of workers but against the broader background of EU citizenship. The effects of the Court's expansive interpretation of the Union citizenship were felt especially strongly in those states—including the UK—which had not applied for the derogation to free movement in 2004 provided in the Luxembourg Accession Treaty. As noted by John Springford, 'many Britons feel that the reciprocal arrangement has broken down: free movement is no longer perceived to be an arrangement that works for the mutual benefit of both Britons and other Europeans'.⁹²

Growing discontent with the UK government's inability to control immigration played a major role in the 2016 Brexit referendum. The 2017 analysis conducted by Matthew Goodwin and Caitlin Milazzo suggested that strong public concerns

(Footnote continued)

Persons, (2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/335088/SingleMarketFree_MovementPersons.pdf.

⁸⁸ J Jowit, 'David Cameron: Justice for All – Unless You're an Immigrant', *Guardian* (14 Feb 2013), <https://www.theguardian.com/society/2013/feb/13/justice-immigrant-david-cameron>.

⁸⁹ Review of the Balance of Competences between the United Kingdom and European Union: Single Market, note 87 above.

⁹⁰ *Ibid.*, para 2.15.

⁹¹ *Ibid.*, D Goodhart, Director of Demos, Submission of Evidence.

⁹² J Springford, 'The Impact of EU Migration on Britain's Economy' in *The CER Commission on the UK and the Single Market: The Impact of EU Migration on Britain's Economy* (2013).

over immigration, and its perceived effects on the country and communities, were central to understanding the 2016 vote for Brexit.⁹³ This explains why controlled immigration was key to the then-Prime Minister Theresa May's Brexit negotiation strategy⁹⁴ and has become totemic issue for the Conservative party, even though the issue over migration remains vexed.

A decade after the *Grzelczyk* judgment, the Court's jurisprudence reveals a chill in its constitutional analysis of European citizenship and a greater emphasis on the limits laid down in secondary law, such as the emphasis in the Citizens' Rights Directive on having 'sufficient resources',⁹⁵ In *Brey*, for example, the Court noted the right to move and reside under the Citizens' Rights Directive,⁹⁶ but also ruled that such right was conditional on having sufficient resources.⁹⁷ In *Dano*⁹⁸ the Court significantly narrowed the scope of citizenship rights by excluding from the right to social assistance those economically inactive EU citizens who go to another Member State solely to obtain social assistance. It may be that this more cautious approach was a partial response to a developing line of academic enquiry dating from the mid-2000s that questioned the Court's expansive interpretation of the material scope of European citizenship.⁹⁹ As suggested in the 2006 Editorial of the *European Law Review* titled 'The Unbearable Heaviness of European Citizenship': 'If European citizenship governs movement and residence within the European Union, then it must consider the conditions of movement and residence, and, in particular, what restrictions may be put on these'.¹⁰⁰ In other words, judgments in these cases signify a shift from the Court's traditional more high level constitutional approach towards an acknowledgment of the political, social and economic realities of Member States.¹⁰¹

⁹³ M Goodwin and C Milazzo, *Taking Back Control? Investigating the Role of Immigration in the 2016 Vote for Brexit* (2017) 19(3) *British Journal of Politics and International Relations* 450.

⁹⁴ Theresa May's Address at the CBI, 19 November 2018, <https://www.bbc.com/news/uk-politics-46257168>.

⁹⁵ See also the discretion of Member States under the Directive on Patients' Rights in Cross-Border Healthcare to Limit Reimbursement of Costs Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the Application of Patients' Rights in Cross-Border Healthcare OJ [2011] L 88/45.

⁹⁶ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States.

⁹⁷ *Brey*, C-140/12, EU:C:2013:565, para 53.

⁹⁸ *Dano*, C-333/13, EU:C:2014:2358.

⁹⁹ M Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship' (2006) 31(5) *European Law Review* 613; B Kunoy, 'A Union of National Citizens: The Origins of the Court's Lack of *Avant-Gardisme* in the *Chen* Case' (2006) 43(1) *Common Market Law Review* 179; K Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42(5) *Common Market Law Review* 1245; E Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects' (2008) 45(1) *Common Market Law Review* 13.

¹⁰⁰ 'The Unbearable Heaviness of European Citizenship (Editorial)' (2006) 31(6) *European Law Review* 779.

¹⁰¹ M Blauberg et al, 'ECJ Judges Read the Morning Papers: Explaining the Turnaround of European Citizenship Jurisprudence' (2018) 25 *Journal of European Public Policy* 1422; S Schmidt et al, 'Free

VI. CONCLUSIONS

To conclude, the concept of European citizenship has deep roots in the history of European integration. Though it was first included in the Treaty in 1993, its origins can be traced back two decades earlier. Union citizenship is a dynamic concept, the content of which was not pre-determined. Its purpose was to strengthen European identity by bringing citizens of the Member States closer to the Union. That was to be achieved through the introduction of various measures, such as the Passport Union and the introduction of a special right to vote in municipal elections for Union citizens living in another Member State, the purpose of which was to help people identify with the new—unique—polity. Seen from a purely constitutional perspective, measures adopted under the Union citizenship umbrella were sensible, coherent, and incremental. The constitutional approach to European citizenship also permeated the jurisprudence of the Court of Justice throughout the 1990s and early 2000s. The Court regarded Union citizenship as a fundamental status which often led it to strike down limitations on the exercise of European citizenship rights as disproportionate. For those deeply committed to the EU project the Court's approach was commendable, if somewhat slow in coming.

However, this Article has argued that the institutions' focus on the constitutional necessity and justification for EU citizenship led to it overlooking some basics, in particular that high-level political announcements have consequences on the ground for the operation of national immigration and social welfare policies. Putting it another way, since 1972, the discourse about Union citizenship focused solely on the symbolic and ideological nature of this new supranational notion, despite the far-reaching practical implications which were embedded in its DNA. While the institutions, especially the Court, are now taking a more cautious approach, the top-down constitutional focus on the creation of EU citizenship has proved in some quarters, especially the UK, to be disintegrative.

(Footnote continued)

Movement and Equal Treatment in an Unequal Union' (2018) 25 *Journal of European Public Policy* 1391.