

The Politics of European Rights

Willem Maas
Yale University

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Abstract

Citizenship rights in most states generally evolved through a long process of political contestation between rulers and subjects, but this is not the case in the European Union. Understanding the development of European rights – expressed in treaties and regulations signed by member states, directives issued by the Commission, and rulings and interpretations made by the Court – would not be complete without exploring the politics surrounding their introduction and expansion. This paper undertakes such an examination by focusing on the key right of EU citizenship: mobility, which consists of the freedom to move and the freedom to take up residence anywhere within the Union. On the basis of a sketch of the historical evolution of these mobility rights, a number of hypotheses are advanced.

Willem Maas
Box 203942 Yale Station
New Haven CT 06520-3942
<http://pantheon.yale.edu/~wm54/>
willem.maas@aya.yale.edu

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Introduction

Citizenship rights in most states generally evolved through a long process of political contestation between rulers and subjects. In the European Union, however, rights were simply introduced by treaties or regulations, and in some cases even fleshed out by Commission directives. They have also been subject to expansive interpretations by the Court. While it might be thought that this could be done only because there was a broad political consensus on the appropriateness of extending and expanding citizenship rights, in fact this process has been uneven and almost random. The question that inspired this paper¹ is: once the freedom of movement ‘necessary’ to the construction of a common market had been achieved, why were mobility rights further extended and expanded? Following a description of the evolution of mobility rights – discussing how the right to move and the right to take up residence were extended to encompass all nationals of EU member states with the introduction of EU citizenship in the Maastricht Treaty – the paper advances ten propositions:

1. The introduction and expansion of mobility rights illustrate the transformation of European integration from an economic to a political phenomenon based on individual rights.
2. Proponents of further integration introduced the concept of citizenship in order to emphasize the possibilities for individuals inherent in further integration. Whether or not it originally started as a ‘cynical public relations exercise’, the concept of EU citizenship provided political justification for extending free movement rights to all member state nationals regardless of economic standing.
3. Once the language of citizenship had been introduced, it became politically difficult to distinguish free movement of persons from free movement of goods, services, and capital. In light of increasing free movement of goods, services, and capital, free movement of persons could not fail to be promoted. Free movement of labor is an economic concept, but it rests on the actions of human beings, who make use of individual rights.
4. The European Parliament effectively used its new co-decision power to promote EU citizenship, and thereby advance the causes connected with the concept. The Parliament’s new power helps explain why the member states could afford to ignore the DTEU citizenship proposals but accepted the citizenship proposals put forward in the discussions preceding Maastricht.
5. The fact that the Commission is not monolithic helps explain why it was consistently favorable to free movement rights for workers but wavered in supporting extended mobility rights. Examining intrainstitutional developments within the Commission (notably the relationship between the employment DG and other DGs) can be instructive for understanding policy development.
6. The member states did not radically change their positions between the early 1980s and the early 1990s, but the addition of new member states that had not participated in the earlier discussions altered the outcome of the IGC leading to

¹ My dissertation seeks to answer three distinct but related research questions. First, why were European rights (particularly mobility rights) introduced? Second, why were European rights supplemented and extended with the introduction of European Union citizenship? Third, why – despite the introduction of EU citizenship – have European rights not been extended further? This paper advances some preliminary hypotheses aimed at answering the second question.

- the Maastricht Treaty. Spain and, to a lesser extent, Portugal were key actors promoting the notion of European citizenship.
7. The issue of movement and residence rights for the economically inactive illustrates how actors in negotiations have difficulty constructing univocal or stable positions when they face contradictory – or at the very least multifaceted – constituencies with different expectations and interests.
 8. Although numerically small, those who stood to benefit from increased mobility rights were important politically (mobile professionals, retirees wealthy enough to move abroad) and symbolically (students).
 9. Experience with the Spanish and Portuguese accessions in 1986 – and German reunification – removed the objection in the discussions leading to Maastricht that extending mobility rights would lead to chaos.
 10. At the same time, member state concerns about the potential for unchecked growth in citizenship rights helps explain why the Maastricht Treaty refused to grant the European Court of Justice jurisdiction over third pillar issues. This is related to the growth of human rights at the European level.

History

Granting free movement rights to workers was originally justified in terms of enabling the free movement of labor, and then as a measure to complete the single market. This explains why free movement provisions were chiefly governed under labor law. Once the freedom of movement ‘necessary’ to the construction of a common market had been achieved, however, why were mobility rights further extended and expanded? This expansion and extension of individual rights coincided with the introduction of European Union citizenship, which took almost two decades – from the Paris Summit in 1974 to the discussions leading to the Maastricht Treaty in 1990 and 1991 – to reach fruition.

The Paris Summit and its aftermath

The 1974 Paris Summit of the Heads of State or Government established a working group to examine the conditions under which citizens of member states “could be given social rights as members of the Community.”² One element of the Summit’s ‘special rights’ agenda was a global right of residence unconnected to the exercise of any economic activity. In 1975, the report ‘Towards European Citizenship’ proposed that ‘special rights’ – consisting of certain basic civil and political rights – be granted by member states to citizens of other member states.³ The Tindemans Report, also published in 1975, included a chapter on ‘People’s Europe’. A major aim of the report consisted of promoting the values of the European Social Charter, notably freedom, equality, and social justice. Two years later, in 1977, the European Parliament issued a resolution supporting European citizenship. But it was another two years – a full five years after the 1974 Summit – before the Commission adopted a proposal for a directive on a general right of residence.⁴ Although the European Parliament supported the proposed directive, the next ten years were “punctuated by debates in the deadlocked Council over the question whether the Community was competent to legislate in this respect at all and the need to incorporate

² Bulletin EC 12-1974/7, item 11.

³ Hans Ulrich Jessurun d’Oliveira, “Union Citizenship: Pie in the Sky?,” in *A Citizen’s Europe: In Search of a New Order*, ed. Allan Rosas and Esko Antola (London: Sage, 1995), 58.

⁴ Based on Article 235 EC. OJ C207/14, 1979.

provisions requiring applicants to prove that they were in possession of sufficient resources and covered by a medical insurance scheme.”⁵ During this time, neither the Commission nor the now more democratically legitimate⁶ Parliament made much progress on the issue of citizenship, although significant steps enhancing the free movement of labor were made with the Single European Act.

The Draft Treaty concerning European Union and the Single European Act

The European Parliament made several recommendations concerning citizenship in its Draft Treaty on European Union, while the June 1984 Fontainebleau European Council resulted in the formation of two committees, thereby placing the issue of citizenship on the agenda of the Dublin European Council to be held that December. The ad hoc Committee for a People’s Europe was chaired by Pietro Adonnino and submitted two reports, in March and June 1985. The ad hoc Committee on Institutional Affairs was chaired by James Dooge and submitted its report in March 1985. On 12 December 1984, the newly-elected European Parliament passed a resolution drafted by the Committee on Institutional Affairs promoting the text of the DTEU and noting the convergences with the conclusions of the Dublin Council. Meanwhile, the Commission somewhat hurriedly⁷ issued a White Paper on ‘Completing the Internal Market’.⁸

The June 1985 meeting of the European Council in Milan set the terms of debate for the rest of the year, although it was unclear whether the United Kingdom, Denmark, and Greece would agree to participate in an intergovernmental conference that would result in a new treaty. When a vote to hold the summit passed,⁹ the new Luxembourg presidency duly convened the IGC and proposed that the EEC Treaty should be revised on the basis of the Dooge and Adonnino reports and the Commission’s proposals on the free movement of persons.¹⁰ Support for expanding individual rights appeared to be growing, as even the British House of Lords criticised “the fact that ‘the right of individuals to bring proceedings challenging actions of Community institutions on their failure to act, are narrowly circumscribed at present’ and that ‘the scope for individuals to bring such actions should be widened’.”¹¹

⁵ Síofra O’Leary, “The Free Movement of Persons and Services,” in *The Evolution of EU Law*, ed. Paul Craig and Gráinne De Búrca (Oxford: Oxford University Press, 1999), 381.

⁶ In 1979, the European Parliament moved from being a ‘dual mandate’ institution—in which all MEPs were simultaneously members of their national parliaments—to an institution whose members are directly elected by the populations of the various electoral constituencies within the member states. Henceforth, MEPs could concentrate more on European affairs.

⁷ The Commission had contracted out a report on the effects of completely eliminating border controls. But the contractors wrote a report on making more supple some borders in some fields. So when the White Paper was released, it was done without an impact assessment. Anecdote related in an interview at the Commission, 20 March 2001.

⁸ Commission of the European Communities, “Completing the Internal Market. White Paper,” (Luxembourg: Office for Official Publications of the European Communities, 1985).

⁹ The deadlock at Milan was broken by the unprecedented action of the President of the European Council calling a vote: the proposal to convene an IGC was adopted by 7 votes to 3. The vote was taken on the basis that article 236 EEC allowed an IGC to be convened by a majority of member states, even though its results ultimately require unanimity. Richard Corbett, *The European Parliament’s Role in Closer EU Integration* (Houndmills, Basingstoke, Hampshire: Macmillan Press, 1998) 216.

¹⁰ Bulletin EC 7/8-1985, point 1.1.10.

¹¹ Select Committee on the European Communities, 14th Report (23 July 1985) ‘European Union’, HM SO HL 226. Cited in Corbett, *The European Parliament’s Role in Closer EU Integration* 193.

The final decision on the text that would become the Single European Act was left to the Luxembourg meetings in December 1985. The internal market was the key point of the talks. The single market was an as yet unachieved basic aim of the EEC Treaty, and the European Parliament called for the agreement on specific deadlines for the free movement of goods and persons (two years), of services (five years), and of capital (ten years).¹² Meanwhile, the Commission proposal to the intergovernmental conference provided a deadline of 31 December 1992 (the end of term of the next Commission) for establishing “an area ‘without borders, in which persons, goods, services and capital shall move freely under conditions identical to those obtaining within a Member State’. Council would act by qualified majority voting, except on the free movement of persons, in which unanimity would be required until the end of 1992.”¹³ The Commission would adopt implementing measures unless the Council unanimously adopted its own ones. The Commission proposal was met with reservations, but work proceeded on a revised proposal. One of these revisions removed the power to decide by qualified majority voting legislation on the free movement of persons; the member states wished to retain the veto in this area. The IGC also failed to reach agreement on Denmark’s proposals for voting rights for EC citizens.¹⁴ However, it was only in the final stages of negotiations that proposals for including a treaty article on fundamental rights were scuttled, and a reference made instead in the preamble to the proposed treaty.¹⁵

Despite extensive lobbying by the European Parliament, the DTEU’s citizenship provisions were not reproduced in the final document which would become the Single European Act.¹⁶ The intergovernmental conference simply agreed to include in the preamble to the Act a reference to the joint promotion of democracy and human rights, and added the European Social Charter to the list of references mentioned in the 1977 Joint Declaration, thus incorporating the issues mentioned in Parliament’s Draft Treaty. Merely making this addition to the preamble rather than enshrining it in the body of the Act itself, however, excluded it from the competence of the European Court of Justice.¹⁷ Though the focus was still mainly on states and economic relations, the Single European Act did refer to ‘persons’; partially as a result of expansive rulings by the Court of Justice, the effect of this was to “impinge upon the capacity of states to exercise exclusive control over specific aspects of the legal status of citizens”.¹⁸

The Directives on Students, Retired Persons and the Economically Inactive

Although provisions facilitating the free movement of workers continued to be elaborated during the 1980s,¹⁹ there was no real movement on extending mobility rights to all;

¹² Draft Treaty on European Union, article 47.

¹³ Corbett, *The European Parliament’s Role in Closer EU Integration* 231.

¹⁴ Ibid. 248.

¹⁵ Ibid. 230.

¹⁶ Otto Schmuck, “The European Parliament’s Draft Treaty Establishing the European Union,” in *The Dynamics of European Union*, ed. Roy Pryce (London: Croom Helm, 1987). Cf Interim Report to the European Council, EC Official Publications Office ISBN 92-824-0186-3

¹⁷ Corbett, *The European Parliament’s Role in Closer EU Integration* 247.

¹⁸ Elizabeth M. Meehan, *Citizenship and the European Community* (London: Sage, 1993) 148.

¹⁹ For example, on 1 July 1982, regulation 1408/71 on social security benefits was extended to cover the self-employed rather than simply employees. The fact that European rights are still growing and evolving is illustrated by the fact that regulation 307/1999 of 8 February 1999 extended the scope of regulation 1408/71 to include all insured persons, particularly students and others not in gainful employment.

‘European’ rights continued to rest on an economic rather than political model. After years of inaction following the 1974 Paris Summit’s discussion of individual rights and the Commission’s 1979 proposed directive on a general right of residence for all citizens of member states, the Commission finally changed its approach in 1989: instead of a single directive, the Commission proposed three separate directives, applying to students, retired persons, and economically inactive persons more generally.²⁰

In January 1990, the Council decided to dispense with the separate legal bases of each of these proposed directives and have them all covered under Article 235EC, the Treaty provision on which it had been impossible to reach agreement over the preceding decade. Parliament attempted to restore the legal basis – Article 6(2) – of the Commission provision on students’ right of residence by asking the Court for an opinion.²¹ Despite the argument that this reflected more closely the Community’s competence concerning the free movement of students and the scope of the principle of non-discrimination on the basis of nationality, the Commission did not join the Parliament’s action. “Clearly, after eleven years of legislative haggling, the Commission was unwilling to jeopardize what had finally been achieved and what probably had been its goal in the first place – a circumscribed right of residence, paying lipservice to the notion of a Citizens’ Europe while insulating the Member States from the sort of benefit tourism which so terrified them.”²²

The Parliament won its court case against the Council. But the purpose of the judicial proceedings is unclear, because the actual provisions of the directive remained unchanged. Parliament may have wanted to leave open the possibility of launching future legal challenges of the directive’s provisions – which would be easier if it was based on Article 6(2), the principle of non-discrimination on the basis on nationality, rather than on Article 235. A competing explanation for why Parliament launched the court case is that “what was at stake was not the championing of free movement and residence rights for economically inactive students but a point of principle designed to strengthen the Parliament’s role in the legislative process.”²³ Despite this rather cynical interpretation, it is clear that Parliament did play a major role in (re)introducing the language of citizenship in the preparations leading to the Maastricht Treaty. MEPs built on their experience with the failed Draft Treaty concerning European Union to ensure that, this time, citizenship provisions would be included in the final treaty.

Preparing for Maastricht

In the changed geopolitical context heralded by the fall of the Berlin Wall, a key concern of the Dublin European Council of 28 April 1990 was to shape future political union by including and extending European citizenship rights.²⁴ But, as noted above, the project of

²⁰ Council Directives 90/364, 93/96 and 90/365, extended residential rights to retirees, students and, generally speaking, all those who possessed sufficient financial resources and health insurance for themselves and for their dependants.

²¹ Case C-295/90 *European Parliament v. Council*.

²² O’Leary, “The Free Movement of Persons and Services,” 381.

²³ *Ibid.*, 382. In Case C-70/88, *European Parliament v. Council* [1990] ECR-I-2041, [1992] 1 CMLR 91, the Court had held that the Parliament enjoyed *locus standi* pursuant to Article 173 EC, given that the right to intervene was an essential element in the institutional balance established by the Treaties.

²⁴ The summit conclusions asked “How will the union include and extend the notion of Community citizenship carrying with it specific rights (human, political, social, the right of complete free movement and

expanding and extending citizenship rights had earlier roots. Examining what she calls “the reconstruction of citizenship practice in the Maastricht period,” Weiner broadly notes that “policy makers were successful in dusting off the resources of previous decades of citizenship policy making.”²⁵ MEPs constitute one key set of these policy makers. Approved by Parliament in October 1988, the Graziani Report on the first year of operation of the Single European Act argued that the Act “had opened ‘the way for a degree of development on the part of the Community which should be exploited’, but that it had nevertheless left the Community ‘deprived of adequate means of action in the areas of the common foreign policy, security, a common currency with a central bank, energy, development aid, cultural cooperation, education and European citizenship’.”²⁶ On the basis of this report, a parliamentary committee with David Martin²⁷ as rapporteur met from November 1989 to February 1990 and drafted a parliamentary resolution adopted on 14 March 1990 which called on the member states to hold an IGC not simply on EMU but also on a range of other issues: incorporation into the treaties of fundamental rights, more extensive social and environmental treaty provisions, and institutional reforms to Council, Commission, and Parliament. The Martin committee’s continuing meetings led to a parliamentary resolution of 11 July 1990 detailing Parliament’s proposals on these issues. Finally, in a third phase, the Martin committee translated this resolution into the legalese of draft proposed Treaty amendments, which were duly adopted by Parliament on 22 November 1990.²⁸

Previously, the Commission had taken the view that the intergovernmental conference should focus only on the issue of European Monetary Union. In the parliamentary debates on the first resolution, however, Commission President Delors came out strongly in favor of expanding the scope of the intergovernmental conference beyond EMU to include the other issues proposed by the Parliament. The Italian parliament – which passed a resolution on 21 March 1990 supporting the EP’s resolution²⁹ – and the Belgian government were also supportive. Among other things, the Belgian government’s memorandum supported entrenching human rights in the Treaty.³⁰ The German government of Chancellor Kohl and French government of President Mitterand were also quick to support the idea of expanding the number of issues to be

residence, etc.) for the citizens of Member States by virtue of these States belonging to the Union?” EC Bulletin 6-1990, pp.15-16.

²⁵ Antje Wiener, *“European” Citizenship Practice: Building Institutions of a Non-State* (Boulder: Westview Press, 1998) 252.

²⁶ Corbett, *The European Parliament’s Role in Closer EU Integration* 280. The citations are from *Resolution on the results obtained from implementation of the Single Act*. European Parliament Minutes of 27 October 1988, OJ C 309 (5 December 1988) p.62.

²⁷ Labour MEP and Vice-President of the European Parliament.

²⁸ Corbett, *The European Parliament’s Role in Closer EU Integration* 284. Corbett notes that this three-step approach was similar to that used in 1982 through 1984 for the adoption of the Draft Treaty establishing the European Union (Spinelli Reports) but in a much shorter time span.

²⁹ The Italian delegation followed this up with a note stating that “a European citizen is developing even before actions by States shape Europe” and concluding that a “legal framework needs to be provided to this new situation.” Europe Documents 1611, 10 April 1990, p.2. Cited in Wiener, *“European” Citizenship Practice* 253.

³⁰ Corbett, *The European Parliament’s Role in Closer EU Integration* 405 note 22. notes that the Belgian Permanent Representative, De Schoutheete, met David Martin in the course of preparatory work for the memorandum.

addressed in an intergovernmental conference, calling in their April 1990 joint letter to the heads of government of the other member states for “a second IGC on political union ‘to be held parallel to the conference on economic and monetary union’.”³¹ Support was not universal, however: the British delegation expressed reservations in three areas: legislative powers for the European Parliament, European citizenship, and the common foreign and security policy. These were pitted against the Franco-German agreement to create a European citizenship.³²

The Dublin European Council of 28 April 1990 asked the foreign ministers to study the need for treaty amendments and report back to the second Dublin European Council which would meet in June and decide whether a second IGC parallel to the one on EMU would be necessary.³³ Between the two meetings, the Greek government published a memorandum³⁴ supporting most of the proposals contained in the Martin (I) committee’s report, and Spanish Prime Minister Felipe Gonzalez urged the other heads of government to address the idea of European citizenship.³⁵ When the foreign ministers met in Parknasilla on 19 and 20 May, they addressed all the issues listed in the parliamentary resolution in the form of questions such as “should citizen’s rights be entrenched?”

When the heads of government reconvened in Dublin on 25 and 26 June 1990, they agreed to convene an IGC on political union parallel with the one on EMU. The European Parliament responded quickly. In fact, the Committee on Institutional Affairs had already been working on filling in the details of the proposals included in its March resolution and passed the ‘Martin II Report’ on 11 July 1990. The fact that the Parliament’s proposals preceded those of the member state governments and of the Commission reflected its hope to shape the agenda.³⁶ The report defined “European Union” as including elements of common citizenship and a common framework for protecting basic rights. It advocated entrenching basic human rights in the Treaty and granting voting rights in local and European elections in the Member State of residence. “Citizens of Member States would become at the same time citizens of the Union.”³⁷ Parliament brought its proposals directly to national governments in the interinstitutional preparatory conferences (CIPs) that met at Parliament’s request four times before the IGCs and ensured that ministers were aware of the European Parliament’s position.³⁸

³¹ Ibid. 286.

³² Colette Mazzucelli, *France and Germany at Maastricht: Politics and Negotiations to Create the European Union* (New York: Garland, 1997) 61, 64.

³³ British Foreign Secretary Douglas Hurd had commented earlier that Belgium had been the first to dive into the swimming pool, even if there was no water in it. But support for the idea of addressing issues other than EMU continued to grow. Reported in Corbett, *The European Parliament’s Role in Closer EU Integration* 285.

³⁴ Memorandum of 15 May 1990. In particular, the memorandum argued for recognizing in the Treaty the concepts of European citizen and of basic human rights and for extending the right to vote in local and European Parliament elections to citizens living in another member state.

³⁵ The letter to the other heads of government was dated 4 May 1990. SEC (90) 1084. Cf. SEC (90) 1015/2.

³⁶ Corbett, *The European Parliament’s Role in Closer EU Integration* 287.

³⁷ Ibid. 288.

³⁸ There were three CIPs with the foreign ministers to discuss political union and one with the finance ministers to discuss EMU. The first meeting with the foreign ministers took place after the April meeting of the European Council in Dublin, in the two days before the foreign ministers held their meeting in Parknasilla. The others took place on 8 October 1990 in Luxembourg (on EMU), on 23 October 1990 in

The Danish government approved a memorandum on 4 October which went quite far for one of the traditionally more reticent member states. Among other things, the memorandum proposed the creation of an Ombudsman. Meanwhile, the Commission's 21 October 1990 opinion on political union favored introducing Community citizenship – defined as free movement and voting rights in local and European elections and incorporating a reference to the ECHR – and the parliamentary Assizes of November 1990 supported the inclusion of European citizenship and fundamental rights in the Treaties.³⁹ The governments of the member states discussed their approach to the intergovernmental conference on political union at the foreign ministers' meeting on 6 and 7 October, at the General Council in Luxembourg on 22 October and Brussels on 5 and 6 November and at the European Council of 27 and 28 October (Rome I) and 14 and 15 December (Rome II).

At Rome I, references to defining European citizenship – as well as to extending EC competencies and EP powers, and a common foreign and security policy – were subject to UK reservations in what was to be British Prime Minister Thatcher's last summit. The Rome II conclusions featured a long list of issues; Council asked the IGC "to examine how to bring intergovernmental matters in the field of justice and home affairs into the Union framework. It emphasized the importance of the principle of subsidiarity without specifying that this should be incorporated into the treaties. Under the heading of European citizenship, the IGC was asked to consider voting rights in European and municipal elections, joint consular protection and freedom of movement, as well as the creation of an Ombudsman."⁴⁰ The Council encouraged exploring ways to include four sets of citizenship rights in the document that was to become the Maastricht Treaty. The first set, civil rights, included "participation in elections to the European Parliament in the country of residence; possible participation in municipal elections". The second set of citizenship rights, social and economic rights, consisted of "freedom of movement and residence irrespective of engagement in economic activity; equality of opportunity and of treatment for all Community citizens." This was thus an extension of mobility rights not only to employed but also to unemployed Europeans. The third set of citizenship rights to be examined for possible inclusion in a subsequent treaty pertained to the joint protection of Community citizens outside the Community's borders. Finally, the Council suggested that consideration be given to "the possible institution of a mechanism for the defence of citizens' rights as regards Community matters ('ombudsman')."⁴¹

In the early months of the IGC (which lasted from the day after the Rome II summit in December 1990 to the final negotiations in Maastricht in December 1991) the Gulf War was a major preoccupation. During the summer, the Yugoslav crisis took some attention away from the negotiations. Reaching firm policy positions at this time was

Strasbourg (on political union) and on 5 December 1990 in Brussels (on Parliament's involvement in IGCs and on co-decision). Ibid. 294-5.

³⁹ "Never before has a major international negotiation been preceded by a conference of the very parliaments that would later have to approve the outcome of the negotiations. The fact that they did so and concluded with a Declaration approved by an overwhelming majority (150 to 13) in which their expectations of the IGC were clearly expressed was highly significant." Ibid. 296.

⁴⁰ Ibid. 304.

⁴¹ *Conclusions of the Sessions of the European Council (1975-1990)*, pp. 388, 404. Cited in d'Oliveira, "Union Citizenship: Pie in the Sky?," 58-59.

difficult, because where the EMU IGC dealt with a specific subject, the IGC on political union contained a much larger set of potential issues to be discussed. The IGC on Political Union and European Citizenship took place on 21 February 1991,⁴² followed shortly thereafter by the Commission's report on European Citizenship.⁴³ Meanwhile, the Luxembourg Presidency prepared a 'non-paper' or comprehensive draft on political union and submitted it to the foreign ministers on 15 April. This Luxembourg presidency report watered down the concept of European citizenship from some of the earlier proposals. By May 1991, three issues on which the personal representatives could not reach agreement – citizenship, social policy, and economic and social policy – were discussed by their ministers. The discussions on European citizenship focused on the question of whether or not the rights inherent in the concept should be given direct applicability. Denmark and, to a lesser extent, the United Kingdom opposed the possibility that European citizenship would entitle individual citizens to force member states to respect their rights.⁴⁴ The British position generally was reticent.⁴⁵

Following the Luxembourg Presidency's 'non-paper,' the Dutch Presidency also prepared a global draft, but only in September, over two months into its Presidency. Meeting on 30 September, in a major embarrassment for Dutch diplomats, the foreign ministers of the other member states rejected the text as a basis for future negotiations. Aside from not appeasing the traditionally reticent member states, the Dutch text reflected the majority opinion on most issues but alienated France on its Common Foreign and Security Policy provisions and Luxembourg on ignoring the text proposed in April. Even those who thought that the Luxembourg text should have been more advanced felt it was too late at this stage of the IGC to try to regain lost ground. The IGC thus proceeded with the Dutch submitting issue-by-issue modifications of the Luxembourg text, culminating in a new working draft tabled on 8 November.⁴⁶ On November 6, Parliament submitted its own report on European Citizenship⁴⁷; the report proposed to establish within the framework of a European citizenship a system of social rights recognised by law.

The Maastricht European Council Meeting was held on 9 and 10 December 1991, and a final text was agreed to only in the early hours of the morning on 11 December. "In the negotiations, France and Germany focussed on foreign policy and security, Spain on citizenship and cohesion, Italy and Belgium on the powers of the Parliament and majority voting, Denmark on the environment..."⁴⁸ Support from the French and Germany

⁴² Finn Laursen and Sophie Vanhoonacker, eds., *The Intergovernmental Conference on Political Union* (Maastricht: European Institute of Public Administration, 1992) 325.

⁴³ Commission of the European Communities, "Union Citizenship. Bulletin EC, Supp. 2/91," (1991).

⁴⁴ Mazzucelli, *France and Germany at Maastricht: Politics and Negotiations to Create the European Union* 145.

⁴⁵ Comparing "the Maastricht negotiations and the Single European Act, the big difference was that in the SEA there were a number of positive aspects that Britain wanted, such as the internal market. However, there was very little that it wanted in the Maastricht negotiations, while its main stance was negative." A former Council Secretariat official quoted in Alasdair Blair, *Dealing With Europe: Britain and the Negotiation of the Maastricht Treaty* (Aldershot, Hants, England: Ashgate, 1999).

⁴⁶ Corbett, *The European Parliament's Role in Closer EU Integration* 310-11.

⁴⁷ European Parliament, "Report of the Committee on Institutional Affairs of the European Parliament on Union Citizenship. Doc A3-0300/91, PE 153.099/fin, 6 November 1991."

⁴⁸ Belgian Ambassador Philippe de Schoutheete de Tervarent, paper presented at the Université Libre de Bruxelles 21 February 1992 (D 1992/2672/27) cited in Corbett, *The European Parliament's Role in Closer EU Integration* 314.

delegations was key to passing the citizenship provisions. The proposed right of a citizen of any member state to vote in municipal and European elections in that individual's state of residence rather than state of origin posed constitutional problems and would become a major focus of the French ratification debate, but President Mitterand had a strong political stake in supporting it.⁴⁹ The final text of the Maastricht Treaty established European Union citizenship and provided, as one of the four sets of rights, that “[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.”⁵⁰

Maastricht: Citizenship, Finally

Some question whether the “history-making”⁵¹ Maastricht Treaty really “broke new ground”⁵² with the concept of EU citizenship, arguing that Union citizenship was introduced only as a “cynical public relations exercise”.⁵³ European policy makers disagree, arguing that “[o]ne of the merits of the Maastricht Treaty is that, by recognizing the right of Union citizens *inter alia* to move and reside freely in the territory of another Member State, it pointed to a new objective: to extend, without any discrimination, the right of entry and residence to all categories of nationals of Member States.”⁵⁴

The High Level Panel chaired by Simone Veil concluded that, by formalising the concept of European ‘citizenship’, the Maastricht Treaty “altered in several respects the situation resulting from the Single Act and its definition of ‘internal market’.” Four respects are key: First, Maastricht’s provisions on European citizenship are specific to the individual, and their effect is to supplement or develop the general rule governing the internal market. The rights concerned constitute ‘individual rights,’ a departure from the perspective that treaties between states cannot and do not provide individuals with enforceable rights. Second, these individual mobility rights are defined not only by the ‘movement’ of persons referred to in earlier formulations but also by a ‘right of residence’. Third, “the right thus defined is granted indiscriminately to ‘every’ citizen of the Union, i.e. to the nationals of any Member State, without restriction as to category.” Finally, Maastricht states that the enjoyment of mobility rights “may be restricted only by requirements specifically provided for in the Treaty or by provisions adopted for its

⁴⁹ Jean Quatremer, “La citoyenneté divise les Douze,” *Libération* 15 May 1991, p.32. Cf. Elisabeth Guigou, *Pour les Européens* (Paris: Flammarion, 1994) 49. Mazzucelli – applying the logic of a two-level game – notes that Mitterand, “in tandem with Kohl, supported the concept of European citizenship at Level I in order to push through his objective of obtaining the vote for foreigners living in France at Level II. Although Mitterand realized that these Treaty objectives would require constitutional amendments, he also knew that Maastricht had the potential to divide the political right at home which would be caught between a desire to preserve national sovereignty and yet not appear anti-European.” Mazzucelli, *France and Germany at Maastricht: Politics and Negotiations to Create the European Union* 197.

⁵⁰ Treaty on European Union, article 8a.

⁵¹ John Peterson, “Decision-making in the European Union: Towards a Framework for Analysis,” *Journal of European Public Policy* 2, no. 1 (1995).

⁵² Corbett, *The European Parliament’s Role in Closer EU Integration* 327. The full citation is that the Maastricht Treaty “broke new ground with the concept of Union citizenship, and a common foreign and security policy.”

⁵³ J.H.H. Weiler, *Certain Rectangular Problems of European Integration. Working Paper WP-24*, vol. I, *Political Series* 20.

⁵⁴ Simone Veil and European Commission., *Report of the High Level Panel on the Free Movement of Persons* (Luxembourg: Office for Official Publication of the European Communities, 1998).

implementation, thus excluding the possibility that failure, on the part of the Community, to adopt the provisions applicable might, *per se* be regarded as an obstacle.”⁵⁵

Propositions

The preceding sketch history supports the propositions listed at the outset:

The Political Evolution of European Rights: Market-based to Individual Rights

{1}The introduction and expansion of mobility rights illustrate the transformation of European integration from an economic to a political phenomenon based on individual rights. A broad historical sketch of European integration during the 1980s holds that former Commission President Jacques Delors redefined the Common Market, previously concerned only with free trade in goods, into something completely different: a European single market based on the free movement of goods, capital, services, and people. One way of reading the development of mobility rights within Europe, then, is that these freedoms – the freedom to move and the freedom to take up employment and/or residence – flow from the desire to complete the single market. But the development of mobility rights can also be seen as grounded in a desire to promote individual rights.⁵⁶ The market-based approach and the individual rights-based approach to European mobility rights are not necessarily incompatible. But the individual rights approach favors extending rights even when competition, efficiency, and other market-positive goals are hindered or challenged.⁵⁷ By contrast, the market-based rationale for extending rights refers primarily to the goal of opening up labor markets. Both approaches, however, lead to political support for increasing mobility within Europe.⁵⁸

⁵⁵ Ibid.

⁵⁶ The implications of the single market for European integration is subject to debate. One view holds that everything deriving from the single market is supranational, while everything else is intergovernmental. Ralph (Lord) Dahrendorf, speaking on ‘The Future of the Nation-State’, St. Antony’s College, Oxford, 6 February 2001.

⁵⁷ The distinction between market-based and individual rights-based approaches to rights is blurred when rights are applied indiscriminately to individuals, regardless of citizenship status. Thus, in many cases, rights are now extended to non-EU citizens as well as EU citizens: in order to facilitate a freer labor market, the Commission is currently studying ways of enhancing the mobility rights of everyone resident within the EU: After five years’ legal residency in any one member state, third country nationals would be free to move to other EU member states.

⁵⁸ Strikingly, other potential approaches to rights have been almost non-existent. One example of another approach to rights is xenophobia or racism, which would favor excluding foreigners from entitlements on the basis of cultural or ascriptive characteristics. This view is very marginal, and it is striking that even far right parties generally express no misgivings about extending rights to citizens of other EU member states, focusing instead on excluding non-EU ‘foreigners’. An important caveat here is the situation of EU citizens who are members of visible minorities. Anti-discrimination legislation in the member states often refers only to nationals, resulting in a lack of clarity for others. This is addressed by Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000, L 180/22). See Damian Chalmers, “The Mistake of the Good European?”, presented at the “Thinking About Europe” seminar, St. Antony’s College, Oxford, February 2001. Another potential position is that control over border and the right to reside within the territory of a state should not be ceded to a European bureaucracy perceived as far removed from local concerns, as well as politically almost unaccountable. This second alternative approach might be expected to have some influence, given concerns about the decline of state sovereignty in the face of ‘Brussels’. Fascinatingly, however, this view has also been almost entirely absent from political debate within the EU. The chief form of the limited opposition to expanded right of residence that does occur has to do more with ‘wealthy Europeans’ driving up land prices than racism or

It is questionable whether the single market can ever be fully ‘completed’, in the sense that full labor mobility is present in no similarly large economic area in the world. But this does not deter those pursuing the project. Indeed the Commission is currently considering various moves to increase labor mobility, through such measures as increasing information about employment opportunities, harmonizing taxation systems, and perhaps even implementing a common social security coding system; all this in the hope of bringing “American-style mobility to the European employment market”.⁵⁹ Proposals of this sort are not new. In early 2000, for example, the Dutch cabinet asked the Social-Economic Council to consider ways of increasing labor mobility in Europe, with the express aim of attracting more workers from other EU member states to the Netherlands.⁶⁰ And the desire for increased labor market mobility – even if restricted to certain economic sectors or for certain categories of workers – were also evident in the discussions in the 1950s culminating in the Treaty of Rome.

The strong treaty endorsement of economic rationales for European rights provides actors interested in furthering European integration with a firm basis for elaborating those rights. Thus, the litigation surrounding Article 30 (the general rule on the free movement of goods) leads to what Maduro calls an ‘Economic Constitution’. By increasing the participation of individuals, the ECJ legitimizes both Community law and itself. This legitimation flows from a direct relation with the ‘peoples of Europe’ referred to in the Treaty of Rome. In other words, the Court’s growing recognition of European-level individual rights such as those found in Article 30 establishes both a legal discourse and a constitutional structure in which individual citizens can use the Court to enforce rights against both the member states and Community institutions.⁶¹

Bringing Citizenship Back In

{2}As the historical sketch indicates, proponents of further integration reintroduced the concept of citizenship, which had been languishing since the Paris summit of 1974, in

other concerns with differences in wealth or other sociocultural attributes between mobile EU citizens and host populations. See Jacques Barou and Patrick Prado, *Les anglais dans nos campagnes, Collection “Minorites et societes”* (Paris: Harmattan, 1995). But for every resident opposed to Europeans moving in, there are others who very much favor it, not least because of the extra tourist money development brings to the region in question. This is very much the case of the Costa del Sol region in southern Spain, where development is proceeding at frightening speeds. Catering primarily to German, British, and other northern European retirees looking for a winter home, the entire coastline from Gibraltar past Malaga is being built up with condominiums, to the detriment of some but the delight of others.

⁵⁹ See for example Frits Bolkestein (Commissioner, Internal Market) and Anna Diamantopoulou (Commissioner, Employment and Social Affairs), “Mobilität ist Schlüssel zu Vollbeschäftigung in Europa. EU sollte Zugangsbeschränkungen abbauen und Steuersysteme aufeinander abstimmen,” *Financial Times Deutschland*, 23 January 2001. Compare “EU plans to issue ‘identity number’ for every citizen,” *The Independent*, 5 February 2001.

⁶⁰ Radio Nederland Wereldroep, 28 May 2000.

⁶¹ Miguel Poiares Maduro, *We The Court: The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1998) 27-30. Maduro cites Ole Due, former President of the Court: “it is remarkable... that those judgements which are often described as landmarks have generally contributed to promoting integration and at the same time to protecting the legal position of individual citizens and undertakings *vis-à-vis* both the authorities of the Member States and the Community institutions”. Ole Due, “The Law-making Role of the European Court of Justice Considered in Particular from the Perspective of Individuals and Undertakings,” *Nordic Journal of International Law* 63 (1994): 126.

order to emphasize the possibilities for individuals inherent in further integration. Whether or not it originally started as a ‘cynical public relations exercise’, the concept of EU citizenship provided intellectual justification for free movement rights for all member state nationals. The argument that the entire motive behind the citizenship initiative was the perceived need, on the part of Eurocrats, of fostering ‘cultural legitimacy’⁶² ignores the role of other actors such as MEPs.

{3} Once the language of citizenship had been introduced, it was no longer as easy politically to distinguish free movement of persons from free movement of goods, services, and capital. In light of increasing free movement of goods, services, and capital, free movement of persons could not fail to be promoted. Free movement of labor is an economic concept, but it rests on the actions of human beings, who make use of the individual rights. Freedom of movement was historically treated as an economic phenomenon, but as soon as the terminology of rights is used it becomes more difficult to do so. Rephrased in citizenship terms, freedom of movement becomes a *political* right.

Evoking the power of the concept of citizenship may also serve to ‘rescue’ the legitimacy of the nation-state, because the nation-state has been the framework for the institutionalization of citizenship.⁶³ It is an open question how much the introduction of EU citizenship serves to reshape the EU into the traditional developmental model of a nation-state. Contrasting with this picture of integration is the view that “a combination unique to EC law of directly effective rights, the Article 177 procedure, and the willingness of national courts to send preliminary references to the Court of Justice has contributed to the construction and evolution of EC law, conferring individual rights, not least on Member State nationals willing to avail [themselves] of the Treaty provisions on the free movement of workers, freedom of establishment, and services.”⁶⁴

Bargaining about Rights

{4} The European Parliament effectively used its new co-decision power to promote EU citizenship, and thereby advance the causes connected with the concept. The Parliament’s new power helps explain why the member states could afford to ignore the Parliament’s Draft Treaty concerning European Union citizenship proposals but accepted the citizenship proposals promoted by the Parliament in the discussions preceding Maastricht.

{5} The fact that the Commission is not monolithic helps explain why it was consistently favorable to free movement rights for workers but wavered in supporting extending mobility rights to other categories of people. A closer look at intrainstitutional developments within the Commission (notably the relationship between the Directorate-General responsible for employment and other Directorates-General) can be instructive for understanding policy developments in this area as well as others. There exists a tendency in much of the literature on the EU to see the Commission as a single actor; however, examining the progressive permutations of any significant initiative as it winds its way through the Commission bureaucracy demonstrates that this is not the case.

{6} The member states did not radically change their positions between the discussions preceding the Single European Act and those culminating in the Maastricht

⁶² Cris Shore, *Building Europe: The Cultural Politics of European Integration* (London: Routledge, 2000) chapter 3.

⁶³ Gerard Delanty, *Inventing Europe: Idea, Identity, Reality* (Houndmills: Macmillan press, 1995). Compare Alan S. Milward, *The European Rescue of the Nation-State* (London: Routledge, 1992).

⁶⁴ O’Leary, “The Free Movement of Persons and Services,” 377.

Treaty, but the addition of new member states that had not participated in the earlier discussions altered the outcome of the IGC leading to Maastricht. As the sketch history indicated, Spain and, to a lesser extent, Portugal were key actors promoting the notion of European citizenship.

{7} The issue of movement and residence rights for the economically inactive illustrates how actors in negotiations have difficulty constructing univocal or stable positions when they face contradictory – or at the very least multifaceted – constituencies with different expectations and interests. On one hand, member states are concerned to protect their nationals abroad. On the other hand, some member states are concerned about ‘benefit tourism’, while at the same time wishing to attract certain categories of people: companies in certain sectors of the economy may desire low-wage workers, which triggers government’s concern with welfare provision. Yet workers with more specialized skills may be more vocal about demanding their rights be respected.

{8} Although numerically small, those who stood to benefit from increased mobility rights were important politically (mobile professionals, retirees wealthy enough to move abroad) and symbolically (students). European civil servants, who constitute a “small but powerful body of Europeans, who are themselves migrants,”⁶⁵ are concerned with the rights and freedoms which attach to the status of Community migrant. As the statistics on the incidence of mobility demonstrate, the expansion of the categories of people covered by the right to move and take up residence did not result in any noticeable change in the numbers actually doing so. The practical effects of extending and expanding mobility rights are relatively small, but the political effects are not.

Citizenship Rights, Individual Rights, and Human Rights

Citizenship rights are politically significant, but so are the related concepts of individual rights and human rights. Although most rights enunciated by EU treaties and Commission directives and interpreted by ECJ decisions flow from the market-based logic of the single market, this does not mean that EU citizenship rights do not possess a human rights dimension.⁶⁶ This dimension loomed large in the discussions leading to Maastricht.

{9} Experience with the Spanish and Portuguese accessions in 1986 – and German reunification – removed the objection in the discussions leading to Maastricht that extending mobility rights would lead to chaos. Spain and Portugal joined the Community in 1986, with special provisions delaying the implementation of free movement rights for Spanish and Portuguese workers. The perceived injustice of these delays help explain Spain’s and Portugal’s subsequent support for EU citizenship.⁶⁷

{10} Member state concerns about the potential for unchecked growth in citizenship rights helps explain why the Maastricht Treaty refused to grant the European Court of Justice jurisdiction over third pillar issues. Indeed the final text of the treaty does not depart from the principle that member state nationality remains primary while EU

⁶⁵ Ibid., 380.

⁶⁶ Indeed, the growth of European rights has reached the elaboration of a Charter of fundamental rights. Although the Charter currently has no binding force and is thus advisory only, it is widely expected to form the basis for future ECJ decisions. The Charter deviates from earlier lists of EU rights by expanding the social rights extended to EU citizens and, in some cases, any individual – regardless of nationality or citizenship – resident within EU territory.

⁶⁷ This parallels the debates within the Commission and Council in spring 2001 about transition arrangements for citizens of candidate countries to be allowed full free movement rights.

citizenship is derivative and secondary. By specifying that European citizenship would remain dependent on member state citizenship, European elites were able to avoid confronting the longstanding traditional corpus of rights already extant in each of the member states. Member states do remain central in guaranteeing the basic rights of citizenship, because rights can best be respected in a system governed by the rule of law. What facile dismissals of European rights miss, however, is the fact that European legal instruments such as directives and treaties now constitute a system of law. Certainly, a focus on human rights agreements should not ignore the fact that they constitute intergovernmental agreements, but the doctrine of direct effect helps constitute a European legal order. Direct effect has been fundamental in the development of European rights because the enforcement and evolution of rights under Treaty provisions depend greatly on their assertion by individual beneficiaries.⁶⁸

The European Court of Justice has paid increasing attention to individual rights, while national courts have generally failed to question the Court's decisions, probably because they have been empowered by ECJ case law.⁶⁹ When judiciaries in member states apply ECJ decisions, they participate in the elaboration of the European constitutional space, including the rights granted European citizens. Because of the wording of the treaty, there have been very few cases classified as dealing with citizenship.⁷⁰ But the number of cases classified as dealing with free movement of persons is substantial and continues to grow. As Maduro notes, the "Court has shifted the focus of its activism from the free movement of goods to the other freedoms (notably the free movement of persons). ...[The Court] favours self-restraint in the traditional areas of Court activism compensated by an enhanced role in the previously more 'neglected' area of free movement of persons."⁷¹ It is easy to see why, if the Court favours greater integration, its judgements focus on market-building in areas which have received scant legislative attention from the Council. But why should the Council *not* legislate in an area where the unanimous decisionmaking rule means states retain great power?⁷² The

⁶⁸ O'Leary, "The Free Movement of Persons and Services," 377.

⁶⁹ Renaud Dehousse, *The European Court of Justice: The Politics of Judicial Integration, The European Union series*. (New York: St. Martin's Press, 1998) 45.

⁷⁰ The treaty states that citizenship of the Union is derivative of national citizenship; member states retain the right to decide who is and who is not entitled to citizenship.

⁷¹ Maduro, *We The Court* 101-2.

⁷² One explanation is institutional: "The more difficult it is for new legislation to be passed (for example, by higher voting thresholds or more veto players), the more bureaucracies and courts are able to exercise discretion to move policy outcomes closer to those they prefer over the legislative status quo." While compelling, such an explanation simply predicts that the overall level of legislative action will decrease. It says little about which specific policy areas will receive attention or neglect. If the member states had objections to expanding freedom of movement rights, they would ensure that the Council accorded priority to shaping how those rights would be defined. With the introduction of Treaty of Amsterdam rules concerning codecision between Parliament and Council, the Commission and the Court once again enjoy discretion: "The greater are the policy differences between the Council and the European Parliament, "Report of the Committee on Institutional Affairs of the European Parliament on Union Citizenship. Doc A3-0300/91, PE 153.099/fin, 6 November 1991."... the greater the discretion available to the Commission in policy implementation and the Court in statutory interpretation." The Amsterdam codecision "procedure increased the size of the EU's legislative core of invulnerable legislation because it requires agreement of the Council and the Parliament for new bills to be passed. As a result the role of the Commission (as an administrator) and the ECJ (in statutory interpretation) have increased. This expansion of discretion is not a necessary feature of codecision; it relies on a divergence of preferences between the Council and the

influence of ECJ case law on national rights regimes is not necessarily free of conflict, and national legal systems may increasingly be perceived as threatened.⁷³ On the other hand, there is the view that the Court's rulings are firmly grounded in the economic and political realities at the Member State level.⁷⁴

Conclusion

This paper examined the politics surrounding the development of European rights by focusing on the key right of EU citizenship: mobility, which consists of the freedom to move and the freedom to take up residence anywhere within the territory of the European Union. On the basis of a sketch of the historical evolution of these mobility rights, a number of propositions were advanced. Key among them are that the introduction and expansion of mobility rights illustrate the transformation of European integration from an economic to a political phenomenon based on individual rights, that proponents of further integration introduced the concept of EU citizenship in order to emphasize the possibilities for individuals inherent in further integration, and that the introduction of citizenship provided political justification for extending free movement rights to all member state nationals regardless of economic activity. Free movement of labor is an economic concept, but it rests on the actions of human beings, who make use of individual rights. Other hypotheses advanced on the basis of the sketch history concern the bargaining that occurred about EU citizenship rights. The paper suggested that the European Parliament effectively used its new co-decision power to promote EU citizenship, that viewing the Commission as non-monolithic can elucidate policy developments, and that the accession of Portugal and especially Spain into the Community helps explain why the Maastricht Treaty introduced citizenship while the Single European Act did not. After making some additional observations concerning the politics of EU citizenship, the paper suggested that member state concerns about the potential for unchecked growth in citizenship rights helps explain why the Maastricht Treaty refused to grant the European Court of Justice jurisdiction over third pillar issues.

Parliament.” Citations from Geoffrey Garrett and George Tsebelis, “The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union,” *International Organization* forthcoming (2001).

⁷³ Dehousse, *The European Court of Justice: The Politics of Judicial Integration* 173.

⁷⁴ See O’Leary, “The Free Movement of Persons and Services.” esp §3 (pp. 382-6).

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