

Note

Managing Diversity in the European Union: Inclusive European Citizenship and Third- Country Nationals

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European citizenship establishes a precedent whereby the exercise and protection of rights – the practice of citizenship – is no longer contingent on residency within the jurisdiction of national citizenship. Free movement rights have allowed European citizens to cross borders and participate more nearly as political and legal equals within the host society. At the same time, however, European citizenship has largely failed to account for the past or future migration of third-country nationals (TCNs) – those who are not citizens of any Member State – into or within the European Union. As a result, the creation of European citizenship has arguably had the unfortunate side effect of further distinguishing and excluding TCNs from the emerging European society. This Note argues that the current legal status of TCNs hinders successful diversity management by individual Member States, undermines European integration, and deprives TCNs of fundamental rights. The Note proposes that European citizenship should be expanded to allow TCNs to acquire European citizenship without the simultaneous

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acquisition of national citizenship in any Member State. European Union authority over the citizenship status of TCNs would benefit the project of migrant integration into local, national, and transnational societies and help further the democratization of European governance. In addition, a redefined European citizenship could trigger a fundamental rethinking of national citizenship, potentially undermine the destructive influence of the extreme right, and, perhaps, lead to a more complete decoupling of the political and legal content of citizenship from the idea of nation.

I. INTRODUCTION: DIVERSITY IN THE EUROPEAN UNION

The European Union (EU) is an ongoing project in diversity management.¹ Member states bring their own histories, languages, economies, and political cultures to a common table in Brussels, and the individual citizens of the European Union exhibit the full cultural, ethnic, and religious diversity of the entire world. As of May 1, 2004, a group of twenty-five national states will be bound together by a common set of European institutions, laws, and political actors that balance and manage the complex set of underlying objectives pursued by governments, business interests, civil society, and individual citizens.² Diversity management in the European Union requires confronting and reconciling not only the diversity *among* states, but also the increasingly diverse populations *within* those states.

Peter Schuck has recently articulated the notion of “diversity-as-ideal” as the belief “that diversity—in general or of a particular kind—is beneficial or not.”³ Although “diversity-as-ideal” may not find its historical origins in Europe,⁴ the European Union has made significant efforts to affirm and celebrate the diversity among and within its Member States. The Treaty on European Union, for example, states, “The Community shall contribute to the flowering of the cultures of the Member States, *while respecting their national and regional diversity* and at the same time bringing the common cultural heritage to the fore.”⁵ The European Commission’s

1 Peter Schuck describes diversity management as “how government self-consciously approaches diversity—so long as one bears in mind that ‘manage’ includes both decisions to make diversity a subject of active legal intervention and decisions to leave diversity to informal, unregulated choices.” PETER SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 6-7 (2003).

2 Since 1995, fifteen states have belonged to the European Union. In April 2003, in Athens, accession treaties were signed to welcome ten new Member States beginning May 1, 2004: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia. See European Commission, *Activities of the European Union—Enlargement*, http://europa.eu.int/pol/enlarg/overview_en.htm (last modified May 2004).

3 SCHUCK, *supra* note 1, at 10.

4 In Schuck’s account, “belief in the diversity ideal . . . appears to be a distinctively, if not uniquely, American (or at least North American) theme.” *Id.* at 14.

5 TREATY ON EUROPEAN UNION, Feb. 7, 1992, 1992 O.J. (C 191) 1, art. 128 (emphasis added) [hereinafter TEU]. The affirming language has been preserved in the Treaty Establishing the European Community. See CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, 2002 O.J. (C 325) 33, 99, art. 151 [hereinafter EC TREATY] (emphasis

1998 Action Plan against Racism looked within the Member States, recognizing that, “European societies are multicultural and multi-ethnic and *their diversity, as reflected by the range of different cultures and traditions, is a positive and enriching factor.*”⁶ The Charter of Fundamental Rights of the European Union proclaims, “[t]he Union shall respect *cultural, religious and linguistic diversity.*”⁷ Although a list of scattered examples over time hardly provides sufficient proof to pronounce the “diversity-as-ideal” as firmly planted in Europe as in North America, neither is diversity unrecognized as a powerful source of potential good.

Although the degree to which individual Member States have embraced “diversity-as-ideal” may vary considerably, the European Union is by definition a gathering together of diverse national political communities. Every Member State is, more or less, a nation-state: a *political* entity whose geographic territory corresponds to the boundaries of a *national* population.⁸ One cannot, however, extrapolate the nation-state model to the European Union itself, because “[u]nlike the national-statist communities, the European Union has been built upon *the affirmation of Europe’s deep diversity.*”⁹ In turn, the European Union may lack a “communitarian sense” of itself, or a cultural “European identity.”¹⁰ Yet from the perspective of European governance, diversity – within limits – is an asset rather than a liability. According to one European Commissioner, “Only someone who does not understand Europe could think along those lines; Europe means diversity. We *need* decentralization. We *need* subsidiarity.”¹¹ Of course, there is an important difference between

added).

6 An Action Plan Against Racism, COM(98) 183 final at 2 (emphasis added).

7 Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364) 1, 13, art. 22 [hereinafter Charter] (emphasis added). The Charter is intended “to assist the Union in its task of further developing common values while respecting the diversity of national identities.” Andrew Duff, *The Citizen and the Convention*, in RETHINKING EUROPEAN CITIZENSHIP 5, 6 (Federal Trust: European Essay No. 24, 2002). Of course, *respect* for diversity may yet fall short of the affirmation that diversity-as-ideal suggests. The ultimate legal status of the Charter is scheduled to be decided during the 2004 intergovernmental conference. PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 358 (3d ed., 2003). See also European Commission, *About the Charter – Legal Status: Giving the Charter Teeth*, http://europa.eu.int/comm/justice_home/unit/charte/en/about-status.html (last visited Mar. 31, 2004) (describing the difference in legal status between maintaining the Charter as a declaration or incorporating it directly into the Treaties).

8 This general claim might be controvertible if one looks, for example, at Great Britain and its constituent English, Scottish, and Welsh, Spain and its Basques and Catalans, or Belgium and its Flemish and Walloons. Nonetheless, whether the nation-state is premised on an “ethnic” basis (e.g., Germany) or a shared “civic culture” (e.g., France), the boundaries of EU Member States – at this point in time – generally correspond to preconceived or constructed notions of *non-diverse* national communities, however those communities were constituted.

9 Theodora Kostakopoulou, *‘Integrating’ Non-EU Migrants in the European Union: Ambivalent Legacies and Mutating Paradigms*, 8 COLUM. J. EUR. L. 181, 186 (2002) (emphasis added).

10 *Id.*

11 Quoted in LIESBET HOOGHE, *THE EUROPEAN COMMISSION AND THE INTEGRATION OF EUROPE* 94-95 (2001). Subsidiarity is the principle by which decisions are made at the lowest or most decentralized level of governance that can be effective. On the value of diversity to European decision-making, see Peter Mair & Jan Zielonka, *Diversity and Adaptation in the*

affirming the value of diversity among state interests, and more fully embracing the diversity within states and among their inhabitants.¹² Nonetheless, in spite of the benefits that European policy-makers see in the process of managing diverse state interests in Brussels, difficulties arise when potential beneficiaries of European governance—including individual citizens or political interest groups—lack a sense of investment in its development or potential.

Disconnect between national citizens of the Member States and the pace and scope of European integration gave rise to a declaration of Citizenship of the European Union in 1992 upon the signing of the Treaty on European Union at Maastricht.¹³ Since Maastricht, national citizens of the Member States have shared a European citizenship status. A decade later in 2002, as delegates to the Convention on the Future of Europe congregated in Brussels to debate revision of the current Treaty into a bona fide European Constitution, the shortcomings and potential of European citizenship received some, if perhaps insufficient, attention.¹⁴

Perhaps of more pressing concern to European leaders is the continuing impact on the European Union of immigrants from the less-developed world.¹⁵ Leaders are preoccupied with increased racial and ethnic tensions within Member States,¹⁶ unpredictable national electorates

Enlarged European Union, in THE ENLARGED EUROPEAN UNION: DIVERSITY AND ADAPTATION 1, 8 (Peter Mair & Jan Zielonka eds., 2002) (“Diversity teaches adaptation, bargaining and accommodation. It is a source of competition, self-improvement and innovation.”). These lessons apply whether one is referring to diverse cultures, policies or interests. See ADRIENNE HÉRITIER, POLICY-MAKING AND DIVERSITY IN EUROPE—ESCAPING DEADLOCK 7-8 (1999) (noting that “the hallmark of the European Union is its socio-economic, cultural, institutional and policy diversity” and describing a policy-making model based on both preserving and accommodating that diversity).

¹² In recent remarks to the European Parliament, U.N. Secretary-General Kofi Annan noted the difference: “I look forward to the day when Europe rejoices as much in diversity within States as it does in diversity between them.” Press Release, Secretary-General Kofi Annan’s Address to the European Parliament upon receipt of the Andrei Sakharov Prize for Freedom of Thought, U.N. Doc. SG/SM/9134 [hereinafter Annan Remarks] (Jan. 29, 2004) <http://www.un.org/News/Press/docs/2004/sgsm9134.doc.htm> (last visited May 1, 2004). The Secretary General’s comments evoke the nascent—but perhaps not fully realized—sense of diversity-as-ideal in Europe.

¹³ TEU, art. 8; EC TREATY, art. 17. This Note uses the terms European citizenship, Union Citizenship, and EU Citizenship interchangeably.

¹⁴ A European Convention charged with drafting language for a new constitutional treaty completed its work in July 2003. Nonetheless, Member States were unable to agree on the proposed constitution by the end of 2003. At the Brussels summit in December 2003, chaired by erratic Italian president Silvio Berlusconi, Member States failed to reach agreement over the proposed text and the talks collapsed. See *The European Union’s Constitution—Brussels Breakdown*, ECONOMIST, Dec. 18, 2003, at 13. At the time of this writing, the exact timeline for finalizing a constitution for Europe remains uncertain.

¹⁵ “Until the eighties, the European Community could be clearly divided into countries of emigration and immigration. The situation now has changed radically, nearly all the Member States, to varying degrees, are touched by immigration, refugees and asylum-seekers.” MARIA MIGUEL SIERRA & JYOSTNA PATEL, EUROPEAN NETWORK AGAINST RACISM, FOR A REAL EUROPEAN CITIZENSHIP 9 (2001), at <http://www.enareu.org/en/publication/citizenshipE.pdf>.

¹⁶ See, e.g., Álvaro Castro Oliveira, *The Position of Resident Third-Country Nationals: Is It Too Early To Grant Them Union Citizenship?*, in EUROPEAN CITIZENSHIP: AN INSTITUTIONAL

who extend occasional support to political candidates of the extreme right,¹⁷ and the difficulty of integrating immigrants into national societies while sufficiently respecting cultural, linguistic, or religious diversity.¹⁸ This Note will consider the relationship among migration, diversity, and citizenship in the European Union, keeping in mind the above concerns.

The European Union has achieved impressive levels of economic harmonization; the free movement of goods and services within the common market is the cornerstone upon which the rest of European integration is based. Under Article 18 of the EC Treaty, European citizenship guarantees citizens, as well as goods, the right of free movement within the common market, albeit subject to other conditions within the Treaty.¹⁹ Nonetheless, European citizenship—carefully crafted as a *supplement* to national citizenship rather than its replacement²⁰—sets a

CHALLENGE 185, 198 (Massimo La Torre ed., 1998) [hereinafter AN INSTITUTIONAL CHALLENGE] (noting the persistent increase in “racist attitudes and attacks” over a twenty-year period). Initiatives like the European Year Against Racism in 1997 typify Community efforts to address discrimination and anti-immigrant sentiment in most Member States. See <http://europa.eu.int/scadplus/leg/en/cha/c10410.htm> (describing aims and implementing measures of the initiative, including the goal of “stress[ing] the threat to . . . social cohesion in the Community which racism, xenophobia and anti-Semitism present.”).

17 “In virtually every major immigrant-receiving country, organized, anti-immigrant forces now exercise at least a modest degree of influence over the public policy agenda.” Anthony M. Messina, *Conclusion, in WEST EUROPEAN IMMIGRATION AND IMMIGRANT POLICY IN THE NEW CENTURY* 207, 211 (Anthony M. Messina ed. 2002) [hereinafter WEST EUROPEAN IMMIGRATION]. See also Peter Ford, *Across Europe, the Far Right Rises*, CHRISTIAN SCI. MONITOR, May 15, 2002 (describing “far-right parties beating the anti-immigrant drum” across Europe); Subsection V.B.4, *infra*.

18 ADRIAN FAVELL, *PHILOSOPHIES OF INTEGRATION: IMMIGRATION AND THE IDEA OF CITIZENSHIP IN FRANCE AND BRITAIN* 22 (1998) (describing pervasive concerns in Western Europe over how to effect migrant integration into host societies).

19 EC TREATY, art. 18. Free movement of persons originally meant the free movement of workers; free movement was the means to an economic end. Since the 1970s, the scope of free movement has been widened from the free movement of workers to the free movement of persons. EMILIANA BALDONI, *THE FREE MOVEMENT OF PERSON IN THE EUROPEAN UNION: A LEGAL-HISTORICAL OVERVIEW* 8 (PIONEUR Working Paper No. 2, July 2003), http://www.obets.ua.es/pioneur/bajaarchivo_public.php?iden+40. Increasingly, free movement of persons has taken on the character of “a free-standing social right, as an end in itself,” but certain restrictions still apply to non-workers. Mark Jeffery, *European Union Development: The Free Movement of Persons within the European Union – Moving from Employment Rights to Fundamental Rights?*, 23 COMP. LAB. L. & POL’Y J. 211, 213 (2001). Non-workers such as students or retirees are required to demonstrate they have their own health insurance or social security benefits. *Id.* at 214. Even citizens who migrate in search of employment, for example, are not usually eligible to receive social services in the host state until certain other conditions are met; home states remain accountable to their nationals even when those nationals are in another state looking for work. In other words, self-sufficiency requirements still place restrictions on absolute free movement. Furthermore, the European Court of Justice (ECJ) has ruled that internal border checks are not inconsistent with the rights of EU citizens to move freely so long as the EU lacks common or harmonized rules on its external borders. Case C-378/97, *Criminal Proceedings v. F.A. Wijnsbeek*, 1999 E.C.R. I-06207, ¶36, [2001] 2 C.M.L.R. 53, ¶36. Nonetheless, the Treaty of Amsterdam explicitly agreed that “significant progress” towards full realization of free movement of EU citizens was to be made by mid-2004. Jeffery, *supra*, at 215.

20 See EC TREATY, art. 17 (“Citizenship of the Union shall complement and not replace national citizenship.”). See also Carlos Closa, *EU Citizenship at the 1996 IGC, in DUAL NATIONALITY, SOCIAL RIGHTS AND FEDERAL CITIZENSHIP IN THE U.S. AND EUROPE* 293, 300

precedent: citizens of any Member State possess the right to enter, reside, work, or attend school in any other Member State.²¹ In addition, guarantees of non-discrimination and equal treatment have been implemented at the European level and have been construed to facilitate such free movement.²²

At the same time, however, market harmonization and European citizenship largely fail to take account of past or future migration by third-country nationals (TCNs)—non-citizens of any Member State—into or within the European Union.²³ Although some progress has been made towards common entry requirements,²⁴ harmonization of the national laws

(Randall Hansen & Patrick Weil eds., 2002) [hereinafter DUAL NATIONALITY] (describing unanimous support for the distinction).

21 See EC TREATY, art. 18 (providing the right to move and reside freely with the European Union to all European citizens, subject to limitations and conditions within the EC Treaty); art. 39(1) (declaring that “[f]reedom of movement for workers shall be secured within the Community”); art. 149(2) (mandating Community action to encourage student mobility); Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, 1993 O.J. (L 317) 59.

22 See EC TREATY, art. 12 (prohibiting discrimination on basis of nationality); CRAIG & DE BURCA, *supra* note 7, at 702 (explaining that the free movement of workers as guaranteed by Article 39 of the EC Treaty represents an application of the Article 12 prohibition of discrimination on the grounds of nationality). Recent ECJ case law also seems to indicate a greater willingness to facilitate free movement rights through the vindication of equal treatment provisions in the social welfare context. See Case C-85/96, *María Martínez Sala v. Freistaat Bayern*, 1998 E.C.R. I-2691. For a discussion of the *Sala* ruling, see Annette Schrauwen, *Sink or Swim Together? Developments in European Citizenship*, 23 FORDHAM INT’L L.J. 778, 780-82, 786 (2000). See also Robin Allen, Q.C., *Equal Treatment, Social Advantages and Obstacles: In Search of Coherence in Freedom and Dignity*, in THE LEGAL FRAMEWORK AND SOCIAL CONSEQUENCES OF FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION 31, 31-48 (Elspeth Guild ed., 1999) [hereinafter THE LEGAL FRAMEWORK] (discussing the non-discrimination principle in the context of access to social advantages for European citizens exercising the right of free movement).

23 “Third-country nationals” (TCNs) are legal immigrants not possessing national citizenship in a Member State. This includes people who entered a Member State with a valid work permit and subsequently gained residency status under the laws of their Member State of residence; it also includes their family members who legally entered the EU pursuant to family reunification laws. The definition also encompasses the children of TCNs; many Member States do not grant *jus soli* citizenship (whereby national citizenship is automatically conferred to persons born on the territory). Some TCNs may, in fact, be second or third generation immigrants. For a similar definition of TCNs, see Oliveira, *supra* note 16, at 185. Refugees constitute another significant portion of EU immigration. *A Strange Sort of Sanctuary*, ECONOMIST, Mar. 13, 2003, at 50. Individuals who are granted asylum, or individuals who for other humanitarian reasons cannot be returned to their countries of origin, can be considered legal migrants—and, thus, TCNs—for this discussion. Illegal immigrants, however, are arguably beyond the scope of these proposals.

24 The 1985 Schengen Agreement reduced controls on persons at internal borders and harmonized certain external borders controls. The Treaty of Amsterdam incorporated Schengen into EU treaty law. See EUROPEAN COMMISSION, EUROPE ON THE MOVE: LIVING IN AN AREA OF FREEDOM, SECURITY, AND JUSTICE—JUSTICE AND HOME AFFAIRS IN THE EUROPEAN UNION 6-7 (2001) [hereinafter ON THE MOVE]. Serious discussions on a common EU immigration policy have been ongoing since the October 1999 European Council summit in Tampere, Finland, and the European Commission has undertaken efforts to facilitate agreement among the Member States on “a common approach to migration management.” European Commission, *Immigration, Designing a Fair Policy*, http://europa.eu.int/comm/justice_home/key_issues/immigration_09_2002_en.pdf (last visited May 2, 2004) (on file with author). Pursuant to the Treaty of Amsterdam, competence over immigration is to shift substantially from intergovernmental (the European

regulating TCN residency and employment has only recently made significant—if still insufficient—progress.²⁵ Furthermore, the European landscape remains a patchwork of national citizenship requirements.²⁶ As a result, TCNs in one Member State may live under a very different national legal regime—and hence have different prospects for obtaining national and thence European citizenship—than immigrants living in a different Member State with more restrictive or less restrictive naturalization procedures. Meanwhile, TCNs remain explicitly *outside* the scope of European citizenship. Although European citizenship is portrayed as a means of developing a greater sense of shared purpose and values across Europe, it simultaneously creates an additional bright line legal distinction between European citizens and their TCN neighbors.²⁷ As this Note will discuss, the current legal status of TCNs in the European Union is inconsistent with the goals of the common market and the EU commitment to “an area of Freedom, Security, and Justice.”²⁸ Furthermore, it hinders successful diversity management by individual Member States.

This Note argues that European citizenship should be expanded to allow TCNs to acquire European citizenship *without* the simultaneous acquisition of national citizenship in any Member State.²⁹ European Union authority over the citizenship status of TCNs would significantly help correct the somewhat incoherent path of EU policy on TCNs since the creation of European citizenship. In turn, this Note argues that a non-derivative European citizenship based on a uniform residency requirement could improve the capacity of EU institutions and national governments to integrate TCN populations more successfully into national and European societies.³⁰ Rather than fueling tensions between Member State citizens and TCNs, a common grant of European citizenship could foster shared interests between nationals and migrants in given localities. The grant to TCNs of European citizenship—and corresponding rights and duties—

Council) to supranational lawmaking bodies (the European Commission and European Parliament) at some point in 2004. *Id.*

²⁵ See *infra* Section III.B.

²⁶ *Id.*

²⁷ Of course, inclusion and exclusion have been central to the rationale of national citizenship since the rise of the nation-state; citizenship has “an irreducible exclusionary import.” Massimo La Torre, *Preface* to AN INSTITUTIONAL CHALLENGE, *supra* note 16, at ix. With the advent of the welfare state, inclusion or exclusion has been essential to determine eligibility for the limited social resources provided by the state; the most serious resistance to a more expansive and robust European citizenship—as discussed in this Note—likely originates in its potential to place greater demands on existing national welfare systems. The extension of European citizenship may lead to difficult—but perhaps much-needed—reforms in national welfare systems throughout the European Union. A detailed analysis of these consequences is beyond the scope of the Note, but such consequences should be borne in mind as an omnipresent backdrop to the citizenship debate.

²⁸ EC TREATY, art. 61 (describing the area of freedom, security, and justice).

²⁹ Under the status quo, national citizenship is a prerequisite to European citizenship. EC TREATY, art. 17.

³⁰ What constitutes the integration of migrants into host societies is highly contested and context-specific; integration into a local community may differ from integration into a national culture. Subsection V.B.1., *infra*, addresses some of the competing integration paradigms.

could also reduce pressure on the various naturalization regimes of the Member States, which currently face a no-win situation. Large (and growing) numbers of immigrants—and the need to integrate those populations—pressure Member State politicians to relax national residency and citizenship regimes to accelerate integration (or at least the access of migrants to rights and services); at the same time, highly visible supporters of populist (and often xenophobic) anti-immigration policies clamor for tightened citizenship laws to protect national identity from the incursions of “invading” populations.³¹ This Note argues that under a regime of inclusive European citizenship providing rights, duties, protections, and opportunities to TCNs, Member States might be free to *tighten* the scope of national citizenship without significantly undermining the human rights or life chances of TCNs. Reaffirming the meaning of national citizenship and restricting its availability need not—as it does under the status quo—further marginalize migrant populations. In this way, the Note seeks to contribute to an area of scholarship requiring more attention: the ways in which transnational and globalizing tendencies can promote cultural, linguistic, and national diversity and distinctiveness, rather than—as much conventional wisdom supposes—demand homogeneity and convergence, or foretell the irrelevance of the nation-state.

Part II summarizes the scope and competing visions of European citizenship. Part III provides an overview of the legal and political status of TCNs in the European Union. Part IV argues that Member State control over acquisition of European citizenship creates incoherence in the political and economic vision of the European Union, and Part V suggests that policy-makers should respond by expanding the scope of European citizenship to TCNs, preferably by connecting European citizenship to residency. Decoupling European citizenship from national citizenship will encourage the integration of TCNs into local, national, and transnational societies and may overcome certain weaknesses inherent in national strategies for migrant integration. In addition, the policy has the potential to undermine aspects of the anti-immigrant, right-wing platform that in recent years has poisoned national party politics throughout Europe; at the very least, these proposals could shift the terms of the debate in constructive ways. Part VI considers the uncertain future role of national citizenship in an increasingly transnational and supranational political space; it suggests that Member States require freedom to reassert national citizenship in forms compatible with long-term immigration flows and the continuing economic and political integration of the European Union.

II. THE CONTOURS OF EUROPEAN CITIZENSHIP

This Part reviews the provisions governing European citizenship and the debates that have surrounded it since its inception. Competing conceptions of European citizenship have ramifications for its application

³¹ See *infra* Subsection V.B.4.

to TCNs.

A. Rights and Duties of European Citizens

The declaration of European citizenship in 1992 was the culmination of a twenty-year effort, beginning with the 1973 Copenhagen Summit, to codify the political integration of Europe.³² At the founding of the European Union in 1992, "Citizenship of the Union" was added to the EC Treaty.³³ European citizenship is derivative of citizenship in a Member State, although the actual text reads, "Every person holding the *nationality* of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship."³⁴ This Note will return to the confusion (or conflation) of the terms *nationality* and *citizenship*;³⁵ in practice, European citizenship is conferred uniquely upon individuals who are already Member State citizens, whether through birthright or naturalization. The exclusive rights of European citizenship are limited but essential.³⁶ European citizens have the right to free movement within the Union,³⁷ the right to vote and stand as candidates in local elections and elections to the European Parliament,³⁸ and the right to consular protection by any Member State when abroad.³⁹ Currently, no clear duties are assigned on the basis of European citizenship. Although these provisions would benefit from reform, this Note argues that even under the status quo, TCNs—and the European Community as a whole—would benefit from clearer access to these "European rights."

B. Visions of European Citizenship

Three visions of European citizenship are discernable in the literature. Two predominant views can be described as *legal-participatory* and *cultural identity-based*. A third perspective seeks to reformulate the conventional approach to citizenship by creating collective identity out of shared and contested visions of citizenship itself. This approach, a *constructive citizenship*, draws on ideas of post-national citizenship and universal

32 See *European Council Declaration on European Identity*, BULL. EUROPEAN COMMUNITIES COMMISSION No. 12-1973, at 118-22 (1973) (describing the 1973 Copenhagen Summit). See also THEODORA KOSTAKOPOULOU, *CITIZENSHIP, IDENTITY, AND IMMIGRATION IN THE EUROPEAN UNION: BETWEEN PAST AND FUTURE* 44-53 (2001) (describing the history of citizenship proposals through the 1970s and 1980s).

33 TEU, Title II, art. G(C) (now incorporated at EC TREATY, art. 17).

34 EC TREATY, art. 17 (emphasis added).

35 See *infra* Section VI.B.

36 The rights listed here are those specifically declared in Part II of the EC Treaty as amended by the Treaty of Amsterdam. See EC TREATY, arts. 17-22.

37 EC TREATY, art. 18. For a brief summary of certain limitations on free movement rights, see sources cited *supra* note 19.

38 *Id.* art. 19.

39 *Id.* art. 20.

personhood.⁴⁰ The visions described here co-exist and overlap in complex ways.⁴¹

1. Liberal Citizenship: The Legal-Participatory Approach

The legal-participatory approach sees European citizenship as a formal means by which to bestow legal and political rights that the Member States alone could not provide. In a practical sense, the institution was intended “to put political integration on a par with economic integration”⁴² by creating spaces for individual participation in European governance. Put otherwise, European citizenship functions as a means by which status as a citizen in the European Union takes on practical value for the individual. The provision of those rights that have exclusive application at a transnational level (e.g., free movement among the Member States) or supranational level (e.g., voting or standing in European elections) embodies citizenship as *legal status*. As with all citizenships, European citizenship defines “who is an insider and who is not,”⁴³ at least in terms of who has the exclusive exercise and protection of those rights. This view of European citizenship privileges the participatory; by taking part in the shaping of European policy or exercising the substantive rights provided thereunder, the citizen herself gives meaning and value to European citizenship. By exercising those rights, European citizens affirm their commitment to the European project and mitigate the infamous “democratic deficit” between individual citizens and Brussels. In other words, under this model, European citizenship takes on practical meaning once the opportunities it conveys are seized upon by those to whom it is available.⁴⁴

40 See KOSTAKOPOULOU, *supra* note 32, at 101-26 (describing “constructive citizenship”); YASEMIN SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE 1 (1994).

41 These categories attempt to consolidate the plethora of citizenship models in the literature. One difficulty of talking about citizenship is that it invariably draws on different starting points and vocabularies, but ultimately evokes many of the same themes. For a similar typology of citizenship models, see Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEG. STUD. 447, 456-89 (2000) (describing paradigms based on legal status, rights, political activity, and identity or solidarity).

42 John Crowley, *Differential Free Movement and the Sociology of the “Internal Border,”* in IMPLEMENTING AMSTERDAM: IMMIGRATION AND ASYLUM RIGHTS IN EC LAW 13, 18 (Elspeth Guild & Carol Harlow eds., 2001) [hereinafter IMPLEMENTING AMSTERDAM].

43 Bernhard Giesen & Klaus Eder, *European Citizenship: An Avenue for the Social Integration of Europe*, in EUROPEAN CITIZENSHIP BETWEEN NATIONAL LEGACIES AND POSTNATIONAL PROJECTS 1, 2 (Klaus Eder & Bernhard Giesen eds., 2001) [hereinafter BETWEEN NATIONAL LEGACIES].

44 See Carlos Coelho, Report on the Third Commission Report on Citizenship of the Union, EUR. PARL. DOC. COM (2001) 506, at 7:

[A] European citizenship cannot be created solely from above . . . the real engagement and the active participation of the citizens in the European Union must originate from the citizens themselves; therefore the Union must obtain a greater legitimacy in the eyes of citizens, and must answer better to the needs, interests and values of the citizens.

With its emphasis on legal status and a clearly defined but narrow set of rights, the legal-participatory approach might be called a “minimalist conception” of European citizenship.⁴⁵ Critics of the legal-participatory conception have found the provisions—and imagination—of European citizenship lacking.⁴⁶ Criticism has focused on the fact that, by and large, the majority of legal, political, and social rights held by European citizens already derive from national law or non-EU sources of law, such as the European Convention on Human Rights.⁴⁷ Joseph Weiler notes the underwhelming nature of European citizenship in the following terms:

Does not Article 8 [now Article 17] look awfully like one of those *Carnets* of “free attractions” some tourist authorities distribute to visitors to make them feel welcome and which you accept in the knowledge that the coupons are free because the attractions are not attractive?⁴⁸

Considering the limited novelty of European citizenship rights, reform of the supranational institutions is required to bolster the value of the European franchise and free movement rights. Notwithstanding these shortcomings, many of these same critics of European citizenship emphasize its great potential as an innovative tool for the civic engagement of the European citizen.⁴⁹

⁴⁵ Giesen & Eder, *supra* note 43, at 9.

⁴⁶ See, e.g., John Handoll, *Reshaping Existing Rights and Duties: Insufficiencies in the Status Quo*, in *RETHINKING EUROPEAN CITIZENSHIP*, *supra* note 7, at 8, 8-12; Jo Shaw, *European Citizenship: For a Triumph of Ambition over Conservatism?*, in *RETHINKING EUROPEAN CITIZENSHIP*, *supra* note 7, at 31, 31-34.

⁴⁷ See Alex Warleigh, *Towards Network Democracy? The Potential of Flexible Integration*, in *EUROPEAN INTEGRATION IN THE 21st CENTURY* 101, 113 (Mary Farrell, et al. eds., 2002); Joseph Weiler, *European Citizenship – Identity and Differentity*, in *AN INSTITUTIONAL CHALLENGE*, *supra* note 16, at 1, 3. The European Convention on Human Rights and Fundamental Freedoms provides a minimum standard of protection that all contracting states must maintain. Alleged violations are adjudicated by the European Court of Human Rights (ECHR) in Strasbourg. The Convention was adopted by Member States of the Council of Europe—an institution entirely separate from the European Union and the European Council of Ministers—but all EU Member States have ratified it. Further, although the ECHR and the European Court of Justice (ECJ) in Luxembourg maintain independent jurisdictions, Article 6 of the TEU requires the European Union to “respect fundamental rights” as guaranteed by the Convention, and the ECJ has integrated some ECHR decisions into EU law.

⁴⁸ Weiler, *supra* note 47, at 13.

⁴⁹ For some of the most innovative proposals for institutional reform within the context of bolstering the value of European citizenship, see Philippe C. Schmitter, *The Scope of Citizenship in a Democratized European Union*, in *BETWEEN NATIONAL LEGACIES*, *supra* note 43, at 86, 99-109 (proposing Europe-wide referenda and the ability to vote on candidates’ term lengths); Shaw, *supra* note 46, at 34 (proposing citizen involvement in the election of the Commission President and a tax program allowing citizens to designate funds to specific European projects); Weiler, *supra* note 47, at 20-24 (proposing a separate European Constitutional Court to deal solely with subsidiarity). See also Warleigh, *supra* note 47, at 105-06 (describing the desirability of a shift from liberal democratic to deliberative democratic models as a means to enhance the legitimacy of European governance). Warleigh focuses on a model of “network democracy” that would increase “the range of stakeholders involved in EU decision-making,” and reviews several “isolated examples of institutional attempts to foster new deliberative practices” in EU governance. *Id.* at 107.

2. Communitarian Citizenship: The Identity-Based Approach

Another perspective sees the legal-participatory approach as doomed from the start if it overlooks the prerequisite of a shared European identity to engender citizen allegiance. The identity-based approach argues that European citizenship is not principally about political and legal rights, but rather a declaration of shared history and culture.⁵⁰ Citizenship is more symbolic than practical—a concept of belonging that evokes an ethno-cultural notion of common experience in spite of Europe’s inherent internal diversity.⁵¹ In this sense, the declaration of European citizenship signals recognition of a pre-existing reality; it functions to rally together citizens who have long labored within nation-states organized around constructed models of cultural or civic nationalism. EU policy has tried to capture and promote the idea of a common European identity by adopting symbols, such as the twelve-star flag or the European anthem.⁵² Historians have taken up the task of showing that a European identity did not appear out of thin air at the beginning of the 1990s.⁵³ In this vision, an identity-based European citizenship both affirms and nurtures a long-extant European identity.

Critics argue either that the identity-based approach is appropriate but insufficiently realized, or that the focus on a shared cultural identity is itself the greatest obstacle to a meaningful European citizenship. Despite the efforts of some historians, collective identity proponents lament the lack of shared founding myths.⁵⁴ The real problem may not be the lack of such myths, but their relative weakness compared to more compelling national counterparts. Others fret that as desirable as a culturally-based

50 European citizenship may require “a symbolic space where projections and memories, the collective experiences and identifications of the people of Europe are represented. Europe has a cultural meaning.” Klaus Eder & Bernhard Giesen, *Citizenship and the Making of a European Society: From the Political to the Social Integration of Europe*, in BETWEEN NATIONAL LEGACIES, *supra* note 43, at 245.

51 Although different European nationals undoubtedly manifest their own habits and traditions, when faced with the rest of the non-European world, the thinking goes, the bonds of similarity will prevail: “Though a Sicilian can manifest some perplexity in front of a guy dressed in leather pants and a feathery hat drinking litres of beer, he will still identify this individual as a European like him, with more things uniting than dividing them.” Massimo La Torre, *Citizenship, Constitution, and the European Union*, in AN INSTITUTIONAL CHALLENGE, *supra* note 16, at 435, 457. Yet one should not confuse a non-existent European nationalism with the fact that “[t]here is certainly a tradition of assumed European cultural superiority.” RAINER BAUBOCK, CITIZENSHIP AND NATIONAL IDENTITIES IN THE EUROPEAN UNION at 18, fn. 18 (Harvard Jean Monnet Working Paper 4/97, 1997). Could a shared notion of “cultural superiority” provide some kind of basis for political connectedness?

52 See KOSTAKOPOULOU, *supra* note 32, at 48. The European anthem is the last movement of Beethoven’s Ninth Symphony. See EU Presidency 2004, *Symbols of the EU*, at www.ue2004.ie/templates/standard.asp?sNavlocator=6,27,124 (last visited Feb. 23, 2004).

53 A European consciousness, unique among the major regions of the world, dates to antiquity. Anthony Pagden, *Europe: Conceptualizing a Continent*, in THE IDEA OF EUROPE: FROM ANTIQUITY TO THE EUROPEAN UNION 33, 33 (Anthony Pagden ed., 2002) [hereinafter THE IDEA OF EUROPE].

54 See, e.g., Ariane Chebel d’Appollonia, *European Nationalism and European Union*, in THE IDEA OF EUROPE, *supra* note 53, at 171, 190; Giesen & Eder, *supra* note 43, at 11.

European identity might be, “one cannot love a market,” and the market is what the European Union is most about.⁵⁵ Efforts like the rotating “European Capitals of Culture” program⁵⁶ or initiatives to “Europeanize” the content of national school curricula⁵⁷ evince the persistence of those who believe that a European cultural identity exists, or that at least its constitutive elements are there to be pieced together.

3. Constructive Citizenship: Engagement and Uncertainty

Constructive citizenship draws from the legal-participatory paradigm, but maintains some need for belonging through collective engagement. Above all, constructive citizenship proponents are troubled by continued attempts to transplant the nation-state model of collective identity (whether based on ethno-cultural criteria or a more liberal civic nationalism) to the European Union.⁵⁸ As a new and unique form of governance, why should its citizenship—and eventual “collective identity”—not also be new and unique?

The harder question, of course, is what replaces—or elaborates upon—conventional citizenship models. Theodora Kostakopoulou envisions a community of citizens based on “co-operative interaction and participation in a variety of associative relations, and through their living in relation to institutions which promote reflexive forms of co-operation and democratic participation.”⁵⁹ Turning on its head the idea of a collective identity drawn

⁵⁵ Klaus von Beyme, *Citizenship and the European Union*, in *BETWEEN NATIONAL LEGACIES*, *supra* note 43, at 61, 75.

⁵⁶ This program subsidizes exhibitions in a chosen European city each year. Begun in 1985, the program explicitly aims to bring “the peoples of Europe together.” European Commission, *European Capitals of Culture*, at http://europa.eu.int/comm/culture/eac/other_actions/cap_europ/cap_eu_en.html (last modified Sept. 1, 2004).

⁵⁷ Another pro-European identity initiative predating European citizenship is the Resolution for Enhancing the European Dimension in Education, adopted May 24, 1988 by the Council. For a summary of recent efforts to “promote Europeaness” in national education systems, see Josep R. Llobera, *What Unites Europeans?*, in *GOVERNING EUROPEAN DIVERSITY* 169, 185-87 (Montserrat Guibernau ed., 2001). The European Parliament has urged these developments. *See also* Coelho, *supra* note 44, at 10 (calling on “the Member States . . . to use educational programmes in order to encourage a better knowledge of Europe.”).

⁵⁸ Transplanting the nation-state model fails to take into account the unique demography and institutions of the EU, and civic nationalism tends to produce a hegemony of the majority culture: “The dictum that to belong is to conform, to ‘take on the essential elements of national character’ holds true even in civic territorial states The pluralism of modern life and the deep diversity of the European Union necessitate a serious rethinking of the connections between citizenship, nationality and culture.” KOSTAKOPOULOU, *supra* note 32, at 6. *See also* Schmitter, *supra* note 49, at 91 (asking why individuals in the “Euro-polity” could “not be loyal to a common set of institutions and political/legal principles rather than to some mystical charismatic founder or set of mythologized ancestors”). Schmitter’s position recalls the “constitutional patriotism” of Jurgen Habermas. For a description of how constitutional patriotism might foster a civic nationalism that is free of “the obsession with cultural homogenization,” see BAUBOCK, *supra* note 51, at 18. *But see* KOSTAKOPOULOU, *supra* note 32, at 31-32 (describing the failure of constitutional patriotism to decouple citizenship from ascriptive identities).

⁵⁹ KOSTAKOPOULOU, *supra* note 32, at 65. Both Kostakopoulou and Alex Warleigh

from the past, Kostakopoulou believes Europe can find an identity “by becoming other than itself” – by rewriting its past and changing for the better.⁶⁰ The process of creating and maintaining a system of supranational governance is itself the prerequisite for “a community of ‘concern and engagement.’”⁶¹ For Kostakopoulou, “belonging” in such a community “is conceived in terms of being together in a common adventure and having equal co-responsibility for institutional design.”⁶² Klaus Eder and Bernhard Geisen consider the possibility of a multifaceted European identity based upon “the diversity of its regions and localities, the continuously changing internal boundaries and the ebb and flow of its Western and Eastern frontiers.”⁶³ Recalling diversity-as-ideal, Eder and Geisen argue that Europe requires “the formation of a citizenry by a culture of diversity and conflict which is noticed as a precious heritage.”⁶⁴

The essence of constructive citizenship is its very *contestability*, its uncertain balancing of individuals who live in multiple political and social spheres and possess different citizenships, as well.⁶⁵ European citizenship is “more like a project and less like a thing or a simple state of being.”⁶⁶ From the standpoint of this Note, the most intriguing aspect of the “project” is its potential not only to decouple nationality from citizenship, but to construct a citizenship that privileges inclusion over exclusion, diversity over assimilation, and which, in turn, is itself a legitimizing force of supranational governance. If diversity-as-ideal remains underdeveloped in Europe—or incommensurate to the rhetoric of European policy-makers—European citizenship might provide a mechanism to effect its wider affirmation. The rest of this Note will focus on the role that European citizenship can play in the integration of TCNs into European societies.

emphasize that democratization efforts are more useful to the project of European governance than is the construction of shared identity or consensus over policy. See Theodora Kostakopoulou, *Democracy-Talk in the European Union: The Need for a Reflexive Approach*, 9 COLUM. J. EUR. L. 411, 419-20 (2003); Warleigh, *supra* note 47, at 104-05 (describing “network democracy” and “identities [that] are not opposed but rather co-existent”).

60 KOSTAKOPOULOU, *supra* note 32, at 30. See also Weiler, *supra* note 47, at 16-17 (“European citizenship should not be thought of . . . as intended to create the type of emotional attachments associated with nationality based citizenship.”).

61 KOSTAKOPOULOU, *supra* note 32, at 103. Kostakopoulou’s vision of European citizenship depends on the lack of any “shared conception of Europe’s destiny” or “cohesive identity in a communitarian sense In this process there is neither consensus nor indeed certainty about the juridico-political shape of the outcome. There is only an active concern and a willingness on behalf of its units to participate.” *Id.*

62 KOSTAKOPOULOU, *supra* note 32, at 186.

63 Geisen & Eder, *supra* note 43, at 11.

64 *Id.*

65 “What remains in Europe is the option for a collective identity that allows citizens to permanently question given interests and that encourages them to enter debates about the legitimacy of their interests.” Eder & Geisen, *supra* note 50, at 266.

66 Shaw, *supra* note 46, at 31 (emphasis in original). See also Handoll, *supra* note 46, at 12; JO SHAW, CITIZENSHIP OF THE UNION: TOWARDS POST-NATIONAL MEMBERSHIP? 93 (final page) (Harvard Jean Monnet Working Paper 6/97, 1997) (noting “the plurality of the sources and resources of EU citizenship”).

III. THIRD-COUNTRY NATIONALS UNDER THE STATUS QUO

This section sketches a history of EU legislation on TCNs and their rights under the status quo.⁶⁷ Rhetoric on the need to integrate TCNs into European societies has failed to produce satisfactory results under current law.

A. Third-Country Nationals and the Rhetoric of Integration

As early as 1976, the Council of Ministers set out goals for the equal treatment of TCNs in the context of economic rights.⁶⁸ Around that same time, Europe's modern immigration "crisis" was beginning to take shape. During the post-war years, most Western European countries had actively recruited foreign workers to satisfy employment demands. During the economic recession of the 1970s, recruitment efforts slowed and work-related immigration was technically frozen.⁶⁹ Nonetheless, national leaders soon realized that temporary guest workers from the developing world—and their children—had no intentions of returning "home." Governments promoted family reunification to "stem the spread of social isolation, alienation and deviancy among settled immigrants."⁷⁰ Although national governments shared this common problem, integration methods remained a national prerogative. Furthermore, immigrants have continued to enter the European Union over the past twenty-five years, some based on links between their home states and the former colonial power, others as refugees and asylum-seekers. Family reunification has continued, and work-related immigration has continued in a limited (and sometimes informal) manner.⁷¹ As channels for legal immigration have been narrowed, illegal immigration has increased accordingly.⁷²

Over that same period, gradual progress towards realization of a common market strongly suggested the extension of EC law to cover the rights of TCNs. After the Single European Act in 1987 reinvigorated

67 For more comprehensive treatments, see BARBARA MELIS, *NEGOTIATING EUROPE'S IMMIGRATION FRONTIERS* (2001); Steve Peers, *Raising Minimum Standards, or Racing for the Bottom? The Commission's Proposed Migration Convention*, in *THE LEGAL FRAMEWORK*, *supra* note 22, at 149, 149-66; Kostakopoulou, *supra* note 9; Martin Hedemann-Robinson, *An Overview of Recent Legal Developments at Community Level in Relation to Third Country Nationals Resident Within the European Union*, 38 *COMMON MKT. L. REV.* 525 (2001).

68 See generally Council of Ministers, *Resolution on the Action Programme for Migrant Workers and their Families*, BULL. EUROPEAN COMMUNITIES COMMISSION, Supp. 3/76 (1976). The first European legislation on migrant workers under Article 39 of the EC Treaty dealt with migrants from other Member States, not TCNs. See Kees Groenendijk, *Security of Residence and Access to Free Movement for Settled Third Country Nationals under Community Law*, in *IMPLEMENTING AMSTERDAM*, *supra* note 42, at 225, 226-27.

69 See MELIS, *supra* note 67, at 10.

70 Anthony M. Messina & Colleen V. Thouez, *The Logics and Politics of a European Immigration Regime*, in *WEST EUROPEAN IMMIGRATION*, *supra* note 17, at 97, 108.

71 See JULIE R. WATTS, *IMMIGRATION POLICY AND THE CHALLENGE OF GLOBALIZATION* 73 (2002) (noting "underground economic activity" during the mid-1990s).

72 See *A Strange Sort of Sanctuary*, *ECONOMIST*, Mar. 15, 2003, at 50.

political integration, the European Parliament put the status of TCNs back on the agenda by proposing that TCNs be granted voting rights in local elections⁷³ and the same employment-related free movement rights within the European Community that Member State citizens enjoyed.⁷⁴ These proposals were rejected by the Council; Member States did not want to relinquish control over the TCNs within their territories, and supranational efforts to provide more rights to settled migrants contradicted domestic trends heading in the opposite direction.⁷⁵

After Maastricht, however, calls for the augmentation and harmonization of TCN rights reappeared, often coming from the European Parliament. In 1993, a proposed Charter of Rights for Third-Country Nationals stated that “[m]igrants must be given a clear status that will enable them to live their own lives as participants in the society in which they live,” including anti-discrimination protection.⁷⁶ Reform, however, was impeded by the architecture of the Treaty;⁷⁷ political compromise had placed immigration policy within Title VI of the Maastricht Treaty—Justice and Home Affairs—providing for legislation by “joint action.”⁷⁸ But immigration policy still required Member State unanimity and reflected a security-based—not socio-economic—view of immigration and TCNs.⁷⁹ During the years between Maastricht and Amsterdam, intergovernmental gridlock paralyzed efforts to reform the uneven EU policy on immigrants and TCNs already within the territory.⁸⁰

The 1996 Intergovernmental Conference, where the foundations of the Treaty of Amsterdam were set down, provided a forum for further discussion of the TCN question. The Economic and Social Committee and numerous NGOs pressed for measures facilitating TCN participation in European society.⁸¹ The Council responded by declaring a Resolution on the Status of Third-Country Nationals on a Long Term Basis in the Territory of the Member States. The Resolution proposed a grant of limited TCN free movement rights within the European Union, the option to apply for employment in other Member States, and automatic residence rights for some migrants.⁸² It justified the provision in the belief that it would “contribute to greater security and stability, both in daily life and in work,

73 BULL. EUROPEAN COMMUNITIES COMMISSION, Supp. 2/88, at 29 (1988).

74 European Parliament on the Joint Declaration Against Racism and Xenophobia and an Action Programme by the Council of Ministers, 1989 O.J. (C 69) 40.

75 See KOSTAKOPOULOU, *supra* note 32, at 50.

76 See MELIS, *supra* note 67, at 30.

77 *Id.* at 13.

78 For a basic description of “joint action” and the development of Justice and Home Affairs from Maastricht through the present, see the overview at <http://europa.eu.int/scadplus/leg/en/cig/g4000j.htm> (last visited Feb. 10, 2004).

79 MELIS, *supra* note 67, at 11.

80 *Id.* at 14.

81 See Closa, *supra* note 20, at 306; see also Sierra & Patel, *supra* note 15, at 19.

82 Council resolution 96/80, 1996 O.J. (C 80) 2. See also European Commission, Establishing a Status for Long-Term Residents, http://europa.eu.int/comm/justice_home/doc_centre/immigration/residents/wai/doc_immigration_residents_en.htm (last visited May 1, 2004).

and to social peace in the various Member States.”⁸³ The resolution represented signs of an emerging consensus in Brussels on the need for a more active EU role in TCN integration.⁸⁴

The Treaty of Amsterdam did little to define the evolving rights of TCNs, but Articles 62 and 137 explicitly set out related harmonization tasks for the Commission and Council. Article 62.3 created a five-year window during which the Council was to adopt “measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months.”⁸⁵ Article 137 instructed the Council to adopt by unanimity measures relating to the “conditions of employment for third-country nationals residing in Community territory.”⁸⁶ Also important, Article 13 provided the Council with powers to enact anti-discrimination laws; the provision specifically mentioned religion, race and ethnicity, but not national origin, as grounds for such measures.⁸⁷

Also of importance was the larger institutional shift that occurred at Amsterdam in response to the inefficacy of the Title VI arrangements provided for at Maastricht. After the passage of a five-year transition period, proposals in selected policy areas under the new Title IV are to become adoptable by qualified-majority voting (QMV) at the Council.⁸⁸ In addition, QMV will apply primarily to measures coordinating common entry and asylum requirements, not the status of TCNs after they have legally entered.⁸⁹ For this reason, among others, the Treaty of Amsterdam has received less than universal praise for its treatment of TCN issues. Article 62 placed a three-month limit on TCN residence in other Member States and made no mention of transferable political rights.⁹⁰ In addition, the five-year transition period was construed by some as showing a possible lack of full commitment to the transfer of competences to the supranational decision-making mode.⁹¹

Post-Amsterdam, however, there is substantial reason to believe that in the minds of policy-makers, the extension of rights to TCNs is now firmly linked to their successful integration into European societies. Preparatory notes for the European Council at Tampere in 1999 emphasized that integration “requires . . . further assimilation of the rights of legal immigrants with those of citizens of the Member States.”⁹² The Tampere

⁸³ *Id.* Critics, however, argued that the resolution was disappointingly vague and had no binding force. See Oliveira, *supra* note 16, at 194.

⁸⁴ See MELIS, *supra* note 67, at 30.

⁸⁵ EC TREATY art. 62.

⁸⁶ *Id.* art. 137.

⁸⁷ EC TREATY art. 13. Although “equal treatment” among EU nationals is guaranteed in a variety of circumstances, this does not directly speak to the rights of TCNs.

⁸⁸ See ENID WISTRICH, IMMIGRATION, MIGRANTS AND CITIZENSHIP IN EUROPE 20 (Federal Trust: European Essay No. 19, 2001).

⁸⁹ TREATY OF AMSTERDAM art. 62(2)(b)(i), (iii); art. 67.

⁹⁰ See Kostakopoulou, *supra* note 9, at 190.

⁹¹ See MELIS, *supra* note 67, at 51, 110.

⁹² See Groenendijk, *supra* note 68, at 233 (quoting Note of the Presidency, Preparation of the European Council of Tampere—Asylum and Immigration Issues, 10015/99 ASIM 31 (July

Presidency Conclusions reaffirmed that position: “[a] more rigorous integration policy should aim at granting [TCNs] rights and obligations comparable to those of EU citizens.”⁹³ The Conclusions also restated the importance of promoting access to national citizenship for TCNs,⁹⁴ and legislative proposals since Tampere continued to emphasize the integrative effects of extending rights.⁹⁵

In 2001, the Commission presented a Proposal for a Council Directive Concerning the Status of Third-Country Nationals Who Are Long-Term Residents.⁹⁶ The proposal referred to the need for a “more vigorous integration policy,” drew a clear connection between the rights of residency and “genuine integration,” and reaffirmed the position that TCN integration is fundamental to the “economic and social cohesion” of the community at-large.⁹⁷ In meetings throughout 2002 and the first half of 2003, the Council debated the exact provisions of any directive relating to the rights of long-term resident TCNs.⁹⁸ Finally, in November 2003, the Council formally adopted its directive on the status of TCNs who are long-term residents.⁹⁹ In several respects, this is a breakthrough for TCNs and

9, 1999)).

⁹³ Tampere European Council, Presidency Conclusions para. 18 (Oct. 16, 1999), at http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm.

⁹⁴ There appears to have been disagreement, however, on whether citizenship acquisition signified the endpoint of successful integration or a means to that end. Groenendijk notes that Germany and the U.K. took the former position, while referring to integration as an “entitlement” for TCNs. Interestingly, smaller countries such as the Benelux states appeared to push for faster approximation of TCN rights to those of national citizens. See Groenendijk, *supra* note 68, at 233.

⁹⁵ In 2000, for example, the Commission proposed a directive on family reunification rights for TCNs, emphasizing links between family reunification, stability, and TCN integration. Amended Proposal for a Council Directive on the Right to Family Reunification, COM (2000) 624 final, Section 2. The Commission’s Communication on a Community Immigration Policy in November 2000 continued the theme, recommending the harmonization of TCN rights due to the demands of the internal market and labor market shortages in various Member States. Communication from the Commission to the Council and the European Parliament on Community Immigration Policy, COM (2000) 757 final at 3-4. See Kostakopoulou, *supra* note 9, at 194.

⁹⁶ Proposal for a Council Directive Concerning the Status of Third-Country Nationals Who Are Long-Term Residents, COM (01) 127 final, 2001 O.J. (C 240 E) 79, http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=52001PC0127.

⁹⁷ *Id.* at paras. 1.1, 1.5 (explanatory memorandum), and para. 5 (Proposal for a Council Directive). Post-Nice, proposals based on the importance of bringing the status of TCNs closer to that of European citizens continued to appear. See, e.g., European Convention Working Group X, Final Report of Working Group X, “Freedom, Security and Justice,” CONV 426/02, at 5, <http://register.consilium.eu.int/pdf/en/02/cv00/00426en2.pdf> (recommending that the EU “assist Member States’ efforts to promote integration of legally resident third country nationals”); Coelho, *supra* note 44, at 9 (welcoming the June 2001 proposal for a directive granting long-term TCNs “similar rights to those of EU citizens *stricto sensu*”).

⁹⁸ See Press Release, 2504th Mtg., Justice and Home Affairs (May 8, 2003), at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=PRES/03/111|0|AGED&lg=EN (describing past debates on the grant of mobility to TCNs and efforts by some delegations to make any grant of rights subject to certain restrictions).

⁹⁹ Council Directive 2003/109, 2004 O.J. (L 016) 44, http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=32003L0109.

represents an important step towards the convergence of TCN rights with those of EU citizens. Clearly, adoption of the directive serves as another declaration by EU policy-makers that the provision of rights is essential to national TCN integration strategies. Unfortunately, the benefits of free movement and equal treatment in respect of social rights are only made available to *long-term* residents by the directive, which even states that “[r]esidence [of five years] should be both legal and continuous *in order to show that the person has put down roots in the country.*”¹⁰⁰ Thus while the directive is an important indication that EU policy-makers are taking seriously the provision of fundamental rights to TCNs, it is problematic that the expansion of access to those rights is viewed as a follow-up to primary integration in the Member State, not as a tool to effect or ease such integration in the first place.

Although this Section has not provided a comprehensive review of every proposal or adopted provision relating to the rights of TCNs, it demonstrates the extent to which the language of TCN integration has entrenched itself in the ongoing dialogue about rights and citizenship in the European Union. Nonetheless, the grant of rights that approximate an “EU citizenship status” — and only after a residency period of five years — should be viewed with some skepticism. As important as the directive may be for certain TCNs, its provisions may be less effective at promoting TCN integration than an outright (and more rapid) grant of European citizenship itself.

B. The Actual Legal Status of Third-Country Nationals

Despite the newfound advantages that long-term resident TCNs should be able to enjoy, the long-term residency directive has little benefit for newly arrived TCNs—arguably the population most in need of protection against “second-class” status and access to integration-enhancing political and social rights. In reality, the legal status of TCNs remains, in the words of one commentator, “very chaotic.”¹⁰¹ Two variables have the greatest effect on the rights and legal status of TCNs: country of origin and Member State of residence. In other words, one TCN may have less expansive rights or a less permanent status *vis-à-vis* another TCN residing in a different Member State or TCNs from different countries of origin living in the same Member State. In all cases, TCN rights are less expansive and less secure than those of a European citizen.

1. Different Status Based on Country of Origin

In its failure thus far to create a community-wide policy of rights for all TCNs, the European Union has, to some degree, externalized the process

¹⁰⁰ *Id.* at ¶ 6 (emphasis added).

¹⁰¹ MELIS, *supra* note 67, at 33.

by entering into bilateral and multilateral treaty agreements with other countries. There are at least thirty agreements between the European Union, Member States, and individual countries such as Switzerland and Turkey or regional country blocs.¹⁰² As a result, the European Union has developed a patchwork of TCN provisions that vary by agreement and provide different rights regarding residency, employment, free movement, family reunification, and social security. This practice reflects a tendency to approach questions of immigration and the rights of migrants as foreign policy rather than domestic policy. The European Court of Justice (ECJ) has played some role in the clarification of agreement provisions, yet has neither harmonized the horizontal inequalities among TCNs nor always favored more expansive rights.¹⁰³ In general, the jurisdiction of the ECJ over immigration matters has been curtailed because of immigration's placement within security and foreign policy at the European level.

The exact provisions of these agreements and the relevant case law are beyond the scope of this Note.¹⁰⁴ Notably, however, the range of rights accorded to TCNs of a given country tends, generally, to correlate with the economic development of the foreign state. Put otherwise, TCNs who originate in countries with greater cultural or political affinity to Western Europe—or states which might appear more likely to eventually join the European Union—may have stronger rights under the current patchwork system. A Swiss or Norwegian has more rights than does an Algerian or a Pakistani, or even a Turk (despite Turkey's acknowledged candidacy for eventual EU membership).¹⁰⁵

2. Different Status Based on Member State of Residence

In addition, TCN status remains largely determined by the laws and regulations of the Member State of residence. A natural convergence of the rights and privileges available in different Member States does not appear to have taken place; neither integration nor diversity management strategies appear necessarily to have converged.¹⁰⁶ Prior to the recently

102 See Hedemann-Robinson, *supra* note 67, at 527.

103 *Id.* at 549.

104 For a useful overview, see generally, *id.*

105 *Id.* at 533.

106 See James F. Hollifield, *Immigration and Integration in Western Europe: A Comparative Analysis*, in IMMIGRATION INTO WESTERN SOCIETIES: PROBLEMS AND POLICIES 28, 61 (Emek M. Ucarer & Donald J. Puchala eds., 1997) [hereinafter IMMIGRATION INTO WESTERN SOCIETIES] (noting no emergence of a national or regional TCN integration model). Similarly, policy convergence regarding nationality law is discernable in some groups of EU countries, but there is not complete EU-wide convergence (although general objectives of "integration" may now be loosely shared). See Randell Hansen & Patrick Weil, *Citizenship, Immigration and Nationality: Towards a Convergence in Europe*, in TOWARDS A EUROPEAN NATIONALITY: CITIZENSHIP, IMMIGRATION, AND NATIONALITY LAW IN THE EU 1, 2-3, 19-20 (Randell Hansen & Patrick Weil eds., 2001). See also Rainer Baubock, *Cultural Minority Rights in Public Education: Religious and Language Instruction for Immigrant Communities in Western Europe*, in WEST EUROPEAN IMMIGRATION, *supra* note 17, at 161, 163 (noting "among the general population a greater tolerance for diversity and a decreased pressure for the complete assimilation of

passed Long-Term Residency Directive, diverse residency requirements created a serious contradiction:

The European Union presents itself as a common space without internal frontiers but great differences exist among national regulations in this area. It is absurd that in one country it takes five years to secure residence rights, while in another it takes ten, if a minimum level of integration is to be achieved.¹⁰⁷

Additional rights are derived from residency, making inconsistent standards particularly problematic. Prior to the Long-Term Residency Directive, requirements for permanent residency status ranged from two years of legal residency in Finland to fifteen in Greece.¹⁰⁸ Beyond residency, however, some of the greatest obstacles to integration arise from differences among Member State naturalization regimes; European citizenship still depends on acquisition of Member State citizenship. Not even considering possible additional requirements (such as language competency), the duration of residency required before naturalization appears to range from three years in Belgium to eighteen years in Finland.¹⁰⁹ This can create absurd situations:

Suppose a family from Turkey splits up in the migration process with a brother going to Germany and a sister to Sweden. After five years the sister naturalizes and acquires thereby Union citizenship. She is now free to join her brother in Germany where she will enjoy not only free access to employment but also the franchise for local and European Parliament elections. Her brother who has lived in Germany all the time will remain in a considerably weaker position.¹¹⁰

Although some commentators identify a greater degree of convergence on naturalization policies for second-generation immigrants, substantial national differences have persisted.¹¹¹ In addition, disparities in family

immigrants compared to earlier periods of high immigration"). The Long-Term Residency Directive—and the rhetoric which preceded it—indicate a stronger trend towards convergence, but many TCNs are unaffected by the directive.

¹⁰⁷ MELIS, *supra* note 67, at 107.

¹⁰⁸ Sierra & Patel, *supra* note 15, at 10.

¹⁰⁹ *Id.* at 13. As of 2001, Austria, France, Ireland, the Netherlands, Sweden, and the United Kingdom required five years of residency. Denmark required seven years, and Greece, Italy, Luxembourg, Portugal, and Spain required ten years. In Germany, naturalization could occur "at the latest" after eight years. In most Member States, exceptions to these requirements exist for European citizens, some refugees, minors, people born on the territory, and individuals from the former colonies of Portugal and Spain. *Id.*

¹¹⁰ BAUBOCK, *supra* note 51, at 13.

¹¹¹ See Hansen & Weil, *supra* note 106, at 5. At the time of this writing, only Ireland maintains a complete *jus soli* citizenship regime, although a national referendum set for June 2004 could scrap the current provisions. See *infra* note 205. Portugal and the United Kingdom have maintained variations on *jus soli* principles that confer automatic citizenship to the children of certain categories of people at birth. In general, however, these provisions have been under siege. The majority of countries require a combination of residence (ranging from

reunification and social security benefits have put TCN families at significant disadvantages compared to European citizens. The non-working TCN spouse (often a woman) of another TCN may be particularly vulnerable to the deprivation of basic rights in the event of the working spouse's death or a divorce.¹¹² In general, varied definitions of "family" in national legislation result in dramatically different rights across Member States. Some states generously include economically dependent parents and grandparents; others, such as Austria, operate a highly-restrictive quota system.¹¹³ In the social security context, TCNs who manage to migrate within the European Union by virtue of national legal provisions may also be deprived of the transfer of health care or pension benefits that would otherwise accompany European citizens.¹¹⁴

In terms of political rights, some Member States have granted TCNs the franchise in local elections, mirroring the rights of European citizens who live in a Member State other than their state of national citizenship. Denmark, Ireland, the Netherlands, Norway, and Sweden are among the countries that have extended some local and regional voting rights to permanent residents.¹¹⁵ Nonetheless, TCNs have no political participation rights in most Member States, and recent events in even some of Europe's traditionally most "immigrant tolerant" states—such as Denmark and the Netherlands—suggest widespread dissatisfaction with Member State efforts to integrate TCN populations.

IV. THIRD-COUNTRY NATIONAL POLICY AND THE PRINCIPLES OF EUROPEAN INTEGRATION

The European Union is remarkable among the world's legal and political systems. First, the common market's success at removing barriers to trade, introducing a common monetary policy and currency, and integrating diverse national economies is an unprecedented accomplishment in modern history.¹¹⁶ Economic integration has long been the clearest *raison d'être* of the European Community and underpinned the

one to ten years) followed by a declaration of intent to naturalize before a certain age has been reached; three countries, Austria, Greece, and Luxembourg appear to offer no naturalization option. Hansen & Weil, *supra* note 106, at 6.

112 See MELIS, *supra* note 67, at 90.

113 See Sierra & Patel, *supra* note 15, at 12.

114 *Id.* at 91.

115 See Zig Layton-Henry, *Insiders and Outsiders in the European Union: The Search for European Identity and Citizenship*, in THE LEGAL FRAMEWORK, *supra* note 22, at 49, 54.

116 The birth of the United States—and specifically the transition from the Articles of Confederation to the federal Constitution—is the modern baseline for creation of a successful common market out of diverse and fragmented state economies. Although there are compelling similarities between the project of European integration and the framing of the Constitution at Philadelphia, the dramatically more complex economic context of the twentieth century, the long history of internal European military conflict, and the relative ethnic and linguistic homogeneity of the American colonies as compared to Western Europe makes the feat of European economic integration distinctly impressive compared with the American achievement.

institutions at their most formative stages. Second, the European Union has been at the vanguard of a progressive human rights agenda, going much further than, for example, the United States in treating social and economic rights as *human* rights.¹¹⁷ Current European Union policy towards TCNs remains at odds with both of these achievements.

A. Paradox of the Common Market and National Control

There is an irreconcilable tension between the common market and Member State control over entry requirements and internal regulation of TCNs. So long as immigration policy and TCN rights vary by Member State of entry or residence, it remains impossible to facilitate unimpeded free movement of persons among the Member States; passports must still be checked, undermining one of the most visible and convenient benefits of European citizenship.¹¹⁸ Alternatively, border checks are relaxed and TCNs circulate in violation of their legal status; this undoubtedly occurs to some degree. But these results are also undesirable and may lead to a stronger association of migrants with illegality. In effect, legal immigrants who circulate within the European Union transform themselves into illegal immigrants, imposing direct costs on themselves and the Member States if they are caught, but also creating symbolic costs by undermining legal controls and efforts to reverse common perceptions of the legally resident TCN as potential criminal and perpetual outsider.

A more compelling perspective focuses on the distortions inflicted on the internal labor market by diverse immigration policies among the Member States. Unemployed European citizens may suffer from Member States addressing their employment needs through less restrictive immigration policies. As some have pointed out, "member states with

117 In articulating a model of "European constitutionalism" and drawing a contrast to American conceptions of constitutional rights, Jed Rubenfeld explains how, more generally, the European approach locates human rights in sources above and beyond the nation-state:

[W]hat makes the new European constitutionalism cohere, and gives European constitutional courts their claim to legitimacy, is the ideology of universal or "international" human rights, which owe their existence to no particular nation's constitution, or which, if they derive from a national constitution, possess nonetheless a kind of supranational character, rendering them peculiarly fit for interpretation by international juridical experts.

Jed Rubenfeld, *The Two World Orders*, WILSON Q., Fall 2003, at 28.

The ECJ explicitly abides by the international human rights treaties signed by the Member States, including the European Convention on Human Rights. See ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 172 (2000). Thus, although judicial protection of fundamental rights in the European Union today does appear to have "a supranational character," this flows from necessary links between the court's "supremacy doctrine"—under which EU law trumps Member State law—and efforts by policy-makers to protect European legislation from annulment by national courts seeking to protect fundamental rights. *Id.*

118 "[R]emoving visible controls at the territorial limit of state jurisdiction, is regarded as having powerful symbolic significance—it may give . . . tangible content to the otherwise very abstract idea of 'integration.'" Crowley, *supra* note 42, at 18.

more liberal immigration policies and, hence, access to a cheaper supply of labor, gain a competitive economic edge over member-states with less liberal immigration policies."¹¹⁹ If the common market means to create a more level playing field throughout the European Union, diverse immigration policies create inequities.

Addressing the problem requires acknowledging that the disconnect between the common market ideal and TCN status implicates entry control and post-entry rights and benefits. For security reasons, the common immigration policy receives significant attention, and the more recent willingness of Member State leaders to pool their sovereignty on the issue reflects a pragmatic, but unsurprising, approach.¹²⁰ Clearly, the benefits of "going it alone" in the name of national sovereignty no longer exceed the costs. The Single European Act (SEA) signaled a similar moment in the context of liberalizing free movement of goods,¹²¹ and Maastricht codified the formal transition from intergovernmental to supranational control in that area (although ECJ jurisprudence had largely effected the shift already).

More than a decade later, Member States face a similar moment of reckoning in the context of immigration and TCNs.¹²² A territory stripped of its *internal* borders must share an *external* border to ensure that people within the territory have met a single set of threshold entry requirements.¹²³ The point may seem obvious, but progress in this direction

119 Messina & Thouez, *supra* note 70, at 105.

120 This approach makes sense when viewed against the relationship between intergovernmental and neofunctional theories of European integration. Neofunctionalists argue that "supranational governance tends to follow from increasing levels of transnational activity—exchange and cooperation across borders—as shaped by the work of the EC's supranational institutions." STONE SWEET, *supra* note 117, at 158. Interstate trade itself created the conditions for supranational institutions (e.g., the ECJ and the Commission) to develop and enforce a legal framework for the free movement of goods and workers amid "larger integrative dynamics that governments do not fully control." *Id.* See also WATTS, *supra* note 71, at 132. Intergovernmentalists privilege the "gatekeeper" role of the Member State governments (e.g., via the Council) and presume Member State control over the pace and scope of integration. STONE SWEET, *supra* note 117, at 158. Ultimately, neither model is fully autonomous of the other; neofunctionalists offer a compelling explanation of how European integration overcomes resistance when the Member States no longer find it in their interest to resist collaboration. This leads to punctuated bursts of effective intergovernmental lawmaking.

121 Messina & Thouez, *supra* note 70, at 104.

122 The ECJ and the Commission have done less to lay a comparable foundation in this context. Despite the lack of ECJ involvement, some commentators have identified possible judicial prongs for an ECJ-mandate of rights harmonization that does not rely on the divergent national residency and employment standards. See Oliveira, *supra* note 16, at 186-87. *But see id.* at 188-89 (examining the ECJ's decision not to grant free movement rights to TCNs under Article 39 of the EC Treaty).

123 Some argue that a common immigration policy does not address the symbolic problem of "inconsistency in supporting both free trade in general terms and restrictive immigration policies." Crowley, *supra* note 42, at 17. Although this point may be ahead of its time in a global context, it makes sense within the highly regulated European common market. Furthermore, although common entry requirements are necessary for internal coherence, this policy risks creating a "Fortress Europe" defined by rigid and restrictive policies. See, e.g., MELIS, *supra* note 67, at 215-17.

has been driven by neither the logic of the market itself nor the legal system—nor by concerns over rights and migrant integration. Rather, efforts to coordinate police and intelligence operations regarding terrorism and international criminal trafficking have forced the issue, thus unfortunately framing the question in terms of security and defense, not human rights or market integration.¹²⁴ Perhaps because immigration control has been so firmly and predictably linked to national sovereignty,¹²⁵ it has taken an additional decade since the advent of the European Union to approach a common immigration and asylum policy.¹²⁶ Nonetheless, the Treaty of Amsterdam in 1997—playing a role much like that of the SEA in 1987—has mandated cooperation on these matters by 2004, and preparations continue apace.¹²⁷

B. The Human Rights Problem

The status of TCNs is also inconsistent with the EU commitment to universal human rights.¹²⁸ As described in Section III-B, TCNs possess dramatically different legal rights depending on their country of origin and Member State of residence, leading to horizontal and vertical inequities across the European Union in terms of political rights, legal protections, and social entitlements. Member States are generally within their powers to regulate the migrants within their national territories in this way, despite divergent and sometimes absurd results.

124 See Messina & Thouez, *supra* note 70, at 105 (noting that terrorism and drug trafficking motivated interstate cooperation). *But see* WATTS, *supra* note 71, at 132 (arguing that another basis for cooperation is a perceived need to enhance “institutional credibility and capacity” because the previous lack of transparency in operations of the Schengen Group—creating the first provisions for free movement by citizens of certain Member States—violated emerging norms of transparency and accountability).

125 See WATTS, *supra* note 71, at 130 (“[F]ormal multilateral coordination on immigration is rare because states do not want to cede control over an issue so central to the notion of national sovereignty.”); MELIS, *supra* note 67, at 124 (noting the link between membership and sovereignty that dates back to the creation of the nation-state entity).

126 The Dublin Convention purports to coordinate asylum policy, but the system does not provide sufficiently common procedures. For a critical assessment, see Nicholas Blake, *The Dublin Convention and Rights of Asylum Seekers in the European Union*, in IMPLEMENTING AMSTERDAM, *supra* note 42, at 95, 95-120.

127 TREATY OF AMSTERDAM art. 62 (mandating a common policy on external borders, the absence of internal border checks on European citizens and TCNs alike, and unified measures setting out the conditions for TCN internal migration, not to exceed three months, within five years of the Treaty’s effective date).

128 The Charter of Fundamental Rights of the European Union, adopted at the Nice Conference in December, 2000, reaffirms this commitment: “Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law.” Charter, 2000 O.J. (C 364) 1, Preamble. Furthermore, a commitment to human rights long precedes the Charter. For a general explanation of “progressive development over many years of a kind of unwritten bill of rights for the Community,” see CRAIG & DE BÚRCA, *supra* note 7 at 318. See also ON THE MOVE, *supra* note 24, at 6 (“The European Union has always stated its commitment to human rights and fundamental freedoms and has explicitly confirmed the EU’s attachment to fundamental social rights.”). See also *supra* note 117.

Nonetheless, the legality of Member State policy is in significant normative and symbolic conflict with the human rights platform of the European Union. The nation-state model is rooted in ideas of closure and limited access, but the simultaneous "exclusion of immigrants from basic citizen rights jeopardizes basic democratic achievements."¹²⁹ This is the present dynamic in the European Union, where TCNs are not entitled to unlimited freedom of movement throughout the Union, not provided with political participation rights by EU law, and not consistently treated on an equal basis with European citizens in the distribution of welfare benefits or legal protections. While TCNs who have managed to enter "Fortress Europe" might expect to have overcome the most difficult obstacle to living in the European Union and enjoying the exercise of basic human rights, external borders are not the only obstacle. The area of free movement is "highly differentiated"; the problem is not an external "Fortress Europe," but rather that the attempt "to combine freedom for some and restriction for others" creates a "fundamentally unstable" edifice.¹³⁰ The result is a European space littered with internal social borders—distinct from and subtler than national geographic boundaries—which "correspond to diverse institutional patterns of entitlement."¹³¹ Although Member States may be in the process of cooperating on external border controls, barriers to social welfare entitlements or political rights for TCNs persist. Given the role bureaucracy can play in the social alienation of TCNs,¹³² one might conclude that even if free movement rights *were* extended, the remaining architecture of social barriers in the absence of additional harmonization (e.g., simplified procedures for the portability of pensions; clearer standards for the cross-border recognition of professional qualifications) poses a significant barrier to equal enjoyment of the basic human rights guaranteed by the European Union. These kinds of social and administrative barriers already diminish the ability of Member State nationals to exercise their European citizenship rights in many cases.

The contradiction in a polity that prides itself on the transcendence of basic rights over national borders but that proceeds to deny those rights to persons legally present within its territory should be evident.¹³³ Despite the

129 RAINER BAUBOCK, *IMMIGRATION AND BOUNDARIES OF CITIZENSHIP* 57 (1992). See also Kostakopoulou, *supra* note 32, at 7 (noting the EU campaigns to promote equality are overshadowed by the "logic of exclusion").

130 Crowley, *supra* note 42, at 32.

131 *Id.*

132 *Id.* at 25 (describing how "administrative procedures put significant demands on cultural capital," at least in the Paris central police station).

133 From one perspective, the status quo is at odds with the very foundations of liberal democracy:

[I]f a liberal society is to remain loyal to its commitment to conceive of individuals as capable of having equally worthy conceptions of the good life which they can question and redefine in the light of new experiences and information, then it should accord permanent resident aliens the possibility to rely on an opportunity, equal to that of any other societal member, to redefine their life projects in the light of their local experience.

emerging affirmation of European diversity described in Part I, the exclusion of economic migrants and asylum-seekers contributes to the false idea of European ethnic and cultural homogeneity.¹³⁴ The reality that many TCNs are also part of a “visible minority” exacerbates the negative social impact of unequal treatment:

To these existing differences Community law adds another distinction: it explicitly withholds from third country nationals rights granted to EU citizens. In doing so Community law tends to reinforce the idea that unequal treatment of EU citizens and third country nationals is justified. Hence, Community law unintentionally is a source of legitimization of unequal treatment of ethnic minorities.¹³⁵

Such results contradict the anti-discrimination goals of the EC Treaty, not to mention the numerous White Papers and Action Plans to combat racism; it underlines how the creation of European citizenship has had the unfortunate side effect of more explicitly distinguishing and excluding TCNs from European society, even those already “within the Fortress.” In the absence of satisfactory alternative measures to address the needs of TCNs, European citizenship has failed to realize the promise of a polity based on universal human rights and new modes of social and political membership. In other words, European citizenship has been implemented ineffectively with regard to the challenge of supranational diversity management.

V. EUROPEAN CITIZENSHIP BASED ON RESIDENCY, NOT NATIONALITY

In light of the diversity among and within the Member States, and the failure of EU policy to live up to its self-defining commitments in the context of human rights and the common market, a new model of residency-based citizenship provides a possible solution. The requirements for acquisition of European citizenship could be minimal; legal residency without criminal conviction anywhere within the European Union for a period of two years, perhaps, could suffice.¹³⁶ Dual (or multiple) citizenship would be permitted, and working knowledge of one of the official European languages might not be required.¹³⁷ In turn, the European Union

Rut Rubio Marin, *Equal Citizenship and the Difference that Residence Makes*, in AN INSTITUTIONAL CHALLENGE, *supra* note 16, at 201, 206.

¹³⁴ Sierra & Patel, *supra* note 15, at 19.

¹³⁵ Groenendijk, *supra* note 68, at 226.

¹³⁶ Most proponents propose a longer waiting period. See, e.g., Marisol Garcia, *Residence as a basis for European citizenship: third-country nationals?*, in RETHINKING EUROPEAN CITIZENSHIP, *supra* note 7, at 13, 16 (proposing five years of residence).

¹³⁷ Despite sure opposition, some non-EU languages might have such widespread currency as to merit recognition. Such a list could include Arabic, Hindi, Mandarin, Russian, or Turkish. Pre-enlargement, the EU already maintained eleven working languages. See European Commission, *Languages in Europe*, at <http://www.europa.eu.int/comm/education/policies/lang/languages/lang/europeanlang>

would be able to extend the rights and duties of citizenship to a significant segment of the population within its jurisdiction.¹³⁸ Decoupling national citizenship from European citizenship could reduce the inequalities between TCNs and Member State citizens without interfering in “a sacrosanct prerogative of the states”—the determination of their own nationals.¹³⁹ Why not simply require the harmonization—or even standardization—of national citizenship across the European Union?¹⁴⁰ This position fatally overlooks the deep ties that persist between state sovereignty and national citizenship, at least in the public imagination.¹⁴¹ Standardization would undermine the perceived “sacrosanct prerogative” of individual states in ways that remain politically infeasible (and perhaps normatively undesirable). One point of this Note is to suggest that the benefits sought through standardized national citizenship requirements could largely be achieved by less drastic or threatening means that leave the evolving institutions of national citizenship intact and viable. Extending European citizenship to legally-resident TCNs would align the treatment of TCNs with ideals of political and economic integration and also offer new possibilities for addressing the persistent problem of absorbing and engaging immigrant populations within host societies. This Part examines the logic of residency-based European citizenship and the speculative benefits that might further justify its adoption.

A. The Logic of Residency-Based European Citizenship

In large part, European citizenship establishes a precedent whereby the

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¹³⁸ Estimates on the total number of legal TCNs within the EU consistently indicate a total around 10-15 million. See Theodora Kostakopoulou, *Nested 'Old' and 'New' Citizenships in the European Union: Bringing out the Complexity*, 5 COLUM. J. EUR. L. 389, 406 (1999) (eleven million); Hedemann-Robinson, *supra* note 67, at 526 (10 million); Gronendijk, *supra* note 68, at 225 (twelve million); *Forget Asylum-Seekers: it's the People Inside Who Count*, ECONOMIST, May 10, 2003, at 22 (twelve to fifteen million). But see Coelho, *supra* note 44, at 15 (estimating more than twenty million). Approximately 1.2 million TCNs enter the EU each year, and another half million may enter illegally. *Irresistible Attraction, in The Longest Journey—A Survey of Migration*, ECONOMIST, Nov. 2, 2002, at 5.

¹³⁹ See Marie-Jose Garot, *A New Basis for European Citizenship: Residence?*, in AN INSTITUTIONAL CHALLENGE, *supra* note 16, at 229, 233.

¹⁴⁰ Several scholars have argued that integration necessitates the harmonization of citizenship requirements. See, e.g., KOSTAKOPOULOU, *supra* note 32, at 67-68. Discussing national citizenship in terms of harmonization, however, is likely to produce a popular backlash that may tend to polarize or, worse, shut down the debate.

¹⁴¹ The primary bond between state sovereignty and the definition of one state's nationals has been recently reaffirmed by the Council of Europe. See, e.g., European Convention on Nationality, Nov. 6, 1997, 37 I.L.M. 44. The Convention's reference to “nationals”—as opposed to citizens—may, however, leave room for other sources of legal authority over citizenship (if a clearer distinction between the meaning of nationality and citizenship is forthcoming). See *infra* Part VII. Of course, the grant of European citizenship to all Member State citizens has already undermined the citizenship monopoly previously held by those states. See *infra* Section V.A. Undermining the monopoly, however, is not the same as putting the monopolist completely out of business.

exercise and protection of rights—the practice of citizenship¹⁴²—is no longer contingent on residency within the jurisdiction of national citizenship. Free movement rights have allowed European citizens to cross borders and participate as near political and legal equals within the host society.¹⁴³ Similar rights of free movement and settlement—when exercised by TCNs who have legally entered the European Union after meeting a set of common entry requirements—should not be any more subversive of political community.

Nonetheless, a frequent objection to granting European citizenship (and free movement rights) to TCNs draws on fears that TCNs are somehow less qualified to possess and exercise the rights of citizenship, that “one does not become a citizen by simply inhabiting a place,”¹⁴⁴ and that European citizenship for non-EU nationals will undermine local communities.¹⁴⁵ Proponents of a constructive citizenship argue precisely the opposite. Although a TCN may not share exactly the “set of norms, values and cultural practices which form the fabric of a community and give meaning to life projects,”¹⁴⁶ this is no obstacle to a European citizenship that does not require the watering-down of national citizenship requirements:

[I]t is difficult to justify why the mobility of long-term resident third-country nationals would pose a threat to the

142 See Antje Wiener, *Rights Policy and Institution Building Beyond the State*, in RETHINKING EUROPEAN CITIZENSHIP, *supra* note 7, at 26, 26-27 (identifying the “informal practice” of European citizenship as “moving across community internal borders; working, residing, studying and voting in a different Member State, making EC law work for oneself”). This strongly recalls the legal-participatory paradigm described in Subsection II.B.1, *supra*.

143 Granted, only approximately 5.5 million European citizens—out of a population of 380 million people in the the European Union—were living in other EU countries as of 1996. See European Commission, *Update on the Internal Market: Citizens First—Raising People’s Awareness About Their Rights* (Nov. 26, 1996), http://europa.eu.int/comm/internal_market/en/update/citizen/pr1.htm (last visited May 1, 2004). More recent estimates of the number of European citizens working in Member States other than their states of national citizenship indicate that there may not have been any significant increase in the total number of European citizens moving across borders. See EUROPEAN UNION, KEY FACTS AND FIGURES ABOUT THE EUROPEAN UNION 64 (2004) (estimating that only 1.67 million EU citizens work in another Member State). This estimate does not include, however, students, pensioners, or the family members of workers who also reside in another Member State.

144 KOSTAKOPOULOU, *supra* note 32, at 104.

145 The same argument underlies a lack of aggressive campaigns to extend national citizenship to immigrants. “The gate to full [national] citizenship is potentially open to newcomers, but not too much, for this is often seen to weaken the affective link among members of the community.” Kostakopoulou, *supra* note 138, at 397.

146 KOSTAKOPOULOU, *supra* note 32, at 104. Kostakopoulou argues for new notions of community and seeks to shift the common ground from that of substantive values to those of process—engagement and cooperation:

[I]t may be argued that a sense of community in the Union or in any other polity does not arise through people having feelings for one another, or holding the same or similar values. Rather, a community of citizens emerges through their being in mutual relations within one another and through their engagement in reflexive forms of community co-operation.

survival of these traditions and beliefs and/or to internal stability. True, the inclusion of 'resident aliens' will prompt national communities to redefine themselves in a pluralistic way and, over time, is bound to induce institutional changes. But such processes of redefinition, negotiation and renegotiation are an essential part of political cultures and living traditions.¹⁴⁷

Is there any reason why a Portuguese national living and working in Finland should seem any more foreign or threatening than a similarly situated national of Angola or Morocco or Peru? Is there any reason why a German national should have more difficulty co-existing with a Turkish guest worker than with a Greek national who has found employment in Berlin? Both the diversity among and within the Member States undermines the "lack of shared values" objection to European citizenship for TCNs. The history of immigration into Europe has already created multi-ethnic societies within the mythical monoliths of European nation-states. If the legal status of a Swede living in Vienna or a Spaniard living in Dublin is already permitted by European citizenship, what convincing argument is there that the Parisian or Londoner—and her local or national community—would be significantly undermined by a Russian or Pakistani national within her midst? Within the European Union, European citizenship has already had "a profound impact upon the ways in which states view and treat nationals of other Member States. Notions such as 'immigrant,' 'resident alien' or 'temporary guest' have been replaced by that of 'Union citizen.'"¹⁴⁸ European citizenship holds great potential for effecting similar changes in the perception and treatment of TCNs. Worker mobility of EU nationals calls for "equality of treatment" but does not "presume assimilation to the values and culture of that [host] state,"¹⁴⁹ whereas acquisition of national citizenship—the current requirement placed on TCNs for access to free movement rights—might make such demands. Concerns that TCNs will flood local labor markets and threaten the livelihood of national citizens are equally undermined by the "[i]ntra-EU mobility of workers driven by economic gain" who already pose a similar risk.¹⁵⁰ This is, of course, both a cost and a benefit of commitment to a common market; labor market uncertainty goes hand in hand with opportunity.

Living side by side is one thing, some might argue, but voting and directing the political agenda of the local or national community is a different matter. At present, national citizenship remains a prerequisite to national voting rights, but European citizenship has remarkably "diluted

147 *Id.* See also, generally, ANDREAS FØLLESDAL, THIRD COUNTRY NATIONALS AS EURO CITIZENS: THE CASE DEFENDED (ARENA Centre for European Studies Working Paper, WP 98/9, 1998), http://www.arena.uio.no/publications/wp98_9.htm.

148 Kostakopoulou, *supra* note 138, at 393.

149 *Id.* at 402.

150 FØLLESDAL, *supra* note 147.

the link" between national citizenship and *local* electoral rights.¹⁵¹ Rather than simply duplicating the rights of European citizenship in provisions directed at TCNs, however, a more straightforward approach would simply expand European citizenship itself to effect that result. Several Member States already provide voting rights to foreigners in municipal elections,¹⁵² and extending that right to TCNs holds potential benefits. Nonetheless, it is important to restate that even European citizens currently do not have the right to vote or stand in national elections of a Member State of which they are not also nationals.¹⁵³

This Section emphasizes how the logic of free movement within the common market undermines arguments that call into question the extension of civil or political rights to residents who do not possess the national citizenship of a host state. The rights of citizenship (secure legal status, political participation, social benefits) have been detached from national allegiance during the first decade of European citizenship practice. Furthermore, providing the rights of citizenship in some other form—as a bundle of rights not attached to the formal status of citizenship—may no longer be adequate; the reification of citizenship has transformed it into a right in itself.¹⁵⁴

B. Practical Benefits of Expansive European Citizenship

An expansive, residency-based European citizenship has the potential to supplement and enhance Member State efforts to manage the internal diversity of post-immigration societies in practical ways.

¹⁵¹ Kostakopoulou, *supra* note 138, at 403.

¹⁵² Denmark, Finland, Ireland, the Netherlands, and Sweden provide voting rights in local elections to residents. Portugal and Spain provide such rights on the basis of reciprocity with the TCN's home state. Kostakopoulou, *supra* note 9, at 196.

¹⁵³ A proposal to extend national voting rights to European citizens was defeated at the 1996 Inter-Governmental Conference. See Kostakopoulou, *supra* note 138, at 409-10.

¹⁵⁴ The idea of a right to nationality dates back at least to the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948, G.A. Res. 217 (III)(A), U.N. GAOR, 3d Sess., at 74, U.N. Doc. A/810 (1948). Under Article 15(1), everyone has the right to a nationality. Over the past fifty years, international law has consistently exhibited a strong policy against the plight of "statelessness." See Myres S. McDougal, et al., *Nationality and Human Rights*, 83 YALE L. J. 900, 960 (1974) (describing the "dramatic deprivation of the power of the individual" when stateless). But an individual need not be completely stateless (i.e. lacking citizenship in any state) to find herself without a "community willing and able to guarantee any rights whatsoever." McDougal, *supra* note 154, at 960 (quoting HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 297 (1958)). In a transnational world—especially where economic migrants may live the majority of their lives beyond the borders of their home state—the state of nationality may similarly be unwilling or unable to advocate for nationals who reside far away in distant jurisdictions. The globalized world—and goals of human dignity—not only demand the widespread acceptance of dual citizenship, but also reasonable and meaningful access to a second citizenship in the place of residency.

1. New Alternatives to National Models of Integration

Every Member State has its own approach to the integration of immigrants into national life, and the variety of approaches is reflected in the diverse nationality laws and naturalization procedures throughout Europe.¹⁵⁵ In some cases, national citizenship serves as a *means* by which social and political integration might be achieved; the extension of rights and duties serves its own integrative function through new citizens exercising their rights, enjoying their benefits, and meeting their obligations. Yet quite often, citizenship is in fact the *endpoint*, a declaration on the part of the migrant and the state that “enough” integration has already occurred such that citizenship has been “earned.” A well-developed literature on models of immigrant integration continues to grow.¹⁵⁶ In order to show the potential gains to be realized from a European citizenship-based model of TCN integration, it is useful to review the most common approaches.

Every state must find ways to order the relations among native and foreign populations. Policy takes into account not only obvious differences among linguistic or cultural practices, but the more insidious problem of lacked “elementary social ties.”¹⁵⁷ Models of TCN incorporation generally are described by categories of exclusion, assimilation, integration, or cultural pluralism, all of which express political choices regarding the management of socio-ethnic diversity:

The exclusionist model denies minority groups civic standing . . . by perpetuating primordial and ethnonationalist narratives which place emphasis on blood loyalty, common ethnic origin and a homogenous culture. Assimilation requires minority communities to renounce their particular ethnic or cultural identity and embrace the culture of the majority community, whereas integration tolerates differences as long as they are confined to the private realm. With regard to the public realm, ethnic communities are expected to embrace the nation’s ideals and to identify with the common culture of citizenship, as defined by the majority . . . Cultural pluralism, in contrast,

155 See generally HANSEN & WEIL, *supra* note 106, (canvassing Member State nationality laws). See also Andrew Geddes, *The Development of EU Immigration Policy: Supranationalism and the Politics of Belonging*, in THE POLITICS OF BELONGING 176, 181 (Adrian Favell & Andrew Geddes eds., 1999) (noting “diverse national immigrant integration paradigms”).

156 See ROGERS BRUBAKER, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* (1992) (comparing integration models in France and Germany); FAVELL, *supra* note 18 (comparing integration models in France and Great Britain); Virginie Guiraudon, *Citizenship Rights for Non-Citizens: France, Germany, and the Netherlands*, in CHALLENGE TO THE NATION-STATE: IMMIGRATION IN WESTERN EUROPE AND THE UNITED STATES 272, 272 (Christian Joppke ed., 1998); Kostakopoulou, *supra* note 9, at 184-87 (providing a useful typology of the most readily identifiable integration models in Europe).

157 Vincenzo Ferrari, *Citizenship: Problems, Concepts and Policies*, in AN INSTITUTIONAL CHALLENGE, *supra* note 16, at 51, 55-56.

does not condition political belonging on cultural conformity, but rather recognizes that disadvantaged groups require public recognition and support in order to flourish.¹⁵⁸

Most state practices fall somewhere between these categories, blurring the lines and defying strict classification. Nonetheless, until the recent liberalization of its citizenship law in 2000,¹⁵⁹ Germany most clearly mapped onto an exclusionist model of TCN incorporation, despite (or, in fact, because of) its relatively liberal entry policy. France is said to typify the assimilation model because of a national obsession with color-blind public policy, a refusal to keep statistics on the ethnic origins of its residents, and a long-held belief in the capacity of *l'État français* to manufacture *les citoyens*.¹⁶⁰ Great Britain can be described as representing the "integration" model.¹⁶¹ Ethnic pluralism and the need for a kind of "multicultural equilibrium" are recognized, but policy-makers attempt to keep issues of "majority-minority relations" outside the mainstream public discourse.¹⁶² The problem of foreign populations is "managed" by elites seeking social harmony and equilibrium; citizenship *per se* carries less symbolic weight than, for example, in France.¹⁶³ Finally, the Netherlands' policies, at least until recently, went perhaps furthest to formalize a cultural pluralism model.¹⁶⁴ Each Member State's approach reflects its own concept of national identity and, more often than not, draws on the

¹⁵⁸ Kostakopoulou, *supra* note 9, at 184-85.

¹⁵⁹ See *Who's a German, Then?*, ECONOMIST, Dec. 7, 2002, at 18 (describing the new naturalization option for second-generation immigrants after reform of the 1913 citizenship law that had long maintained strict *jus sanguinis* criteria to the disadvantage of guest workers).

¹⁶⁰ FAVELL, *supra* note 18, at 43-44.

¹⁶¹ "Integration" here refers to one incorporation model. This Note refers generally to integration as any policy choice intended to define or shape the relative positions of TCNs *vis-à-vis* the national population and institutions of local, national, and European governance. The Note's definition is influenced by an emerging consensus that views integration as "a long-term, two way process of change, that relates both to the conditions for and the actual participation of refugees in all aspects of life of the country." REPORT OF THE THIRD EUROPEAN CONFERENCE ON THE INTEGRATION OF REFUGEES Sec. 1 (1999), http://www.refugeenet.org/pdf/doc_conference_report_1999.pdf (last visited May 1, 2004) (quoting ECRE TASK FORCE OF INTEGRATION, REPORT OF THE SECOND CONFERENCE OF INTEGRATION OF REFUGEES IN EUROPE (1998)) [hereinafter THE INTEGRATION OF REFUGEES]. See also Joanna Apap, *Citizenship Rights and Migration Policies: The Case of Maghrebi Migrants in Italy and Spain*, in THE LEGAL FRAMEWORK, *supra* note 22, at 105, 123 (defining integration as "a process through which the indigenous population and the minority settled in the same place gradually intermingl[e] and mov[e] towards equality on the socioeconomic, cultural and political levels, becoming a single population unit . . .").

¹⁶² FAVELL, *supra* note 18, at 124.

¹⁶³ *Id.* at 123. See also *Dim Drums Throbbing in the Hills Half Heard*, ECONOMIST, Aug. 8 2002, http://www.economist.com/world/europe/printerfriendly.cfm?story_id=1270416 (noting Britain's coming to terms with the idea of integration, compared to greater resistance in France and Germany).

¹⁶⁴ See Guiraudon, *supra* note 156, at 284-85. See also Han Entzinger, *Shifting Paradigms: An Appraisal of Immigration in the Netherlands*, in EUROPEAN MIGRATION IN THE LATE TWENTIETH CENTURY: HISTORICAL PATTERNS, ACTUAL TRENDS, AND SOCIAL IMPLICATIONS 93, 101-12 (Heinz Fassmann & Rainer Munz eds., 1994).

formative historical experiences of the nation-state's emergence. Despite the diversity of citizenship theories, naturalization laws, and TCN integration policies across Europe, the Member States share a common problem: in many, if not most cases, these policies have failed to address the complicated needs of migrant and native populations at a time when familiar political and economic institutions are in flux.¹⁶⁵ At the very least, this is the conclusion one might draw based on evidence of increasing dissatisfaction among EU nationals and TCNs alike.¹⁶⁶

European citizenship has the potential to enhance TCN integration. A European citizenship based on a reasonable and limited residency requirement has the potential to encourage new patterns of political participation and a social membership—not based on feelings of “belonging,” but rather out of an equal opportunity to contest the means and ends of a common future in Europe. National integration regimes—however well intentioned—are inherently unable to succeed beyond a certain point. One can argue that popular perceptions of social and political membership remain so rigid, perhaps through habit more than choice, that efforts to maintain the credo of citizenship-as-integration (or citizenship-as-membership) are doomed to failure.¹⁶⁷ Tinkering with the legal criteria for naturalization at the national level may do little to improve the position of TCNs *vis-à-vis* their EU national neighbors if expectations of cultural assimilation remain fixed, in place of more flexible attitudes recognizing multiple loyalties and points of self-identification.¹⁶⁸ Despite the rhetorical

165 One can point to the acceleration of political integration at the European level, giving rise to a new (or renewed) sovereignty crisis in the Member States, and globalization, whereby popular perceptions of increasing global wealth give rise to higher expectations and, often enough, severe disappointment. On the latter, see AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* 245 (2003).

166 See, e.g., Hollifield, *supra* note 106, at 60 (noting the prevailing politics of “xenophobia, nativism, and restrictionism”); Messina & Thouez, *supra* note 70, at 115 (providing statistics on anti-immigration sentiments from 1997); Ford, *supra* note 17 (examining increasing support for right-wing parties based on concerns about “crime and foreigners”); Warren Hoge, *Britain Proposes Changes in Asylum Process*, N.Y. TIMES, Feb. 8, 2002, at 12A (providing an example of how settled or naturalized migrants might have very sensible reasons to resist a presumed obligation to assimilate culturally: “One Oxford-educated British Asian writer responded by saying, ‘I feel under no obligation to bring my daughter and son up to drink themselves to death in a pub for a laugh.’”); *Who gains?*, ECONOMIST, Mar. 2, 2002, at 50 (noting a 2000 poll that indicated 61% of French citizens think there are too many foreigners in France).

167 See Adrian Favell, *To Belong or Not to Belong: The Postnational Questions*, in THE POLITICS OF BELONGING, *supra* note 155, at 209, 215 (lamenting the irrelevance of an “official ideology of integration or multiculturalism” if such principles cannot “lay bare the sociological realities of belonging” and be “effectively transformed into norms that direct individual actions and decisions”).

168 “The confusion between [the state and the nation] makes it impossible to formulate admission to the nation solely in terms of legal procedures, which may not be socially recognized if they conflict too sharply with the underlying cultural basis of nationhood (as viewed by its current members).” John Crowley, *The Politics of Belonging: Some Theoretical Considerations*, in THE POLITICS OF BELONGING, *supra* note 155, at 15, 34. The difficulty of reconciling Islam—the faith of many TCNs in Europe—with the nation-state is particularly acute, and some commentators have suggested that the nation-state locus of authority in Europe makes the representation of Muslim interests impossible. Talal Asad, *Muslims and*

efforts of the French “civic nation” or Dutch pluralism, respectively, to ignore or privilege cultural difference in their citizenship models, it remains difficult for many Member State citizens to reconcile that “immigrants who have no share in the national history and who emphasize their cultural distinctness could still fully integrate *into the nation*.”¹⁶⁹ Otherwise said, the “denationalization of citizenship” within the nation-state may be fatally hindered if nationalists control the terms of debate.¹⁷⁰ The concept of citizenship—as defined and shaped by the national monopoly over its grant and exercise—has created an edifice inextricably wrapped up in notions of culture, tradition, and national myths.¹⁷¹ For this reason, “the [present] vocabulary of integration may not be apposite to issues of European membership . . . and its replacement with that of democratic equality and inclusion should be considered.”¹⁷² It makes little sense to restrict the dynamic potential of European citizenship by continued reliance on flawed national citizenship models, despite some national reforms of late. Furthermore, joining the national community via naturalization is not necessarily a desirable choice for TCNs, even if given the option. Naturalization that requires a significant renunciation of “previous identity could cause serious conflicts and a sense of insecurity within the individual,” especially when the legal gains of citizenship are not matched by social acceptance or meaningful political opportunities.¹⁷³ This is where the potential of European citizenship fits in. Embracing a European solution to the national problem of migrant integration requires, to an extent, conceding the *impossibility* of “total integration,” at least in the sense the term has been understood in most European states—integration *into the nation*. Rather, European citizenship might offer a means by which *not* belonging to the nation could be transformed from a socio-political liability into an instrument of political and cultural identity: “[I]n an imperfect world, where nation-states are no longer able to match rhetoric with reality—become the self-contained, coherent cultural entities they claim are—not-belonging might actually be made into an effective resource and social advantage.”¹⁷⁴

European Identity: Can Europe Represent Islam?, in *THE IDEA OF EUROPE*, *supra* note 53, at 209, 209. Although European citizenship seems like a potential device for better integrating European Muslims into a variety of social and political contexts, this position seems weakened by recent debate over whether to include language denoting a common Christian heritage in the draft Constitution for Europe.

169 Baubock, *supra* note 106, at 165 (emphasis added). See also Layton-Hendry, *supra* note 115, at 53 (describing debate over “whether Muslims can really be French,” even if they are citizens).

170 Bosniak, *supra* note 41, at 509 (noting the possibility that “the association between citizenship and nation-state will be hard to sever, and that citizenship will remain inextricably linked in the public consciousness with the nation-state and its institutions . . . if advocates of nationalism . . . are highly successful in defining the terms of the emerging debate”).

171 Aristide R. Zolberg, *The Dawn of Cosmopolitan Denizenship*, 7 *IND. J. GLOB. LEG. STUD.* 511, 511-12 (2000).

172 Kostakopoulou, *supra* note 9, at 183-84.

173 Apap, *supra* note 161, at 121.

174 Favell, *supra* note 167, at 220-21. As Favell explains, “accepting the cultural order and hierarchy of values imposed by the national political community might indeed not be the

This strategy is not without substantial risks for the migrant, particularly under the status quo where opting-out of the national context provides little alternative.¹⁷⁵ A European citizenship for TCNs, however, would provide them with a place—albeit one needing renovation and fortification—into which one could *opt-in*. Moreover, the participation of TCNs as European citizens should not be handicapped by the shortcomings of European citizenship today, and can instead offer a vital transformative urgency to the project itself. A European public sphere for EU nationals and migrants alike could provide the conceptual space within which non-national, non-statist identities are more readily permissible and, indeed, the expected starting point for individuals and groups with diverse interests to work with and against each other to create new outcomes and accommodations.

That said, the potential of European citizenship—both for EU nationals and immigrant populations—remains unrealized and uncertain. While this Note argues that European citizenship should be viewed as a promising alternative to the national integration models that have struggled to effect political and social inclusion, the task is made much more difficult by the conceptual problem of extricating our contemporary ways of thinking from the national citizenship models at work. Nonetheless, the following sections discuss ways in which European citizenship might be preferable to national citizenship as an instrument of migrant incorporation.

2. New Modes of Political Participation and Social Interaction

There is widespread agreement that equal rights, especially voting, can have a powerful integrative influence.¹⁷⁶ “Secure residence status” and “equal treatment” have been considered essential to “integration in the host society” for EU nationals who have crossed borders.¹⁷⁷ The desire for rights on the part of TCNs may be little linked to any desire for acceptance into the local culture, but rather a means to assert an independent voice and, in the process, to encourage adaptation of that same local culture.¹⁷⁸

The benefits of secure residency are clear. TCNs today must live with the constant possibility of severe consequences (i.e., incarceration or

smartest, or most strategically successful way of behaving,” especially given the “opening up for political and social action in transnational spaces.” *Id.*

¹⁷⁵ *Id.* at 222.

¹⁷⁶ See, e.g., WATTS, *supra* note 71 at 60 (arguing that labor leaders generally believe additional legal rights for migrant workers enhances stability); Sierra & Patel, *supra* note 15 at 20 (“Equal rights, including the right to vote, represent the most powerful integration measure possible.”); *Europe’s Muslims*, *ECONOMIST*, Aug. 8, 2002,

http://www.economist.com/world/europe/printerfriendly.cfm?story_id=1270621 (“If [Muslim immigrants] are to become good members of society, then, they must be given citizenship, the right to vote and all the other rights that other citizens enjoy.”).

¹⁷⁷ Groenendijk, *supra* note 68, at 226.

¹⁷⁸ See Geddes, *supra* note 155, at 181 (TCN “motivation for access to supranational rights associated with EU citizenship may well stem from instrumental motivations—access to legal, social and political entitlements—rather than questions of identity.”).

deportation) if national regulations are changed or criminal activity is alleged (e.g., if the national political climate shifts in response to terrorism). Although these problems are mitigated by the new legislation on long-term TCN residents, the value of certainty and stability to social integration cannot be underestimated: "If an individual is entitled to a permanent residence permit he/she can decide whether to invest the energy needed to improve economic possibilities such as seeking recognition of diplomas or undertaking language training. Without this security the investment is too uncertain."¹⁷⁹ Thus, a grant of citizenship that guarantees the option to remain within the Member State of residence both reduces instability and encourages pro-integration initiatives on the part of the individual. A shift from national administrative discretion to EU-based rights and protections for TCNs could be invaluable in this respect.

In some cases, long-term residency will, over time, lead to measurable social integration. Certainly, not *all* TCNs in the European Union today remain alienated from mainstream host societies; some who have successfully integrated have, undoubtedly, made the necessary choices and sacrifices to find a place in the host state. For some, this has required assimilation or abandonment of their original cultural and social orientations. However, if long-term residence leads to some social integration in the community—but still leaves TCNs outside national citizenship—it belies the legitimacy of a liberal democracy to maintain seemingly arbitrary restrictions on political participation.¹⁸⁰ Even if social integration has not been achieved, political participation should be viewed as a means to encourage integrative behavior, not only as a prize for those who have already endured years of uncertainty and, in some cases, been forced to capitulate to the majority culture.

But for TCNs, why would access into European and local politics—the guarantees of European citizenship—be of greater import than national voting rights? There is no guarantee that it would, certainly not without additional reforms to European governance (such as a stronger European Parliament, the emergence of genuine European political parties, and closer working relationships between the elected representatives in Brussels and Member States). But again, great potential benefits exist precisely because the modalities of European politics remain a work in progress.¹⁸¹ Community law has already had a profound influence on the ways that European citizens participate in politics. It would be worthwhile

179 Elspeth Guild, *Primary Immigration: The Great Myths*, in IMPLEMENTING AMSTERDAM, *supra* note 42, at 65, 83. Guild analogizes the problem to international commerce, where states and businesses have demanded—and received—certainty-increasing measures from international law. *Id.* The sympathy afforded international trade has not trickled down to the problems of the economic migrant.

180 See Marín, *supra* note 133, at 206 (arguing that residence defines "the relevant referential political community for legitimation purposes.")

181 Kostakopoulou, *supra* note 32, at 9 (foreseeing "the multiplication of 'access points'" into the political process). See also Yasemin Soysal, *Changing Boundaries of Participation in European Public Spheres*, in BETWEEN NATIONAL LEGACIES, *supra* note 43, at 159, 164 (describing multi-level politics and collective mobilization).

to extend the experiment to TCNs, thus providing substantial numbers of people with a political forum that does not—or perhaps cannot—be provided within the national framework. TCNs need to become stakeholders in European politics, and be given the tools and incentives to influence policies that have a direct effect on their daily lives.¹⁸² Through participation, TCNs “will generate stronger loyalties among their family and community members towards the host societies as European societies.”¹⁸³ Voting and individual participation may serve to reinforce ideals of liberal democracy and civil society to which TCNs—depending on their country of origin—might be unaccustomed.¹⁸⁴ Although it would be a serious mistake to perceive TCNs as a uniform political bloc sharing identical interests—TCNs together make up an even more diverse group than do the collective European nationals—one could imagine TCNs aggregating their political claims across the Member States and generating a transnational movement backed up by actual voting power, thus overcoming their relatively weak, fragmented, and unrepresented status among the Member States today.

In addition, political participation may change the attitudes of erstwhile hostile or indifferent native populations or domestic interest groups. Perceptions that minority cultures are traditional, static, or monolithic and without internal conflict would be challenged.¹⁸⁵ This would create the potential for new interest-based coalitions among segments of the TCN population and national citizens, and “political parties [could] turn seriously towards [TCNs] not only in hunting for votes, but also in search of ideas.”¹⁸⁶ Thus political rights for TCNs could spur both transnational political movements, but also, and of likely greater benefit, new domestic alliances between native and migrant groups who discover shared political objectives. Both results suggest modes of political participation that would develop hand-in-hand with social interaction and integration, broadly-defined.

3. European Labor Market Flexibility

Extending European citizenship to TCNs will also benefit the European labor market. Section IV.A of this Note argued that the objections to free

182 “[C]itizens are eager to use whatever opportunities may exist at the Community level to induce constitutional developments at the national and subnational levels.” Kostakopoulou, *supra* note 138, at 403. Sex equality and environmental law are two areas where transnational political mobilization has had an impact. *Id.*

183 Garcia, *supra* note 136, at 15.

184 *Id.* Under the status quo, TCNs who do not bring civil society experience with them to Europe may find it hard to acquire in their new environment. See Kostakopoulou, *supra* note 9, at 181 (noting the relegation of TCNs “to the periphery of the emerging European civil society”).

185 Garcia, *supra* note 136, at 15-16.

186 *Id.* at 15. See also THE INTEGRATION OF REFUGEES, *supra* note 161, at 21 (noting suggestions that politicians should be woken up to the potential value of “winning votes” from refugees and migrants).

movement rights for migrants are illogical in the common market context.¹⁸⁷ This Section argues that the right to move freely among the Member States and to take up employment or establish a business wherever suitable is more beneficial than threatening, despite occasional short-term difficulties. With an aging population and declining birth rates, Europe faces a demographic crisis that requires significant additional numbers of immigrants in the coming years to satisfy its labor markets and keep pension systems afloat.¹⁸⁸ Providing those immigrants with the rights of European citizenship—and, particularly, free movement rights—could encourage a more efficient allocation of the resources new migrant populations provide.

The precise effects of cross-border mobility on European labor markets are difficult to describe with great certainty, and it is difficult to draw for conclusions from the available empirical evidence as to whether fears of TCNs exercising free movement rights to flood local labor markets are well-founded.¹⁸⁹ At a political level, however, Member States have been playing a game of rhetoric that contradicts behind-the-scenes practice. Despite the unofficial party line across most of Europe supporting a freeze on economic immigration and decrying the influx of immigrants by other channels, many employers seek out migrant labor, perpetuating an economic pull factor independent of state immigration policy.¹⁹⁰ Several commentators note that extending free movement rights to the TCN

¹⁸⁷ See discussion *supra* notes 114-126 and accompanying text.

¹⁸⁸ Europe's demographic crisis and declining birth rates have been widely reported. In recent remarks, U.N. Secretary-General Kofi Annan reaffirmed that "immigration is an inevitable and important part of the solution" to the problem of a projected net decrease in the European Union's population by 2050 were immigration to cease. See Annan Remarks, *supra* note 12.

¹⁸⁹ See Groenendijk, *supra* note 68, at 237. When Spain and Portugal joined the European Community in 1986—before the advent of European citizenship and broader guarantees of free movement rights—wealthier Member States feared that migrants would flood their labor markets in search of employment and more generous social welfare rights. As a result, restrictions on full freedom of movement rights were put into place for a seven year transition period. By 1995, however, the number of Spanish and Portuguese citizens living in other Member States was actually less than before enlargement, largely because of economic progress in the home states. George Parker, *Fears of Big Move West May Be Unfounded*, FIN. TIMES, Dec. 10, 2002, at 10. The 2004 expansion of the European Union eastward has raised similar fears. At the time of this writing, most Member States have already imposed a range of restrictions to prevent any such influx of new workers from the East, despite their new status as European citizens. The accession treaties allow for such restrictions until 2011. For a list of various restrictions enacted by the Member States, see *Outline of EU Enlargement Restrictions Planned by Current Members*, EU BUSINESS, Feb. 8, 2004, at <http://www.eubusiness.com/afp/040208024629.f6npa5yb>. Both the joining states and the European Commission have expressed serious concerns about such controversial—and perhaps unnecessary—moves. *Brussels Sounds Alarm Over EU's Post-Enlargement Barriers*, EU BUSINESS, Feb. 24, 2004, at <http://www.eubusiness.com/afp/040224153741.61r9a50i>. By drawing distinctions among European citizens based on national citizenship, the restrictions undermine the value of European citizenship as an institution. Furthermore, such trends suggest that efforts to provide approximate citizenship rights to TCNs from non-enlargement states will continue to face considerable obstacles in the near future.

¹⁹⁰ Messina & Thouez, *supra* note 70, at 107 (describing migrant labor as a highly flexible, inexpensive and malleable workforce). See also, generally, WATTS, *supra* note 71.

population “creates greater prosperity for the whole area by relieving the burden of unemployment in one region” as migrants relocate in search of better opportunities.¹⁹¹ In this sense, the grant of European citizenship to TCNs may be more valuable, from a mobility standpoint, than the grant of European citizenship to EU nationals: “[i]mmigrants, unlike natives, move readily to areas where labour is in short supply, so easing bottlenecks.”¹⁹² TCNs may be uniquely well-positioned in Europe to take advantage of the opportunities for European citizens to exercise free movement within the internal market.

4. Diminished Influence of the Far Right

Underlying this entire discussion is a reassessment of the far right wing of the European political spectrum. Nearly every Member State has at least one political party of the extreme right whose platform combines anti-immigration (i.e., opposition to entry) and anti-immigrant (i.e., opposition to the extension of rights) positions.¹⁹³ Austria, France, and the Netherlands have all experienced high-profile electoral successes by the anti-immigrant far right over the past four years.¹⁹⁴ Predictably, anti-immigrant sentiment

191 Guild, *supra* note 179, at 91. See also MATLOOB PIRACHA & ROGER VICKERMAN, IMMIGRATION, LABOUR MOBILITY AND EU ENLARGEMENT 17 (Studies in Economics, University of Kent) at <http://www.kent.ac.uk/economics/research/1europe/RIIACChapter-final.pdf> (Aug. 2002) (concluding that “there is not an overwhelming problem of the potential gross flow of migrants for the EU either now or consequent on enlargement” and that “migrant flows can play a valuable role in helping to improve the flexibility of EU labour markets”).

192 *Opening the Door*, ECONOMIST, Nov. 2, 2002, at 11. Indeed, “migrants frequently move for short periods as a means of enhancing short-term earnings or longer term earning prospects.” PIRACHA & VICKERMAN, *supra* note 191, at 4. Frequent short-term migration, however, makes it harder for TCNs under the status quo to meet the residence requirements that precede the extension of rights which approximate European citizenship—let alone European citizenship itself. Furthermore, not all commentators believe that demand-pull theories are borne out in practice, noting that “the relatively modest scale over recent years” of cross-border economic migration in the European Union “suggests a fairly modest demand.” David Coleman, *Mass Migration to Europe: Demographic Salvation, Essential Labor or Unwanted Foreigners?*, in WEST EUROPEAN IMMIGRATION, *supra* note 17, at 47, 69. But perhaps the lack of migration is better explained by the existing legal and social obstacles to such movement?

193 These parties range from the electorally insignificant British National Party in the United Kingdom and the National Democratic Party in Germany to the influential Freedom Party in Austria, the People’s Party in Denmark, the National Front in France, and Pim Fortuyn’s List in the Netherlands. See generally Ford, *supra* note 17.

194 Furthermore, political institutions in many Member States provide considerable opportunities for extremist parties to exercise undue influence or distort the national agenda. In France, for example, the two-stage system of presidential elections allowed Jean-Marie Le Pen of the far right National Front to best then-Prime Minister Lionel Jospin of the Socialist Party in the first round of the 2002 elections. In the second round, amid public outcry, Le Pen was trounced by incumbent President Jacques Chirac. But the far right insurgency in the first round deprived France of a meaningful debate on many non-immigration issues in the second round, handing victory—and a hollow mandate—to Chirac. In general, proportional representation systems in several Member States often require that coalition governments either include the far right (e.g., Austria’s Freedom Party joining the ruling coalition in 2000 to widespread objection) or form right-left coalitions that restrict political progress on difficult issues. Arguably, stagnant politics of this sort in the Netherlands contributed to the rise of the

builds on perceptions that TCNs have not done enough to integrate (i.e., assimilate) or simply are incapable of being assimilated. National communities may feel threatened because migrants are associated with crime and delinquency, but, at a more visceral level, because the presence of people who look and act differently from the majority threatens “national identity.” Aware of these problems, governments proceed under competing pressures.¹⁹⁵ Policy-makers may reform the integration process itself: states enact measures to encourage integration by providing special assistance and benefits for migrants, but also by amending naturalization laws to make national citizenship more attractive and accessible. Such reforms include relaxed *jus soli* citizenship rules,¹⁹⁶ shorter residency prerequisites for naturalization, or lifting bans on dual citizenship.¹⁹⁷ These approaches assume, of course, that the availability, acquisition, and exercise of national citizenship promote TCN integration. They also assume that TCNs *desire* national citizenship, a premise that may be incorrect.¹⁹⁸

Relaxed naturalization requirements, however, are politically difficult and can backfire. Perceptions that the state is accommodating TCNs at the expense of a traditional view of national identity can inflame the rhetoric of extreme nationalists and attract mainstream voters to the cause of the far right.¹⁹⁹ Citizenship reforms provide fodder to reactionary nationalists who seize the opportunity to demonstrate how the state is “caving in” to foreigners and undermining whatever sense of nation still exists.²⁰⁰ In turn, harder lines are drawn between native and migrant populations that may counteract whatever integration goals the legal reforms were intended to achieve. Although Germany is one Member State that has liberalized its naturalization laws, most Member States have tightened their controls on both entry and access to rights and national citizenship, thus impeding TCN integration.²⁰¹ One commentator describes the trend towards stricter

late Pim Fortuyn in 2002.

195 France, for example, typifies how TCN integration debates implicate national identity. “[S]ome argued that if immigrants or asylum seekers permanently remained in the country, it would destroy French identity, whereas others argued, on the contrary, that it was the poor reception of, and the failure to integrate, newcomers that would harm French identity.” METTE ZOLNER, RE-IMAGINING THE NATION: DEBATES ON IMMIGRANTS, IDENTITIES AND MEMORIES 11 (2000).

196 See, e.g., *supra* note 159.

197 See HANSEN & WEIL, *supra* note 95, at 9, 17 (arguing that the goal of “full integration” predisposes states towards permitting dual nationality).

198 Surveys have indicated that dual citizenship is often more important to TCNs than either national or European citizenship. See WISTRICH, *supra* note 88, at 16. These results are slightly misleading, however, because European citizenship places no demand on its citizens to renounce any given national citizenship. Nor would such a requirement be necessary if European citizenship were made available to TCNs.

199 See Hansen & Weil, *supra* note 106, at 19.

200 French voters who remained wary of the far right complained in 2002 that France’s “traditional values” were not being defended. *Who Gains?*, *supra* note 166, at 49.

201 Germany’s efforts to distance its citizenship model from the ethno-cultural, *jus sanguinis* approach does not mean that Germany is whole-heartedly moving towards a more progressive integration regime. On the contrary, Germany has lowered the maximum age limit of children who can be reunited with their in-country parents and has imposed strict

“internal control measures” as “severe infringements of what were thought to be civil and social rights.”²⁰² In the United Kingdom, “both citizenship and nationality laws paradoxically have been made less inclusive in order to discourage the arrival of new immigrants,”²⁰³ although these tactics negatively affect the integration prospects of TCNs already in the territory. France has placed limits over the past decade on its *jus soli* citizenship, now requiring a formal declaration of citizenship by candidates at a later stage.²⁰⁴ Even Ireland, which since 1935 has granted Irish citizenship to anyone born on Irish soil, is on the verge of limiting *jus soli* citizenship through a national referendum.²⁰⁵ Member States that are “new” immigration countries—mainly along the Mediterranean—have also enacted restrictive policies. Greek policy draws on fears that Greek national identity must be preserved in the face of a growing foreign population, even one largely composed of ethnic Greeks from abroad.²⁰⁶ A similar phenomenon may exist in smaller Member States, where foreign populations—especially because of their high urban concentration—appear even more subversive. This might account for Luxembourg’s reluctance to reform its naturalization laws.²⁰⁷ Denmark has also begun to make things harder on TCNs, particularly through tighter restrictions on family reunification, even though such privileges were traditionally viewed as enhancing the prospects for successful integration.²⁰⁸

It seems reasonable to conclude that although the problem of integrating TCNs into national communities is urgent, politicians are unwilling or unable to construct progressive and successful national integration policies. Efforts to manipulate national citizenship rules to

time delays on entry into the labor market for TCN family members who join earlier arrivees. Hans van Amersfoort, *International Migration and Civil Rights: The Dilemmas of Migration Control in an Age of Globalization*, in *THE LEGAL FRAMEWORK*, *supra* note 22, at 83, 85.

202 *Id.* at 87. The Netherlands has also reduced access to national citizenship and excluded asylum applicants from work or school, impeding their integration into Dutch society. *Id.* at 83, 86.

203 Messina, *Conclusion*, in *WEST EUROPEAN IMMIGRATION*, *supra* note 17, at 208. *See also* Amersfoort, *supra* note 201, at 83.

204 *See* Amersfoort, *supra* note 201, at 83. Commentators attribute this shift to the persistent efforts of Le Pen and the National Front.

205 *Referendum To Be Held To Restrict Citizenship Rights*, *IRISH TIMES*, Mar. 11, 2004. The decision has been criticized as a “move calculated to encourage racist tendencies.” *Id.* Nonetheless, it seems that Ireland is following the pattern of other European states that maintained liberal *jus soli* regimes previously, when they were primarily countries of emigration. On the chipping away of *jus soli* citizenship in Europe, see Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, http://canada.metropolis.net/events/metropolis_presents/EU_speakers/weil2_e.htm (last visited May 1, 2004).

206 Anastassia Tsoukala, *The Perception of the ‘Other’ and the Integration of Immigrants in Greece*, in *THE POLITICS OF BELONGING*, *supra* note 153, at 109, 120 (describing legislation intended to impede or even make impossible the integration of TCNs). *See also* Hansen & Weil, *supra* note 106, at 15-16 (noting Greek reluctance to reform naturalization rights for second-generation migrants).

207 Hansen & Weil, *supra* note 106, at 15-16.

208 *The Worries and the Welcomes*, *ECONOMIST*, Feb. 2, 2002, at 48. *See also* Melis, *supra* note 67, at 159 (describing restricted family reunification rights for TCNs).

encourage TCN naturalization appear highly susceptible to popular backlash fueled by the far right; perhaps national citizenship is inherently ill-suited to the task of TCN integration? Member States have largely adopted regulations meant to discourage immigration from abroad by making life more difficult at home; in turn, anti-immigration policies and rhetoric exacerbate tensions between national citizens and the foreigners already in their midst. On top of all this, external controls largely fail anyway.²⁰⁹

European citizenship offers an alternative to this dilemma. By extending European citizenship to migrants, new modes of political and social participation, as well as economic mobility, could significantly enhance migrant integration in a variety of contexts. Although TCNs would not possess voting rights in national elections, migrants would have a secure legal status providing for expansive civil and political rights, as well as a minimum threshold of social rights.²¹⁰ In turn, national populations would be spared the symbolic ramifications of a weakened naturalization regime; national citizenship would no longer need to seem devalued or diluted by legal efforts to integrate TCNs.

What benefits would follow? First, one might argue that through European citizenship, the focus of TCN integration policy could be reassigned to Brussels, mitigating the “anti-immigration/immigrant pressures . . . on national governments.”²¹¹ Some have argued that “decision-making on immigration policy that occurs behind closed doors can be more liberal than that which is exposed to the glare of anti-immigration sentiment in broader public debates.”²¹² Providing the European institutions with competence over TCN integration through an expanded European citizenship may be a “seductive” option,²¹³ but the “behind closed doors” mentality is democratically problematic. Nonetheless, the best justification for “kicking the problem upstairs” to Brussels might be that by giving the European Union the authority to go ahead with a trial period of residence-based European citizenship, the terms of the citizenship debate could be sufficiently reframed and

209 See Amersfoort, *supra* note 201, at 87 (noting failure to manage international population mobility); Suzanne Daley, *Europe Wary of Wider Doors for Immigrants*, N.Y. TIMES, Oct. 20, 2001, at A3 (noting the growth of a consensus, prior to September 11, 2001, that a zero-immigration policy in Europe is not working).

210 As mentioned in note 27, *supra*, extending social rights through European citizenship seems likely to pose the greatest obstacle to residency-based citizenship proposals. Nonetheless, a basic threshold of social entitlements across the European Union should be guaranteed. Providing more expansive social rights on par with those provided to the national citizens of a particular Member State may, however, require some kind of financial contribution from Brussels. Although no one seems keen to discuss the prospect of a “European tax” to finance such an arrangement, some kind of redistribution mechanism would enhance the social rights available under any non-derivative European citizenship. The benefits would not be limited to TCNs with European citizenship, but would accrue to all European citizens exercising their free movement rights.

211 Geddes, *supra* note 155, at 183.

212 *Id.*

213 Messina & Thouez, *supra* note 70, at 117.

denationalized to encourage renewed dialogue within national communities on the ultimate merits of expanded European citizenship.

Second, extending European citizenship to TCNs might offer the Member States an opportunity to exercise greater autonomy and creativity in the design or reform of their own national citizenship laws. Some scholars have suggested that the rise of European citizenship predicts—or demands—the harmonization of Member State naturalization laws.²¹⁴ On the contrary, this Note argues that after the extension of European citizenship to TCNs, tightening national citizenship requirements is an acceptable or even desirable outcome in the context of diversity management. The trend towards more restrictive external and internal controls on immigrants illustrates that national citizenship retains a profound significance for many Europeans; talk of its dilution or replacement stimulates passionate opposition.²¹⁵ To the extent that European citizenship has been portrayed as a “dangerous supplement”²¹⁶ to national citizenship—lying in wait and ready to supplant it when the time is right—the institution has been left weaker and less effective. It seems reasonable that strengthening of European citizenship by broadening its membership base and by adopting reforms to make European elections more meaningful can be matched by a bolstering of national citizenships, as well. This is, however, contingent on the extension of fundamental human rights—civil, political and social—via European citizenship. Strengthening the cultural-national “ties that bind” cannot come at the expense of fundamental human rights. But neither access to such rights—nor to a sense of *belonging* to the civic community—should need to depend on simultaneous membership in the “club” of nationality.

“Europeanizing” the status of TCNs would reduce pressure on the Member States to liberalize their nationality laws, but avoid undermining EU obligations to human rights and the common market. It would be a positive reassurance to national communities at a time when more and more sovereignty is shifting towards Brussels if Member States could reassert their unique cultural characteristics without marginalizing the rights and legal status of TCNs in the process. The reinsertion of national culture into national citizenship law is entirely compatible with multiculturalism, so long as the Member State—or a given *nationality*—is not viewed in isolation, but rather as one nation among many in the European Union.²¹⁷

In turn, although the influence of xenophobic political parties will still find some expression in stricter naturalization requirements for admission

214 See *supra* note 140 and accompanying text.

215 See Crowley, *supra* note 168, at 19 (“Cosmopolitan celebration of the decline of the nation-state can be rather glib, and arguably has done as much to stimulate as to dampen the attractions of xenophobic nationalism.”).

216 See Kostakopoulou, *supra* note 138, at 395.

217 See Baubock, *supra* note 106, at 181 (“One may suspect that a model of nationhood that is less open for the integration of immigrants may be compatible with an appreciation of multiculturalism that emphasizes separation between groups and attachment to particular origins.”).

to the nation, the movement would be less effective at undermining the integration of TCNs through roll-backs of political or social rights; the far right might find itself less able to hijack the national agenda on a xenophobic platform. In addition, TCNs would also have better legal protections against xenophobic attacks.²¹⁸ Nonetheless, it should be conceded that the precise effect of these proposals upon the political far right is impossible to predict. One negative consequence could be that right-wing demagogues might shift the focus of their ire to a single institutional target—the EU complex in Brussels—instead of diffusing it across national centers (although most parties on the far right are already staunchly anti-Brussels). On the whole, however, it may well be that the potential for a reaffirmation of national culture—while preserving the European rights of non-nationals—would outweigh such concerns. The proposals in this Note will surely not make xenophobia go away, and, in the short-term, they could provoke upheaval over the meaning of European citizenship. The dialogue resulting from any short-term reckoning over the meaning of European citizenship, however, would be beneficial. It may take a grant of European citizenship to TCNs for EU nationals to begin a serious accounting of what European citizenship can or should contain or represent.

5. Overcoming the Half-Way Status of European Denizenship

Proposals and adopted provisions for greater TCN rights—including the most recently adopted directive on the status of long-term TCN residents—stop short of granting full European citizenship to TCNs.²¹⁹ A second-best solution—now a reality for long-term TCN residents—talks of “denizenship,” whereby TCN residency and free movement rights would be harmonized across the European Union.²²⁰ Yet such a result seems to fall short of the aspirations of a constructive citizenship,²²¹ and settling for European denizenship passes up an historic opportunity to redefine the meaning and practice of citizenship more generally.²²² It also risks

²¹⁸ See Garcia, *supra* note 136, at 14 (describing the lack of “political capability for defence or reaction from [TCNs] given their weak position”).

²¹⁹ See generally Kostakopoulou, *supra* note 9.

²²⁰ Denizens are “individuals who are tax paying, permanent, but non-voting residents.” Beverly Springer, *Testing Tolerance: The Impact of Non-European Migrants on Western European Cultures*, in IMMIGRATION INTO WESTERN SOCIETIES, *supra* note 106, at 195, 197.

²²¹ Kostakopoulou, *supra* note 9, at 195-96 (noting the failure of denizenship to include political participation rights).

²²² Compare Schmitter, *supra* note 49, at 101 (providing support for denizenship status) with Hedemann-Robinson, *supra* note 67, at 586 (equating denizenship with a second rate citizenship). Speaking beyond the European context, Zolberg describes “cosmopolitan denizenship” as a better option than post-national citizenship, the latter being an unrealizable goal given the lack of global governance and rights enforcement mechanisms. Zolberg, *supra* note 171, at 518. See also Peter Schuck, *The Re-evaluation of American Citizenship*, 12 GEO. IMMIG. L. J. 1, 30 (1997) (also noting the problems of enforcement mechanisms in a theory of post-national citizenship). On a global scale, these points are well-taken; within the European Union, however, the crucial institutions of supranational governance, particularly an effective

ossification of the process, whereby TCNs continue co-existing with European citizens on a long-term basis as legal and social inferiors.²²³ Only a combination of secure residency rights, the freedom to move throughout the European Union, *and* opportunities for formal political participation fulfills the foundational ideals of the European Union and the full demands of political and social integration into host societies. TCNs should enjoy basic rights—especially those of political participation—*without* having to acquire a new national citizenship at all. Although denizenship might provide a temporary fix to the plight of some TCNs, it fails to redefine European citizenship or the relationship between Member State citizens and TCNs. It also maintains the primacy of national citizenship as the only true means by which rights can be secured with a high degree of long-term certainty and legitimacy.

In the end, a European citizenship for TCNs has the capacity to draw from all three of the citizenship models discussed in Section II.B.²²⁴ By extending political and free movement rights to TCNs, the recognition and value of European citizenship as *legal status* might substantially increase. Whereas EU nationals may appear to have been slow to take advantage of European citizenship,²²⁵ TCNs are better positioned to inject European citizenship with the dynamism it needs. In the process, TCNs would participate in economic, political, and social activities that maintain strong integrative features, but with potentially lesser countervailing responses from the guardians of national citizenship. In turn, the public profile of European citizenship could be elevated more rapidly and serve more efficiently as a device of identity formation. Finally, the inevitable discourse that would surround such a development might awaken national populations to the reality of a supranational citizenship that defies national strictures and accommodates constant forces of change and re-evaluation. In this sense, European citizenship would remain faithful to the project of an open-ended, constructive citizenship that forces citizenship and its fulfillment—at both national and European levels—more squarely into the public debate.

VI. THE FUTURE OF NATIONAL CITIZENSHIP

If European citizenship has the potential to function effectively as a tool of TCN integration, would its extension not remain a subtle assault on the relevance of national citizenship in the future? A clear answer remains elusive, but detaching European from national citizenship *will* require rethinking what national citizenship represents and how it should function

judiciary, do exist and explain why the European Union provides an excellent testing ground for such an experiment in non-traditional citizenship.

²²³ This assertion assumes that the rights of denizenship will always—in some form or another—remain inferior to the rights of European citizens. If there were no difference whatsoever, why maintain the distinction at all?

²²⁴ See *supra* Section II.B.

²²⁵ See *supra* note 128.

in the post-enlargement European Union.

The expansion of European citizenship to include TCNs—amidst ongoing debates over the distribution of sovereignty between Brussels and the Member States—offers a unique opportunity to restate the requirements of national citizenship. With less concern that tighter naturalization requirements would exacerbate obstacles to immigrant integration, Member States should find they have a freer hand to experiment with naturalization requirements. One possible outcome would be the creation of a market of national citizenships; TCNs, emboldened with the free movement rights of European citizenship, would have the opportunity to choose whether the rewards of any given national citizenship (and the related Member State labor market, school system, or other social benefits) merit the effort (e.g., language acquisition or cultural assimilation) to naturalize. European citizenship would already guarantee a floor of extensive rights, protections, and, perhaps someday soon, duties.

A. Return of the Cultural Nation

A true market of national citizenships both requires and legitimates a return of “the cultural nation.” National populations, largely but not exclusively defined today in terms of national *citizens*, would need to reevaluate what the *nation* stands for and requires of its members—its *nationals*. One would need to determine how far the sovereignty of the nation can legitimately extend; what legislative or administrative duties would remain exclusively national, as opposed to belonging to Brussels, or to the Member State? As already described, some Member States have begun to attach additional requirements—internal controls—to naturalization procedures, despite their potentially negative impact on TCN integration. There is considerable reason to question those policies designed to make naturalization more difficult (by stipulating excessive residence requirements or prohibiting dual citizenship). Without European citizenship rights, national requirements that place cultural demands—such as language acquisition or demonstration of “cultural appreciation”—on TCNs as the cost of access to basic rights are also problematic; they place unnecessary limits on who can participate meaningfully and productively in society. But if a widely accessible European citizenship were to function as a rights safeguard for TCNs and an alternative space for social and political integration, there would be less cause to object to naturalization procedures that take on a more overtly cultural bent. Several Member States have moved to emphasize their linguistic and cultural distinctiveness.²²⁶ It is not unreasonable for *the nation* to ask potential members to acquire competence in the national language or a basic

²²⁶ See *Feeling at Home, in The Longest Journey—A Survey of Migration*, ECONOMIST, Nov. 2, 2002, at 10 (describing language requirements in the U.K. and Denmark); *Fortuynism Without Fortuyn*, ECONOMIST, Nov. 30, 2002, at 44 (same for the Netherlands). Hoge, *supra* note 166 (describing U.K. proposals to require knowledge of English, Gaelic, or Welsh).

understanding of national history and institutions; it is a problem, however, if the *state* makes such claims on would-be citizens. In a world of competing and complementary national identities and spheres of belonging, there is nothing wrong *per se* with permitting the nation to impose cultural requirements, provided that such wide-ranging powers of exclusion are not concurrently exercised by the state—the governmental entity which extends and protects the set of basic human rights.²²⁷

The conflation of nation and state in the EU Member States suggests that national governments will maintain considerable—if not total—discretion over exclusion from the nation. But depending on how broadly Member States define the rights and duties attached to nationality in the future, their control over national membership may vary significantly in its effect on TCN integration. As more rights and powers are Europeanized, the relevance of nationality to social co-existence could diminish further. The presence of a working supranational government with effective enforcement mechanisms would make possible this experiment in division of control over the terms of membership for both the citizen and the national.

B. Citizenship and Nationality – A Problem of Semantics

A fundamental obstacle to understanding this idea of differentiated standards for membership in the *nation* and the *state* is the nearly absolute conflation of the relevant terms—and their conceptual conflation in the “nation-state.” When the only way to secure the rights that today are affiliated with citizenship was through the state, citizenship and national identity became interchangeable; the state was synonymous with the ethno-cultural nation.²²⁸ As a result, the terms *nation* and *state* collapsed into one another and have retained muddled meanings up through the present day.²²⁹ But the geopolitical circumstances that gave rise to this conundrum of semantics have changed significantly. Decolonization and

²²⁷ In this context, the state must be construed as the ultimate political body that meets basic liberal democratic criteria and can enforce its laws. The European Union, although not a “state” in the traditional sense, fits this definition; it is certainly more a state than a nation.

²²⁸ ELIZABETH MEEHAN, *CITIZENSHIP AND THE EUROPEAN UNION*, (Center for European Integration Studies, 2000) at 4, at http://aei.pitt.edu/archive/00000186/01/dp_c63_meehan.pdf.

²²⁹ French *nationalité* was not a legal concept before the French Revolution, but a sense of national feeling. The Revolution’s innovation of citizenship necessarily drew on nationality, and the terms remain interchangeable in French. See Dieter Gosewinkel, *Citizenship, Subjecthood, Nationality*, in *BETWEEN NATIONAL LEGACIES*, *supra* note 43, at 17, 28-29. See also Meehan, *supra* note 228, at 5 (“[I]t was not until 1962 that Irish official documents began to be clear that there was a difference between citizenship as nationality and citizenship as the capacity to exercise rights.”). Even translation of the provision declaring European citizenship suffered from inconsistent translations of the relevant terms in some countries. See Gerard-Rene de Groot, *The Relationship Between the Nationality Legislation of the Member States of the European Union and European Citizenship*, in *AN INSTITUTIONAL CHALLENGE*, *supra* note 16, at 115, 121.

the fall of communism have produced a less state-centered world.²³⁰ To those factors, one might add the contemporary transnational problems of non-state aligned terrorism; highly communicable diseases; increasingly interdependent global financial institutions; and dramatic advancements in world telecommunications and travel. Furthermore, individuals have increasingly sought and received legal recourse—in matters ranging from human rights abuses to copyright infringement—from sources of legal authority above or beyond the nation. Given the rise of supranational and transnational institutions that attempt to manage these problems, the semantic distinction between citizenship and nationality—or between the state and the nation—must be reexamined to make sense of what the decoupling of citizenship from nationality ultimately means.²³¹ A residency-based European citizenship might provide the necessary impetus for a restatement of the distinction.

C. From National Citizenship to Mere Nationality?

Even if the basic proposals of this Note were enacted, national citizenship would retain formidable sway in the European Union. National voting rights largely would remain exclusive to national citizens, and national governments would retain considerable areas of near exclusive policy-making authority. Defense, education, and taxation remain, for example, areas of predominant Member State control, although some overarching limitations on national government power do exist, whether coming from the European institutions, NATO, or other international bodies. For the near future, Member States will undoubtedly maintain significant control over these and other policy areas, although, as this Note has pointed out, areas of traditional Member State control—like immigration—are increasing difficult to manage alone. But in the short-term, national citizenship is not going anywhere, and the nation-state perseveres.²³²

However, there is no reason to view present-day national citizenship as a permanent legal phenomenon; nor must the nation-state be viewed as an inevitable and eternal form of political organization. At some point, Europe may be faced with the abandonment of national citizenship—as that term is now understood—altogether. Rather than a regime of concurrent European and national citizenship, Europeans may find that national citizenship—as a description of legal status or legitimate participation in

²³⁰ Zolberg, *supra* note 171, at 516.

²³¹ As far back as 1927, one commentator lamented the rampant misapplication of the ill-chosen word “nationality” and suggested “stateality” instead. Olivier Beaud, *The Question of Nationality Within a Federation*, in *DUAL NATIONALITY*, *supra* note 43, at 314, 315. However, “[r]edefining citizenship and nationhood in the older states of Western Europe . . . will be a much longer and more painful process.” Hollifield, *supra* note 106, at 61.

²³² See Anthony Pagden, *Introduction*, to *THE IDEA OF EUROPE*, *supra* note 53, at 2 (noting that the nation-state looks to persist for the “foreseeable future,” despite suspicions to the contrary).

political discourse—no longer accurately reflects legal and political life in the European Union. But while national citizenship may require transformation, the rise of “postnational” or “postmodern” societies need not signal the obsolescence of *nationality*, as some have suggested.²³³ The “decline” of national citizenship need not coincide with a decline in the diversity of national cultures.

An alternative, perhaps far-fetched today, would be a recharacterization of national citizenship to what it really is, or aspires (with some difficulty) to be—*nationality*, or national identity. Nationality could assume a value of more descriptive than political or legal content, although some privileges or responsibilities would still attach to one’s nationality, however defined. Cultural and educational policy (or portions thereof) could be left to the nation, for example, which henceforth could operate independently (or with some high degree of autonomy) from Member State governments. European citizens—defined by residency or birthright—would be able to vote not only in European and local elections, but in Member State elections in their place of residence. Quasi-governmental bodies would be left to administer “nationality,” meaning control over admission to the nation and the areas of policy placed under national control.²³⁴ Just as new applicants for national membership might be reasonably required to demonstrate language ability or familiarity with the national history, similar demands could even be made on birthright members. Past a certain age, nationals might be required to demonstrate an upkeep of language skills or a consistent engagement with national institutions. Returning again to the idea of markets, one might similarly imagine a market of nationalities, competing for new members and to retain the old; nationalities could determine how loose or tight the bonds of membership would need to be. In a sense, this would represent the privatization of nationality. Traditional assumptions about nationality and citizenship would be reversed. The former, traditionally a status “one is born into,” would no longer be fixed; the latter, traditionally contingent on the state’s grant of rights or the individual’s affirmative act of naturalization, would become universal and inalienable.

Despite efforts to foster a European culture, the European Union, consistent with its recognition of the great diversity within its borders, largely has omitted culture from “communitarization.” For some, this means that European culture will “continue to be a conglomerate of nation-

233 See WISTRICH, *supra* note 88, at 15 (“Perhaps in a ‘postmodern society’ where individuals increasingly move from one country to another to work and live, the concept of nationality may be obsolete”). It is difficult to tell whether Wistrich’s “nationality” refers to “national citizenship” or something else, illustrating the pervasive semantics problem.

234 This Note does not purport to explain with any degree of specificity the potential scope or administrative shape of a “national status” decoupled from the apparatus of the state. The question of separating political and cultural membership from each other is a challenging and frustrating exercise, as would be ensuring that “national interests” would not simply engender invidious discrimination and anti-social behavior through new institutions. On both conceptual and logistical levels, the notion of a non-state centered nationality requires further and careful elaboration.

state cultures.”²³⁵ This is mostly the right idea, but one need not restrict national culture to the political confines of a nation-state. As this Note has tried to demonstrate, the inability to separate the legal and political basis of citizenship from the normative and spiritual elements of nationality has been the obstacle to a dynamic European citizenship—and to the meaningful participation and integration of TCNs—all along. In these ways, it has hindered effective diversity management. European society no longer needs to instrumentalize nationality as “a proxy for defining the political community.”²³⁶ This is the point of a constructive European citizenship to undergird a system of supranational governance capable of both integrating TCNs and maintaining national histories, languages, and traditions. References to a “postnational” Europe are misleading, although recognizing that “culturally different national communities can exist within the same political community” is essential.²³⁷ The future of the European Union is not *postnational*, but rather about how national diversity—and one’s own national affiliations—can serve as useful points of reference among many for the individual citizen operating within a system of overlapping allegiances, interests, and loyalties.

VII. CONCLUSION

This Note has examined the dilemma of diversity management in the European Union by exploring the complex relationship between TCNs and the concurrent regimes of European and national citizenship. The status quo deprives TCNs of fundamental rights and undermines European integration. Furthermore, the processes of migrant integration at the national level suffer from inherent weaknesses that frustrate the ability of Member States to manage their own internal diversity. Finally, the status quo denies policy-makers the opportunity to seize upon the potential of European citizenship to offer innovative solutions.

In turn, this Note has proposed that access to European citizenship should be severed from the requirements of national citizenship and based on minimal residency requirements. An expanded European citizenship would benefit the project of migrant integration into local, national, and transnational societies, and provide needed impetus to the further democratization of European governance. In addition, a redefined European citizenship could trigger a fundamental rethinking of national citizenship, potentially undermine the destructive influence of the extreme right, and, perhaps, lead to a more complete decoupling of the political and legal content of *citizenship* from the idea of *nation*.

²³⁵ M. Rainer Lepsius, *The European Union: Economic and Political Integration and Cultural Plurality*, in BETWEEN NATIONAL LEGACIES, *supra* note 43, at 205, 220.

²³⁶ See Kostakopoulou, *supra* note 9, at 201 (“Nationality has commonly been taken as a proxy for defining the political community and the transplantation of this principle to the European level has resulted in exclusion of Europe’s long-standing residents of migrant origin.”).

²³⁷ See, e.g., D’Appollonia, *supra* note 54, at 189.

Although the ramifications of an inclusive European citizenship are speculative, they strongly suggest that European policy-makers should take into account the possibilities that European citizenship provides for the management of national diversity, at both supranational and national levels. New challenges and problems call for new ways of thinking about deeply embedded institutions of legal, political, and social organization. An open-minded approach to the possibilities of European citizenship—and its engagement with the contested position of TCNs in the European Union—would be a dramatic, but welcome, development.