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INTERPRETING THE CONCEPT
OF EUROPEAN UNION CITIZENSHIP

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1. Introduction

The loyalty of citizens to a single political authority can no longer be taken for granted. In a world with high levels of migration, complex political and economic interdependencies, new political formations and structures of government at subnational, national and international level, global telecommunications and mass media, and an increasingly splintered notion of personhood which makes 'universal citizenship' difficult to envisage, this loyalty may need to be competed for by states, governments and other political authorities.[2] This contention is particularly strong if it is applied in the context of citizenship of the European Union, a legal concept introduced by the Treaty of Maastricht (or Treaty on European Union). This Treaty brought about crucial amendments to the Treaty of Rome establishing what is now known as the European Community, especially in the arena of 'political union', as well as the perhaps better known developments in relation to Economic and Monetary

Union and the introduction of a single currency. Our focus of interest in this paper is Union citizenship, which brings about a new level of complexity in relation to the constellation of identities within Europe, if only because at its most basic it decouples the link between nation and citizen and establishes an embryonic and as yet largely unexplored new relationship.[3]

Citizenship of the Union has been established by constitutional *fiat*, through the medium of Treaty provisions signed, ratified and consequently formally accepted in full by all the Member States of the EU (Part Two of the Treaty - Articles 8-8e EC). It will receive further constitutional affirmation once the Treaty of Amsterdam, agreed in June 1997 and formally signed on October 2 1997, comes into force following ratification.[4] Through small additions to the provisions, the new Treaty confirms the existence of the status of Union citizen, as *complementary* to national citizenship. Notwithstanding this *complementarity*, important rights and duties are contained in the provisions of what remains – after the Treaty of Amsterdam – Part Two of the Treaty – and in certain derivative legislative instruments adopted by Council of the EU – on matters such as free move-

[3] For further exposition see J. Shaw, 'Citizenship of the Union: Towards Post-national Membership?', in Academy of European Law (ed.), *Collected Courses of the Academy of European Law*, vol VI, Book 1, Kluwer Law International, The Hague, 1998, pp237-347 (also published as Harvard Jean Monnet Working Paper No. 6/97); ibid, 'European Union Citizenship: The IGC and Beyond', (1997) 3 *European Public Law* 413; ibid, 'The Many Pasts and Futures of Citizenship in the European Union', (1997) 22 *European Law Review* 554-572; ibid, 'Interpreting European Union Citizenship: A Contribution to European Identity?', (1998) 61 *Modern Law Review* 293-317; ibid, 'Constitutional settlements and the citizen after Amsterdam', in K. Neunreither and A. Wiener (eds.), *Beyond Amsterdam: Institutional Dynamics and Prospects for Democracy in the EU*, Oxford University Press, Oxford, 1999 (also published as Harvard Jean Monnet Working Paper No. 7/98); ibid, 'The Problem of Membership in European Union Citizenship,' in Z. Bankowski and A. Scott (eds.), *The European Union and its Order*, Oxford: Blackwell, forthcoming; S. Fries and J. Shaw, 'Citizenship of the Union: First Steps in the Court of Justice', (1998) 4 *European Public Law* 533-559.

[4] Rewording of Article 8 EC [Article 17 after renumbering].

ment, voting in European Parliamentary and local elections, consular and diplomatic protection and petitions to the European Parliament and applications to the European Ombudsman. Compliance with the principles of political citizenship enunciated in these provisions – if only at the formal level – has largely been brought about through implementation of EU legislative instruments at national level by the Member States[5] or through necessary EU-level innovations such as the appointment of the Ombudsman. However, whatever the character of these rights in legal or constitutional terms, their very existence does not in itself establish any claim to citizens' loyalty on the part of the European Union or European Community. The legal structures do not bring about a *community* or *union*[6] of those persons covered by the legal definition of citizenship of the Union – namely nationals of the Member States. In other words, while the legal structures certainly establish a formal *vertical* relationship between the EU structures of government (the EU 'polity-in-the-making') and the class of Union citizens, we can derive no assumptions from this about the nature or existence of the *horizontal* relationship (e.g. sense of cultural identity, of nationhood or of civic obligation) between those citizens which binds them together.[7]

It is entirely understandable (if not predictable) that a form of citizenship would take root in the EU legal order in the 1990s, both because of internal preoccupations with the affective and political dimensions of integration and because of external concerns with the continuing relevance of 'citizenship' in the (post)modern world against a paradoxical background of simultaneously increasingly globalization (including cultural globalization) and sharpening senses of regional identity and

[5] 'Real' implementation must, in many cases, be doubted: see Second Report of the European Commission on Citizenship of the Union: http://europa.eu.int/comm/dg15/citizen/citeng.htm.

[6] Use of the lower case is intentional.

[7] Note, 'The Functionality of Citizenship', (1997) 110 *Harvard Law Review* 1814.

ethno-nationalism. At the same time, it is equally clear that the EU's engagement with concepts of citizenship could never be a simple and straightforward adoption and application of existing concepts developed within the forum of the nation state and nation state-building, once the full historical legacy of citizenship is acknowledged. The recognition of that legacy demands, as we shall see, the acceptance of citizenship as a contested domain in both the political and the intellectual senses of the term.

Thus, attempts by the EU institutions, in particular the Commission, to 'compete' directly for the loyalty of citizens by seeking to construct some form of 'European identity' by the top-down imposition of symbols of statehood such as a 'European' anthem or flag have generally been doomed to failure or, worse, derision and the accusation that public money is being needlessly wasted. On the other hand, more sophisticated, and also successful, attempts to ginger up a sense of 'Europeanness' can be found especially in the domain of education, where funding programmes have proved exceptionally popular and have encouraged widespread mobility of students and staff in Universities. Ultimately, however, European citizenship cannot offer a simple panacea for other inadequacies of the 'European project', such as the lack of democracy or transparency in decision-making or a sense of remoteness from the European Union political institutions which have led to widespread discontent and alienation in many Member States. This is because citizenship, while a popular concept in both political and intellectual discourse, is itself a multi-textured and intensely contested concept, offering a many-faceted set of lenses through which to observe aspects of the 'human condition'. As such, it offers one way of understanding or postulating, for example, the balance between wealth creation based on individualism and social protection based on social and economic solidarity, or the relationship between humankind and the environment.

The story of citizenship is intimately linked to the story of the emergence of the nation state as a dominant form of political organisation. A legal concept of 'nationality', more or less loosely connected to an ethnic sense of the 'nation', is frequently invoked to distinguish between the citizen insiders and the alien outsiders. But the formal legal concept is an inadequate description of the meaning of 'citizenship' as it is currently constituted. In the late twentieth century, it is almost as common to use the discourse of citizenship as a (sociological) framework for understanding and investigating the extent to which individuals can lay claim to full membership of an (economic) society, bearing in mind the increasing crisis of the modern welfare state, or as an (anthropological) framework for understanding psycho-social concepts of human identity, as to use it in relation to concepts of nationalism and statehood. Similarly, it is clear that concepts of 'social citizenship' are less obviously connected to the vocation of a particular nation state, but they too are highly controversial. In that context, in particular, the degree of contestation within citizenship has increased as it is used as a vehicle for argument both by those seeking the recognition of difference and by those whose primary reference point is a concept of equality. The plasticity of citizenship allows it to be reconceptualised to incorporate elements of both universalism ('we are all equal') and difference ('equality cannot be allowed to mask the fact that we are divided by race, gender, ethnicity, religion, etc. as well as unified by our personhood'). All of these insights reinforce the highly complex nature of citizenship as a prism or lens through which to examine aspects of the human condition and suggest that any given notion of citizenship cannot simply be transplanted from one economic or political location to another without full regard to context.

The objectives of this paper are to present in brief terms the nature and scope of citizenship of the Union, as a legal construct (Section II), focusing upon its emergence in the Treaty of Maastricht and its implementation hitherto but extending the

review to a wider account of citizenship postulated according to the classic triad of civil, political and social rights. Working outwards from this construct, I shall then present a critical account of both the problems and the possibilities which are associated with citizenship when applied in the EU context (Section III). The discussion of problems will concentrate upon the limitations inherent in discussing citizenship as an object of study, if no account is taken of the very specific conditions offered by the dynamic project of 'integration' within which Union citizenship has emerged and is now developing or of the essentially contested nature of citizenship which demands a critical approach. The discussion of possibilities concentrates on understanding citizenship as having a context-specific meaning, as a potential lens for aspects of the 'European condition' and indeed, as a useful vehicle for explicating certain fundamental problems of polity-formation in the EU context. In particular, its utility can be seen in relaton to issues such as democracy, legitimacy and accountability, the status of individuals and individual rights, and the efficiency and efficacy of government. In that sense, citizenship is deployed less as an object of study in itself and more in view of the methodological richness and diverse theoretical heritage that citizenship studies in general can offer. The final section outlines in summary form an approach to citizenship of the Union which is sensitive to the rich heritage of both citizenship studies and integration studies. Space precludes both detailed discussion of the legal content of citizenship of the Union as it currently stands and detailed empirically based explication of how the model set out in Section IV might operate within the EU.[8]

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[8] See further the references at n.2 above, the literature cited therein and, amongst the most recent literature: *The European Union: immigration, asylum and citizenship*, Special Issue of the *Journal of Ethnic and Migration Studies*, Vol. 24, No. 4, October 1998 (ed. A. Favell); M. La Torre (ed.), *European Citizenship: An Institutional Challenge*, The Hague: Kluwer Law International, 1998; U. Preuss and F. Requjo (eds.), *European Citizenship, Multiculturalism, and the State*, Baden-Baden: Nomos, 1998; R. Koslowski, 'EU Citizenship: Im-

2. *The Nature and Scope of citizenship of the union*

Citizenship of the European Union finds formal 'constitutional' expression in Part Two of the EC Treaty which sets out the two classic elements of citizenship, namely a definition of membership which allows the identification of the class of citizens and statements constituting the citizen as holder of rights and bearer of duties. Thus Article 8 EC – as introduced by the Treaty of Maastricht – provided:

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.

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

The Treaty of Amsterdam adds a new sentence to paragraph 1: 'Citizenship of the Union shall complement and not replace national citizenship', and renumbers these provisions Articles 17-22. Articles 18-22 (ex Articles 8a-8e[9]) set out in more detail the principal rights associated with Union citizenship. There is in fact no further reference to duties and that aspect of citizenship - ordinarily understood in a broader citizenship theory context to be a key element of how individuals are constituted as sovereign within a given polity - remains wholly obscure as yet. Principal amongst these rights are freedom of movement and consequential rights of residence for EU citizens, rights to consular and diplomatic protection, voting and standing rights in local and European Parliament elections, and political rights of access to the EU institutions and the European Ombudsman. However, not all citizenship rights are clustered in the citizenship section of the Treaty; in addition, they are to be found in

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plications for Identity and Legitimacy', in T. Banchoff and M.P. Smith (eds.), *Legitimacy and the European Union: the contested polity*, London: Routledge, 1999; J. Weiler, 'To be a European citizen: Eros and civilization', in ibid, *The Constitution of Europe*, Cambridge: Cambridge University Press, 1999.

[9] Following renumbering, the common practice is to note the former number of an Article in the EC Treaty as 'ex Article 8', etc.

other provisions of the EU Treaties,[10] in the case law of the Court of Justice where rights - especially free movement and non-discrimination rights - have been formulated, restated or reinforced, and in secondary legal instruments adopted by the EU institutions.

One reason for this complex legal structure is that citizenship was not in truth a policy innovation of the Treaty of Maastricht. The contribution of that Treaty was, of course, the introduction of the formal provisions presented here, which were included after extensive and important debate during the Intergovernmental Conference on political union which concluded in 1991, a debate which was initiated principally by a Spanish Memorandum on citizenship. Behind that Memorandum and that constitutional move, there lay, in truth, a developing 'practice' of citizenship policy, extending over a period of twenty years, which was to be found principally in the activities of the Court of Justice and the European Commission.[11] This has seen a gradual solidification of the resources of citizenship from 'mere' ideas into concrete policy outcomes with legal force. Hence the clustering of certain rights in Part Two of the EC Treaty lies over an existing framework of legal rules and policy-making activities deeply embedded in the day-to-day practices of the EU institutions.

One might usefully summarise the *status quo* of Union citizenship rights by reference to the tripartite grouping of citizenship rights suggested by TH Marshall[12] and adopted by many writers

[10] Perhaps the most significant of these is Article 12 EC (ex Article 6) which provides for non-discrimination on grounds of nationality, which likewise only protects EU citizens/nationals of the Member States.

[11] On the development of the practice of citizenship see A. Wiener, *Citizenship Practice: Building Insitutions of a Non-State*, Boulder, Col.: Westview, 1997; ibid, 'Assessing the Constructive Potential of Union Citizenship - A Socio-Historical Perspective', *European Integration online Papers*, Vol. 1 (1997), No. 017, (http://eiop.or.at/eiop).

[12] T.H. Marshall, *Citizenship and Social Class*, Cambridge: Cambridge University Press, 1950 esp. pp28-29. A point of interest is, however, that the development of citizenship rights has not followed the classic linear pattern of civil,

since then: civil rights, political rights and social rights. This also has the advantage of establishing as a reference point a widely accepted 'ideal-type' for citizenship – at least in the national domain. As will be apparent, in the EU domain when citizenship is assessed against this paradigm the existing rights and duties appear as something of a patchwork; moreover the pattern is so far incomplete and lacking in a certain degree of coherence. Although what follows is not a complete restatement, but merely highlights some key features of citizenship rights in the EU context, it nonetheless offers a more inclusive approach to stating the scope of citizenship in the EU at present than an approach solely based on the formalities of Part Two of the Treaty. It has regard to the full range of EC law and policy, allowing us in turn to flesh out the 'thin' or 'minimal' statements in Part Two of the EC Treaty, employing a form of contextualisation within the framework of a 'thicker', 'maximal' vision of what it is to be a full 'member' of the EU under the legal, political and socio-economic orders of the EU.[13] That contextualisation forms an important stepping stone towards the interpretation of Union citizenship suggested in Section IV.

Civil Rights

The civil rights of EU citizens are primarily constituted through the existence of the European Community as a 'community of law'. So, according to Deidre Curtin,[14] 'the unique sui generis nature of the Community, its true world-historical significance [is constituted by its character] as a cohesive legal unit which confers rights on individuals.'

It is customary to credit the European Court of Justice with the achievement of 'constitutionalising' the EC Treaties, princi-

followed by political, followed by social. For a fuller audit of EU citizenship rights see Shaw, 'Citizenship of the Union: Towards Post-National Membership', above n.2.

[13] Terminology drawn from M. Walzer, *Thick and Thin: Moral Argument at Home and Abroad*, Notre Dame: University of Notre Dame Press, 1994.

[14] 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', (1993) 30 *Common Market Law Review* 17 at p67.

pally by upholding the authority of EC law in relation to national law. Thus EC law is superior to national law, and takes effect within the national legal orders as a superior and autonomous source of law such that individuals can very often derive individual justiciable rights from provisions of EC law which national courts must uphold. This process of 'constitutionalisation' has assisted in the institution of a 'rule-of-law' ideology within the European Community, allowing partisans of the process of integration to point to the extent to which and the length of time for which the EC and now the EU has resembled a developed federal system, within which respect for the law and a settled hierarchy of norms with EC law at the apex of the pyramid is paramount. Other key elements have included the development of a jurisprudence of fundamental rights, and the elaboration of key principles such as that contained in Article 12 (ex Article 6) EC which prohibits (within the scope of competence covered by the EC Treaty) discrimination on grounds of nationality against nationals of Member States. Furthermore, the underlying market principles of EC law, in particular the free movement of persons, have been elevated to the status of 'fundamental' right. Of course, the message that this delivers is a little mixed since it creates a confusion between the idea of the 'market citizen', the *Marktbürger*, who is a limited figure of the economic sphere, and the 'true' citizen who must be sovereign within a democratic political system.[15]

In other words, the question remains whether the extent of preoccupation with the civil rights of citizens of the Union has not been simply driven by the twin pillars of the logic of the rule-of-law and integration teleologies pursued by the Court of Justice and the logic of the market framework of the treaties. A significant change comes about with the ratification and coming into force of the Treaty of Amsterdam, because this creates the

[15] See generally M. Everson, 'The Legacy of the Market Citizen', in J. Shaw and G. More (eds.), *New Legal Dynamics of European Union*, Oxford: Oxford University Press, 1995.

possibility in Article 13 (ex Article 6a) for the Council of the EU to adopt – albeit in relation only to the spheres of competence covered by the EC Treaty itself – measures guaranteeing a comprehensive right to non-discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[16]

Political Rights[17]

It is well known that many of the elements of 'political structure' in the EU lag way behind the relatively sophisticated edifice of the legal system. Both the practice of democracy, and the associated political rights for citizens, remain pale shadows of the national 'versions' of democracy. The EC Treaty itself concentrates upon limited electoral rights in local and European Parliamentary elections, and upon forms of non-judicial access to the political institutions through the medium of petitions and complaints. Democratic participation in the form of European Parliament input into legislative decision-making has been growing at a steady rate, but the absence of a cross-European culture of political parties maintains a dislocation between the laudable work of MEPs to ensure democratic accountability and the basis upon which people actually vote in European Parliamentary elections. The role of the European Parliament in the March 1999 resignation of the European Commission, in the wake of the Report of the Wise Men, marks a new transition on the political muscle of the European Parliament, but the rupture between the exercise of political power and popular representation remains as strong as ever.

[16] For more details see Shaw, 'European Union Citizenship: The IGC and Beyond', above n.2; E. Szyszczak, 'Building a European Constitutional Order: Prospects for a General Non-discrimination Standard', in A. Dashwood and S. O'Leary (eds.), *The Principle of Equal Treatment in EC Law,* London: Sweet and Maxwell, 1997; L. Waddington, 'Article 13 EC: Mere Rhetoric or a Harbinger of Change?', (1999) 1 *Cambridge Yearbook of European Law*, forthcoming.

[17] See further Shaw, 'European Union Citizenship: The IGC and Beyond', above n.2; H. Lardy, 'The Political Rights of Union Citizenship', (1996) 2 *European Public Law* 611.

A key area of development is that of transparency, especially the right of access to the documents of the EU institutions. Initiatives of a non-constitutional nature arising particularly out of the post-Maastricht malaise have created the opportunity for actions to be brought in the two EU courts by individuals and indeed by one Member State with a strong culture of openness in government (the Netherlands).[18] Judicial developments have seen the Court declaring in Netherlands v. Council that:

'the domestic legislation of most Member States now enshrines in a general manner the public's right of access to documents held by public authorities as a constitutional or legislative principle.

In addition, at Community level, the importance of that right has been reaffirmed on various occasions, in particular in the declaration on the right of access to information annexed (as Declaration 17) to the Final Act of the Treaty on European Union, which links that right with the democratic nature of the institutions. Moreover, (...) the European Council has called on the Council and the Commission to implement that right.'[19]

To an extent, that concern is mirrored in the new post-Amsterdam Treaties. Article 1 TEU (ex Article A) provides for decisions to be taken as 'openly as possible' and new provisions in the EC Treaty,[20] while avoiding taking the key step of announcing a constitutional 'citizens'' right to freedom of information, provide for access to European Parliament, Council and Commission documents subject to general principles which will allow the Council to continue to protect the secrecy of much of its business by invoking the 'public interest'.

Social Rights

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[18] Case T-194/94 *Carvel and The Guardian* v. *Council of the EU* [1995] ECR II-2765; Case C-58/94 *Netherlands* v. *Council of the EU* [1996] ECR I-2169; Case T-105/95 *WWF (UK)* v. *Commission*, judgment of March 5 1997.

[19] Case C-58/94 *Netherlands* v. *Council* [1996] ECR I-2169 at paras. 34 and 35.

[20] Article 255 EC (ex Article 191a).

At first blush, in view of the rather fragmentary 'social dimension' of the EU, one might be tempted to conclude that the social rights of EU citizens are exceedingly sparse. However, if one reads social citizenship in the EU against a broader canvass of socio-economic citizenship this allows a revisioning of social rights of citizenship in three parts: market citizenship, industrial citizenship and welfare citizenship. Perhaps the strongest message of a review of social citizenship rights in the EU is how the market order established by the framework of 'fundamental freedoms' to be found in the EC Treaty simultaneously both empowers and constrains the EU citizen. It offers new possibilities and rights in relation to the domains of employment, production and consumption, where the exercise of individual 'choice' can in some senses be seen as contributing to the process of building the EU as a political as well as economic entity. But it also constructs a limited market-oriented picture of the citizen in which welfarist principles find it hard to establish a foothold in hostile territory. For instance, in relation to sex discrimination law – long lauded as a 'success' of EU social policy – the Court of Justice draws a stark distinction between employment related discrimination, and issues which arise directly out of (traditional) divisions of labour within the domestic household or the family.[21]

At the same time, the rhetoric of social policy remains strong. The Commission is a forceful proponent of the idea of a 'European Social Model';[22] moreover, the 1996 report of the independent *Comité des Sages* on a 'Europe of civic and social

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[21] E.g. Case 184/83 *Hofmann* v. *Barmer Ersatzkasse* [1984] ECR 3047; see generally T. Hervey and J. Shaw, 'Women, work and care: women's dual role and double burden in EC sex equality law', (1998) 8 *Journal of European Social Policy* 43-63; G. More, 'Equality of Treatment in European Community Law: the Limits of Market Equality', in A. Bottomley (ed.), *Feminist Perspectives on the Foundational Subjects of Law*, London: Cavendish, 1996.

[22] See generally Shaw, 'The Many Pasts and Futures', above n.2; on the relevance of the European Social Model for policy see most recently former Commissioner Padraig Flynn, 'A Social Model for the New Millenium', Lecture, Harvard University European Union Center, March 1999.

rights' also contains a powerful defence not only of the need for such rights in a 'People's Europe' but also of the empowering nature of bottom-up processes of constitution-building in which individuals and social groups are involved in the formulation of key statements of citizens' rights.[23]

This review of the current *acquis* of Union citizenship has linked the concept the evolving framework of EU law and policy. To deliver a 'picture' of a concept of citizenship based on a snapshot at any given moment of history loses sight of both the dynamic nature of citizenship itself – constantly evolving, rarely if ever static – and the dynamism of EU polity-formation. However, it forms a useful backdrop against which Citizenship of the Union can be reconceptualised in the following sections.

3. *Problems and possibilities of a concept of union citizenship*

This section presents some of the difficulties often encountered in studies of citizenship in the EU context, leading to a discussion of possible ways of overcoming the conceptual obstacles to a fuller account of Union citizenship.

The approach so far taken in this paper has been essentially descriptive of the legal rights of EU citizens - with elements of normativity and prescription in circumstances where I have seen fit to suggest what EU citizens rights *should* be. In terms of approach, a contextualised perspective has been adopted, with legal rights placed in a broader context of the overall political and socio-economic systems of the EU and against the backdrop of an 'ideal-type' of citizenship based on a triad of civil, political and social rights. However, it is difficult for any work on Union citizenship to go beyond the level of description, contextualised description or bare 'wish-list' without a critical reading of how Union citizenship should be conceptualised.

[23] *For a Europe of civic and social rights*, Report by a Comité des Sages chaired by Maria de Lourdes Pintasilgo, Luxembourg: OOPEC, 1996.

This limitation is evident whether the descriptive focus is upon the implications of the nationality referent for Union citizenship in Article 17 EC (ex Article 8) which depends upon the legal and constitutional systems of the Member States, upon the centrality of the right of free movement and its market origins (Article 18 EC (ex Article 8a) with links to provisions such as Articles 39 and 43 EC (ex Articles 48 and 52)), or upon the detailed operationalisation of the political rights of petition or complaint or the electoral rights provided for elsewhere in Part Two of the Treaty.

Critical work on Union citizenship thus far has tended in two directions. It has offered either a critique of the narrow terms of the definition of 'who is an EU citizen' and in particular the exclusion of lawfully resident third country nationals from EU citizenship and consequently rights of free movement, or an analysis of the limited scope of citizenship rights such as to lead, for example, to the practical exclusion of certain groups such as non-workers, or gays and lesbians.[24] In truth, work which critically examines the limits of EU citizenship needs to go a step beyond this approach, and acknowledge that a critical concept of citizenship must be deployed from outset, and not merely a critical perspective on the scope of Union citizenship.

[24] E.g. C. Lyons, 'Citizenship in the Constitution of the European Union: rhetoric or reality?', in R. Bellamy (ed.), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives*, Aldershot; Avebury, 1996; M. Feldblum, 'Reconfiguring Citizenship in Europe', C. Joppke (ed.), *Challenge to the Nation-State: Immigraton in Western Europe and the United States*, New York and Oxford: Oxford University Press, 1998; R.A. Elman, 'European Union Citizenship: New Rights for Whom?', in P.-H. Laurent and M. Maresceau (eds.), *The State of the Union*. Vol. 4, Boulder, Col.: Lynne Rienner, 1997; A. Kiernan, 'Citizenship - The real democratic deficit of the European Union?', (1997) 1 *Citizenship Studies* 323; R. Hansen, 'A European citizenship or a Europe of citizens? Third country nationals in the EU', (1998) 24 *Journal of Ethnic and Migration Studies* 751-768. Cf. R. de Lange, 'Paradoxes of European Citizenship', in P. Fitzpatrick (ed.), *Nationalism, Racism and the Rule of Law*, Aldershot: Dartmouth, 1995, whose critique extends also to a critique of the rule-of-law ideology of the Court of Justice which represents such a crucial driving force within the EU.

Only then will it be possible to scratch below the surface veneer of discussions of nationality rules and positive legal rights which dominates much mainstream EU citizenship scholarship,[25] especially that appearing in the legal studies domain.[26]

So, for example, one might adopt a theory of constructive citizenship, against the background of the acknowledged indeterminacy in political and social relationships generated by the increasingly uncertain coupling of nation, state and nationalism. From within the domain of political philosophy, Theodora Kostakopoulou[27] suggests seven propositions which uphold her theory of constructive citizenship; of these, perhaps the most important is the one which rejects an essentialist concept of individual identity or foundational communities as the basis for citizenship but suggests instead that the European Union might evolve as a 'community of concern and engagement.'[28] Set along-

[25] For a more extended critique of citizenship scholarship in the legal domain see Shaw, 'Interpreting European Union Citizenship: A Contribution to European Identity?', above n.2.

[26] Examples of such scholarship include: A. Rosas and E. Antola (eds.), *A Citizens' Europe. In Search of a New Order*, London: Sage, 1995; C. Closa, 'The concept of citizenship in the Treaty on European Union', (1992) 29 *Common Market Law Review* 1137; ibid, 'Citizenship of the Union and Nationality of Member States', 32 *Common Market Law Review* 487; D. O'Keeffe, 'Union Citizenship', in D. O'Keeffe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, Chichester: Chancery/Wiley, 1994; S. O'Leary, *The Evolving Concept of Community Citizenship*, The Hague: Kluwer International, 1996; E. Marias (ed.), *European Citizenship*, Maastricht, European Institute of Public Administration, 1994; S. Hall, *Nationality, Migration Rights and Citizenship of the Union*, London: Graham and Trotman, 1995.

[27] T. Kostakopoulou, 'Towards a Theory of Contructive Citizenship in Europe', (1996) 4 *Journal of Political Philosophy* 337; see also ibid, 'European Union citizenship as a model of citizenship beyond the nation state: possibilities and limits', in A. Weale and M. Nentwich (eds.), *Political Theory and the European Union: Legitimacy, constitutional choice and citizenship*, London: Routledge, 1998 and ibid, 'European citizenship and immigration after Amsterdam: openings, silences, paradoxes', (1998) *Journal of Ethnic and Migration Studies* 639-656.

[28] Above n.26 at p346. Compare the different approaches of Jürgen Habermas ('constitutional patriotism' in 'Citizenship and National Identity', in B. van Steenbergen (ed.), *The Condition of Citizenship*, London: Sage, 1994), Joseph

side this underlying precept are propositions about the need for a problematized politics of 'belonging' or membership, a critical reinvention of the language of rights, the acceptance of a public domain for decision-making and participatory democracy, the upholding of values of social justice, and the awareness of multiple commitments and shifting identities which affect people's abilities to be 'full' and active citizens. The paper concludes with a call for an open concept of political life which allows constant contestation to be a way of life rather than a deviant practice.[29]

Similarly, Antje Wiener examines the constructive potential of Union citizenship, but from a perspective which uses a socio-historical frame of analysis drawn from critical social history and critical international relations scholarship to set out the creeping development and concretisation of the 'resources' of citizenship from ideas into practical policies.[30] The detailed presentation of empirical evidence concerning these policies demonstrates the point at which this approach diverges from the more abstract approach of Kostakopoulou. Wiener's work is grounded in the process of interpreting and explaining the evolution of European integration, from a broad institutionalist perspective on how those policies are made and with a focus on the

Weiler ('supranationalism' in Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision', (1995) 1 *European Law Journal* 219), and Etienne Tassin ('public spaces of fellow-citizenship' in 'Europe: A Political Community', in C. Mouffe (ed.), *Dimensions of Radical Democracy*, London: Verso, 1992) to non-ethnic notions of a 'community' of Europeans. So far as each of these (and indeed other) models lack empirical detail, the choice between them seems largely an abstract one at this stage.

[29] Cf. 'Citizenship Bound and Citizenship Unbound', in K. Hutchings and R. Dannreuther (eds.), *Cosmopolitan Citizenship*, Basingstoke: Macmillan, forthcoming: 'a community can only come about in contesting its very constituency and thus forever postponing its fixity'.

[30] Wiener, 'Assessing the Constructive Potential of Union Citizenship - A Socio-Historical Perspective', above n.10; see also ibid, 'The Embedded Acquis Communautaire: Transmission Belt and Prism of New Governance', (1998) 4 *European Law Journal* 294-315.

governmental processes and institutions of a polity-in-the-making.[31] Following closely this methodological and theoretical approach, I would argue that it is important to adopt an approach to interpreting and using a construct of Union citizenship which draws not only the critical theories of citizenship, but also upon the contribution of regional integration theory to understanding how and why policies emerge in the EU context and to identifying the crucial actors and interests within different policy fields and at different levels of policy-making. It is an approach which takes full advantage of the rich theoretical canvasses offered by both citizenship theory and integration theory at the present time.

4. Reinterpreting union citizenship

The first element of the approach focuses on theoretical approaches to citizenship which focus on a dialectic of identity and rights, producing a space in which a 'practice' of citizenship is constantly negotiated and re-negotiated. An evocative statement of this position comes from Charles Tilly who identifies 'citizenship as a set of mutual, contested claims between agents of states and members of socially-constructed categories: genders, races, nationalities and others'.[32] This goes well beyond - but is not inconsistent with - the accepted political definition of citizenship as 'full membership of a community'.[33] Tilly's ap-

[31] See P. Schmitter, 'Is it Really Possible to Democratize the Euro-Polity? And if so, what role might Euro-Citizens play in it?', ms. Stanford, January 1996.

[32] C. Tilly, 'Citizenship, Identity and Social History', in C. Tilly (ed.), Citizenship, Identity and Social History, Supplement 3, International Review of Social History, Cambridge: Cambridge University Press, 1996 at pp4-6.

[33] David Held offers the following definition: 'Citizenship has meant a reciprocity of rights against, and duties towards, the community. Citizenship has entailed membership, membership of the community in which one lives one's life. And membership has invariably involved degrees of participation in the community': D. Held, 'Between State and Civil Society: Citizenship', in G. Andrews

proach has to be read in the light of the overriding principle of equality, although it suggests that 'equality' in conditions of fractured and multiple identities is unlikely to be easy to 'fix' and may in fact be a dynamic rather than a static concept. In terms of the meaning of Union citizenship, it is not so dissimilar to the approach suggested by Michelle Everson who sees this form of citizenship, at this stage of its development, as concerning (equal) rights of participation in 'the institutionalisation of a nascent form of European civil society'.[34] However, it adds to that an additional dimension concerning the formation and negotiation of identity which can, as has been shown, for example, by Raymond Breton, contribute in crucial ways to the formation of transnational polities.[35] As will become apparent, it is assumed in this approach that the community of citizens or members may be 'beyond the nation state', in other words, that it will be post-national in the sense of rejecting the definitive nature of the national tie. Thus the community in question could be either a 'supranational' or even 'subnational' community, equally as easily as it could be a 'national'. Such a postnational community - especially if it is a supranational community - cannot rely for its cohesiveness on the vocation of the modern nation state to provide for the security, economic well-being and cultural identity of its citizens,[36] or indeed its vocation to claim the loyalty of citizens, but must look elsewhere for such cohesiveness.[37]

(ed.), Citizenship, London: Lawrence and Wishart, 1991 at p20.

[34] M. Everson, 'Women and Citizenship of the European Union', in T. Hervey and D. O'Keeffe (eds.), Sex Equality Law in the European Union, Chichester: Chancery Wiley, 1996 at p205.

[35] R. Breton, 'Identification in Transnational Political Communities', in K. Knop, S. Ostry, R. Simeon and K. Swinton (eds.), Rethinking Federalism: Citizens, Markets and Governments in a Changing World, Vancouver: University of British Columbia Press, 1995.

[36] R. Axtmann, Liberal democracy into the twenty-first century. Globalization, integration and the nation-state, Manchester: Manchester University Press, 1996, p2.

[37] 'Postnational' and 'postnationalism' are terms increasingly frequently

Turning to the other side of the dualism of identity and rights, it is essential to take a broad 'access-oriented' concept of rights in order to bridge the gap between rights rhetoric and reality. 'Access' can provide the strategy to translate formal equality of rights into something approaching substantive equality of outcomes.[38] The importance of the concept of access is apparent whenever discussions arise not only of who has what rights 'in the name of citizenship', but of how and why those rights have come to be defined, and the (participatory or exclusionary) processes which have led to the 'giving' or 'taking' of rights. This suggests an approach to rights and rights discourses in the EU which goes well beyond the formal surface of rights claims before the Court of Justice, or national courts. Rights should not be seen passively, but should be part of the continual contestation or negotiation of identity which goes to the very root of the definition of citizenship applied here.

The second dimension is provided by theoretical approaches to European integration which invite discussion of much the same space, but viewed this time as the dialectic or tension between the grand history-making and constitution-building side of the rise of the European Union, dominated by the sweep of a rhetoric of an 'ever closer Union', and the day-to-day negotiation of policies through the interactions of the institutions, the Member States, sub-state governmental actors and non-governmental actors. In focusing on the steady and constant conjunction of constitution-building and policy-making, I would also stress the need to take seriously the rule-of-law bargain

which underlies the normative authority of the Union and its legal order.[39] However, this bargain has important institutional dimensions which stretch beyond the Court of Justice, which is so often picked out as the primary protagonist for a centralising concept of integration in law and legal norms; thus it is vital to include also the institutional roles of the other institutions (especially the Commission's policy entrepreneurship), as well as factors such as the routineised processes of policy-making and the learning-by-doing which has characterised the work of those institutions.[40] In sum, the approach to European integration which I have used to develop my understanding of citizenship derives most directly from the use of notions of institutionalism and governance in order to theorise the development of the Union polity.[41]

One insight to emerge from a citizenship thinking which offers an essential background frame for the specific Union context considered here is that many of the concepts of nationality, na-

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used in the EU context; for prominent examples, see D. Curtin, *Postnational Democracy. The European Union in search of a political philosophy*, The Hague: Kluwer Law International, 1997; Y. Soysal, *Limits of Citizenship. Migrants and Postnational Membership in Europe*, Chicago/London: University of Chicago Press, 1994.

[38] See generally D. Majury, 'Strategizing in Equality', (1987) 3 *Wisconsin Women's Law Journal* 169; H. Fenwick and T. Hervey, 'Sex Equality Law in the Single Market: New Directions for the European Court of Justice', (1995) 32 *Common Market Law Review* 443.

[39] C. Joerges, 'Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration', (1996) 2 *European Law Journal* 105.

[40] L. Cram, 'The European Commission as a multi-organization: social policy and IT policy in the EU', (1994) 1 *J. of European Public Policy* 195.

[41] See generally S. Bulmer, 'The Governance of the European Union: A New Institutionalist Approach', (1994) 13 *Journal of Public Policy* 351; P. Pierson, 'The Path to European Integration. A Historical Institutionalist Analysis', (1996) 29 *Comparative Political Studies* 123; G. Marks, F. Scharpf, P. Schmitter and W. Streeck, *Governance in the European Union*, London, etc.: Sage, 1996; M. Jachtenfuchs, 'Theoretical Perspectives on European Governance', (1995) 1 *European Law Journal* 115; B. Kohler-Koch, 'Catching up with change: the transformation of governance in the European Union', (1996) 3 *Journal of European Public Policy* 359. For a review, written from the perspective of the relevance of these theories for lawyers, see K. Armstrong, 'New Institutionalism and EU Legal Studies', in P. Craig and C. Harlow (eds.), *Law-Making in the European Union*, The Hague: Kluwer Law International, 1998 and ibid, 'Legal Integration: Theorizing the Legal Dimension of European Integration', (1998) 36 *Journal of Common Market Studies* 155-174. The concept of socio-historical institutionalism suggested by Wiener (above n.10 and 29) may well offer a useful framework for analysis of the broad legal-institutionalist dimensions of Union citizenship.

tional identity and nation which underlie the classic 'statist' approaches to the notion of citizenship are in fact plastic in character. What this leaves is a fertile and relatively untouched terrain at the transnational level for institutional innovation, in accordance with a set of principles driven by values of equality, justice, democracy and legitimacy which I would argue must operate in a liberal and pluralistic community. But more fundamentally the analysis also reveals a level of indeterminacy and uncertainty about the precise *causal* relationship between citizenship as an institution and the very existence of stable, identified and cohesive communities. Is it citizenship which constitutes communities, or the reverse? There seems no conclusive position on this question. So, while it is not at all difficult to specify the significance of the decoupling of nationality and national identity which suggests the need for an emergent 'political' concept of citizenship which could attach to other aspects of identity formation. It is, however, much more problematic to suggest effective and detailed alternatives to the traditional approaches based on nationalism and nationhood, precisely because the notion of a linear progress between institutions and communities has been fatally undermined.

One compromise position might be to suggest a virtuous circle of reciprocal reinforcement between 'post-national' communities and a conception of democratic citizenship incorporating both a sense of membership and a body of substantial rights (including political and socio-economic rights). This has the advantage of including both a 'top-down' perspective of citizenship as a set of constitutionally given rights, and a 'bottom-up' perspective which acknowledges citizenship as one practical response to citizens' claims, incorporating also the imperative of identifying and understanding how these claims can be transformed into 'rights' in the EU context.[42] It can be shown that the formal insti-

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[42] See V. Della Sala and A. Wiener, 'Constitution-Making and Citizenship Practice - Bridging the Democratic Gap in the EU?', (1997) 35 *Journal of Common Market Studies* 595-614.

tution of citizenship conceived in these terms can and does reinforce the sense of community, but also that other policy instruments which likewise feed into strengthening the community (for example - applying this insight to the Union - policy on education and training for migrant workers and their families and the rights which thereby arise) can help to make the existence of any given form of membership more meaningful for that community of Union citizens. As I have already noted, there is a close parallel between the 'space' or 'tension' emerging from the juxtaposition of 'top-down' or 'bottom-up' approaches to constitutionalism and the role thereby envisaged for the citizen, and the 'space' between moments of 'constitution-building' (which occur spasmodically) and the 'day-to-day politics' which marks the characteristic mode of governance in the Union. The precise location of these 'spaces', and their articulation through a form of citizenship which is simultaneously both ideal-type and historically embedded material practice, represents the unique vocation of the citizenship figure in the Union.

It is easy to see how an agenda for further investigation can emerge from these ideas about citizenship and constitutions, and the juxtaposition of dual arenas of constitution-building and day-to-day politics. Let us take just two key areas of contestation for the Union citizenship: the issue of participation, and the issue of membership.

Turning first to participation in processes of constitutionbuilding, we see that these processes are particularly important, for they embody also the symbolic dimension of the Union. They represent much of the substance of the Union's claim to legitimacy. In turn, they must, therefore, enshrine the recognition of the status and the claim of the citizen. Yet within the Union, participation in that form is formalised only in the context of ratification procedures for new Treaties (e.g. in referendums). Citizens are not directly included in the constitution-making forum itself, the Intergovernmental Conference, where they are represented instead by their governments who have not necessarily

been elected upon a platform of articulated negotiating premises
but by reference to national electoral preoccupations. As to par-
ticipation in day-to-day policy-making in the Union, here it is
the banalities of the well-known 'everyday' democratic deficit[43]
which threaten constantly to disempower the citizen.[44]

A second area of contestation is the dilemma of membership
in the Union citizenship context. On one hand, we have the con-
stitutional formalism of Article 17 EC (ex Article 8), which re-
stricts 'membership' to nationals of the Member States. Is it this
formalism which truly defines the scope of membership, or the
deeply embedded market structures underpinning the practices
of EC law which restrict unfettered access by non-workers and
by certain categories of workers or their families (e.g. gay and
lesbian partnerships) to 'full membership' of a EU (market)
polity? Or perhaps, rather than in the arena of market citizen-
ship, is it through the practice of 'claiming' openness in EU deci-
sion-making, especially that in the Council, that the constitution
of the Union citizen will truly emerge?

5. Conclusions

My conclusion from this analysis is that citizenship of the
Union - as a historically, geographically and culturally contin-
gent institution, but one perhaps capable of offering a new post-
national model for citizenship - can only be fully understood by
reference to *both* the broader theory of citizenship, *and* situation-
specific ideas about European integration (including the legal
dimensions of integration) which stress the dynamic, open-
ended nature of that process.[45] It is the latter alone which allow

[43] See D. Wincott, 'Institutional Interaction and European Integration: To-
wards an Everyday Critique of Liberal Intergovernmentalism', (1995) 33 *Jour-
nal of Common Market Studies* 597.

[44] See J. Weiler, 'The European Union Belongs to its Citizens: Three Immo-
dest Proposals', (1997) 22 *European Law Review* 150.

[45] For an argument that concerns about 'integration' and

us to see citizenship not only as a symbolic flag waved from
time to time by actors such as the Commission, the European
Parliament and even the Member States, but also as one facet of
the day-to-day policy-making activities of all those institutions
in which 'rights' represent an important concrete output. This
means that any attempt to draw up all or part of a balance
sheet of citizenship rights drawn not only from Treaty provi-
sions, but also from diverse 'hard' and 'soft' law instruments in
the various fields of Union policy (including the Second and
Third Pillars, as appropriate), is not just an exercise in codifica-
tion or consolidation, but also a recognition of citizenship as an
integral part of the Union polity understood as a dynamic gov-
ernance structure. This includes understanding the political par-
ticipation rights of individuals (and social groups) in Union
policy-making - so far as they exist - as an aspect of the con-
struction of citizenship in an active sense. However, the ap-
proach to rights must be critical, just as a critical concept of
citizenship must be adopted. It must be sensitive to the context
in which rights might operate, sensitive to the importance of ac-
cess and, above all, hostile to formalism.

'democracy/legitimacy' have been insufficiently blended and considered in
tandem see P. Craig, 'The Nature of the Community: Integration, Democracy, and
Legitimacy, in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, Oxford:
Oxford University Press.