

Stateless Roma in the European Union:  
Reconciling the Doctrine of Sovereignty  
Concerning Nationality Laws with  
International Agreements to Reduce and Avoid  
Statelessness

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# Stateless Roma in the European Union: Reconciling the Doctrine of Sovereignty Concerning Nationality Laws with International Agreements to Reduce and Avoid Statelessness

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## **Abstract**

Part I of this Note discusses the historical and legal background of Roma in the EU, as well as the nature of the EU legislation and international agreements that comprise the legal substance of Roma statelessness. Part II examines the doctrine of Member State sovereignty concerning nationality laws and the viewpoint, shared by many scholars and politicians, that this sovereignty is eroding and the Court of Justice of the European Union ("Court of Justice") should continue to limit it. Part II also discusses several solutions to the problem of Roma statelessness in the EU in light of the erosion of the doctrine of sovereignty. Part III analyzes the adequacy of the solutions in Part II, rejects them, and then offers a new solution—an affirmative mandate for Member States to confer Member State nationality, and thereby EU citizenship, on Romani individuals who fall within the purview of the international agreements, which these Member States have signed, to reduce and avoid statelessness.

# STATELESS ROMA IN THE EUROPEAN UNION: RECONCILING THE DOCTRINE OF SOVEREIGNTY CONCERNING NATIONALITY LAWS WITH INTERNATIONAL AGREEMENTS TO REDUCE AND AVOID STATELESSNESS

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### *INTRODUCTION*

The Roma are one of Europe's largest and most historically marginalized ethnic minorities, due in part to the complex nature of Member State and EU citizenship laws, which often render them stateless. The European Union ("EU") is a complex legal and political body that integrates the market economies of twenty-seven Member States via harmonizing legislation.<sup>1</sup> The formation of the EU, as it exists today, began in the 1950s; but the creation of EU citizenship did not occur until the Treaty of Maastricht in 1992.<sup>2</sup> EU citizenship confers a distinct citizenship status only on persons who already possess the nationality of one of the EU Member States.<sup>3</sup> EU citizenship carries four rights that

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1. See GEORGE A. BERMANN ET AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* 3 (2d ed. 2002) ("The Community's architects sought to create . . . an integrated economic market that would afford enterprise the benefits of harmonization and economies of scale, while bringing to the population as a whole a higher standard of living."); see generally József Böröcz & Mahua Sarkar, *What Is the EU?*, 20 INT'L SOC. 153 (2005) (outlining the geopolitical, economic, and social aspects of the European Union ("EU")).

2. See BERMANN ET AL., *supra* note 1, ch. 16 (describing nature of EU citizenship and rights of EU citizens); see generally Treaty on European Union (Maastricht text), July 29, 1992, 1992 O.J. C 191/1 [hereinafter Maastricht TEU] (establishing the legal status of EU citizenship).

3. See Maastricht TEU, *supra* note 2, art. 8, 1992 O.J. C 191/1, at 7 (creating a distinct EU citizenship for nationals of Member States); BERMANN ET AL., *supra* note 1, at 106 ("Persons holding nationality of a Member State immediately acquire EU citizenship, which 'shall contemplate and not replace national citizenship.'") (citation omitted); Dimitry Kochenov, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights*, 15 COLUM. J. EUR. L. 169, 171-72 (2009) ("European citizenship is linked to the nationality of the Member States, making it impossible to become a citizen of the Union without being a Member State national."); Rainier Bauböck, *Citizenship and National Identities in the European Union* (The Jean Monnet Ctr. for Int'l and Reg'l Econ. Law and Justice, Working Paper No. 4, 1997),

belong only to those who are EU citizens: the right to free movement, the right to stand in and vote in elections, the right to diplomatic and consular protection of other Member States, and the right to petition the European Parliament and to apply to the Ombudsman.<sup>4</sup>

While many Roma have a Member State nationality, and are therefore EU citizens, many others are stateless because Member States deny them nationality. Those without nationality are often denied it based on their race or ethnicity, or because they lack access to basic services or administrative procedures and documents that would confer nationality status.<sup>5</sup> These unjust conditions persist despite many international agreements that EU Member States have signed committing themselves to reducing and preventing statelessness.<sup>6</sup> The EU does not forbid racial and ethnic discrimination concerning immigration and nationality laws and, therefore, Member States retain a high level of sovereignty concerning these issues.<sup>7</sup> This doctrine of Member State sovereignty is widely respected by the international community, including legal scholars, legislators, and politicians.<sup>8</sup> The result is that many Roma lack both Member State nationality and EU citizenship, and thus the rights afforded all EU citizens, leaving them stateless.<sup>9</sup>

Statelessness carries with it several long- and short-term difficulties.<sup>10</sup> In light of this, the international community has

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available at <http://centers.law.nyu.edu/jeanmonnet/papers/97/97-04-3.html> (“[A]ccess to the citizenship of the Union [is] wholly dependent on the rules for acquisition, transmission and loss of its various national citizenship.”). In the context of EU law, the phrase “Member State nationality” is essentially equivalent to “Member State citizenship.” This paper uses the term “Member State nationality.”

4. See Maastricht TEU, *supra* note 2, art. 8, 1992 O.J. C 191/1, at 7 (enumerating rights conferred upon EU citizens by the Treaty); BERMANN ET AL., *supra* note 1, at 106 (describing the rights conferred upon EU citizens).

5. See *infra* notes 54–68 and accompanying text (noting particular laws and practices of some Member States regarding conferral of nationality on individuals).

6. See *infra* notes 29–44 and accompanying text (citing several international agreements regarding statelessness).

7. See *infra* notes 48–54 and accompanying text (describing the legal basis for the Race Directive and the exception for immigration and nationality laws).

8. See *infra* notes 45–52 and accompanying text (exploring the doctrine of Member State sovereignty and its implications concerning immigration and nationality laws).

9. See *infra* notes 45–47 and accompanying text (discussing the nature of EU citizenship and its dependence on Member State nationality).

10. See *infra* notes 54–68 and accompanying text (exploring the difficulties that accompany both *de jure* and *de facto* statelessness).

long recognized that statelessness should be prevented and avoided at all costs.<sup>11</sup> The EU is obligated to take responsibility for reducing and avoiding statelessness, and a legal mechanism should be created for that purpose.<sup>12</sup>

Part I of this Note discusses the historical and legal background of Roma in the EU, as well as the nature of the EU legislation and international agreements that comprise the legal substance of Roma statelessness. Part II examines the doctrine of Member State sovereignty concerning nationality laws and the viewpoint, shared by many scholars and politicians, that this sovereignty is eroding and the Court of Justice of the European Union (“Court of Justice”) should continue to limit it. Part II also discusses several solutions to the problem of Roma statelessness in the EU in light of the erosion of the doctrine of sovereignty. Part III analyzes the adequacy of the solutions in Part II, rejects them, and then offers a new solution—an affirmative mandate for Member States to confer Member State nationality, and thereby EU citizenship, on Romani<sup>13</sup> individuals who fall within the purview of the international agreements, which these Member States have signed, to reduce and avoid statelessness.

# I.      *BACKGROUND ON ROMA AND INTERNATIONAL AND NATIONAL LAW CONCERNING STATELESSNESS*

Roma have suffered a long history of discrimination in the EU, which has led to statelessness for many of them.<sup>14</sup> Although Member States are parties or signatories to several international agreements and treaties that aim to prevent or eliminate statelessness, none of these agreements have had a profound effect on Romani communities.<sup>15</sup> Additionally, some Member States have blood-based nationality laws that prevent some Roma from becoming nationals. This Part provides background on

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11. See *infra* notes 29–44 and accompanying text (examining international agreements concerning statelessness).

12. See *infra* notes 124–37 and accompanying text (suggesting a solution to the problem of Roma statelessness).

13. The term “Romani” is used as an adjective. It can be spelled “Romani” or “Romany.” This Note uses “Romani.”

14. See *infra* notes 16–24 (discussing discrimination against Roma).

15. See *infra* Part I.B. (discussing international agreements aimed at reducing statelessness and their lack of effect on the Roma).

Roma discrimination and examines the international framework relevant to the issue of statelessness among Roma in the EU. Section A summarizes the origins, discrimination, and current situation of Roma in the EU. Section B discusses relevant international treaties concerning statelessness, including the 1954 Convention relating to the Status of Stateless Persons ("1954 Convention"), the 1961 Convention on the Reduction and Prevention of Statelessness ("1961 Convention"), the European Convention on Nationality, and the Universal Declaration of Human Rights. Section B also interprets the doctrine of sovereignty in the context of EU legislation, including the Treaty of Amsterdam, The Treaty Establishing the European Community ("EC Treaty") Article 13, and the Race Directive. Finally, Section B identifies the nationality laws and practices of several EU Member States, particularly Germany, Austria, Italy, Hungary, and Slovakia, in order to examine specific instances of statelessness created by national laws.

#### *A. The Historical Background of Roma in the EU*

The current unfortunate social, economic, and political circumstances of Roma in the EU are the product of centuries of discrimination.<sup>16</sup> Estimates vary, but scholars generally agree that there are ten to twelve million Roma living in Europe today.<sup>17</sup> The Roma originated from India.<sup>18</sup> It is unclear exactly when Roma arrived in Europe, though some scholars agree that they

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16. See *infra* notes 21–27 and accompanying text (outlining the historical pattern of discrimination against Roma in the EU).

17. See EUROPEAN COMM'N, THE SITUATION OF ROMA IN AN ENLARGED EUROPEAN UNION 6 (2004) ("[T]here are possibly over ten million Roma in Europe as a whole . . . . Around one and a half million Roma joined the European Union when the ten new Member States acceded to the Union in May 2004. Roma are the European Union's largest minority ethnic community."); EUROPEAN COMMISSION: THE EUROPEAN UNION AND ROMA, <http://ec.europa.eu/social/main.jsp?catId=518&langId=en> (last visited Dec. 17, 2010) (estimating that there are currently between ten and twelve million Roma residing in the EU).

18. See Adam M. Warnke, *Vagabonds, Tinkers, and Travelers: Statelessness among the East European Roma*, 7 IND. J. GLOBAL LEGAL STUD. 335, 338 (1999) (stating that different groups of Romani people came from India); CLAUDE CAHN & ELSPETH GUILD, ORG. FOR SEC. AND COOPERATION IN EUROPE, RECENT MIGRATION OF ROMA IN EUROPE 8 (2008) (noting the general acceptance of the fact that European Roma are descendants of people from India).

were present around the fourteenth century.<sup>19</sup> Due to a misconception that Roma came from Egypt, non-Roma began to refer to Roma as “gypsies.”<sup>20</sup> Scholars explain how this term encapsulates several stereotypes, including an inaccurate generalization that all Roma are nomadic, and a general societal belief that Roma are inherently criminal.<sup>21</sup>

The history of discrimination against Roma in Europe is varied and widespread. From the fourteenth century until the end of the nineteenth century, Roma in Romania were slaves.<sup>22</sup> Additionally, some scholars estimate that Nazi Germany systematically exterminated around 500,000 Roma during the Holocaust.<sup>23</sup> After the fall of communism, several successor states of fallen communist regimes refused to confer citizenship status on certain categories of individuals on an ethnic basis, including

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19. See, e.g., CAHN & GUILD, *supra* note 18, at 8 (stating that Roma arrived in Europe around the fourteenth century); COUNCIL OF EUROPE, *ARRIVAL IN EUROPE*, available at [http://romafacts.uni-graz.at/images/stories/pdf/2.0\\_arrival-europe.pdf](http://romafacts.uni-graz.at/images/stories/pdf/2.0_arrival-europe.pdf) [hereinafter *ARRIVAL IN EUROPE*] (stating that there is reliable historical evidence that Roma were present in Europe as early as 1385 AD). But see Warnke, *supra* note 18, at 338 (indicating that Roma migrated to Europe between 1000 and 1025 AD).

20. See Warnke, *supra* note 18, at n.2 (explaining how the term “gypsy” is a negative generic term that applies to Roma and to other groups of traveling people, and how it perpetuates the misconception of Egyptian origin); Lua Kamál Yuille, ‘Nobody Gives a Damn About the Gypsies’: *The Limits of Westphalian Models for Change*, 9 OR. REV. INT’L L. 389, 393–94 (2007) (describing the erroneous English belief that Roma came from Egypt); CAHN & GUILD, *supra* note 18, at 8 (claiming that reference to Roma as “Gypsies” is one of few common unifying features of an otherwise “immensely diverse” group).

21. See Yuille, *supra* note 20, at 408 (declaring that historical nomadism was the result of economic and social exclusion, although most Roma are no longer nomadic); Yuille, *supra* note 20, at 398 (citing a fundamental societal presumption that all Roma are the same and that they are “either bohemian or criminal”); Warnke, *supra* note 18, at 339–40 (addressing how non-Romani Europeans suspected that justifications for exempting Roma from travel restrictions in the fourteenth century were covers for thievery); CAHN & GUILD, *supra* note 18, at 9 (describing the notion of Roma as nomads as “stigmatizing and erroneous” because very few Roma and related groups are actually still nomadic).

22. See Warnke, *supra* note 18, at 342 (commenting on the development of an active slave trade in the late fourteenth century in what is now modern-day Romania); CAHN & GUILD, *supra* note 18, at 9 (positing that the abolition of slavery in Romania at the end of the nineteenth century led many Roma to flee south-eastern Europe for Northern and Western Europe to escape their destitution).

23. See Warnke, *supra* note 18, at 342–43 (placing the Roma death toll at over 500,000); *ARRIVAL IN EUROPE*, *supra* note 19 (revisiting extensively the Nazi extermination of Roma during the Holocaust and citing estimates of up to 750,000 for the death toll).



Roma.<sup>24</sup> Today, Roma are often the targets of violence from non-Roma, and are subject to police harassment on a regular basis.<sup>25</sup>

Romani populations throughout Europe have experienced mass expulsions carried out by national governments.<sup>26</sup> Oftentimes, Romani families are relegated to the outskirts of towns instead of being integrated with the rest of society, and educational institutions segregate Romani school children from non-Romani children.<sup>27</sup> Though it is difficult to determine an

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24. See CLAUDE CAHN & SEBIHANA SKENDEROVSKA, UNITED NATIONS INDEPENDENT EXPERT ON MINORITY ISSUES, ROMA, CITIZENSHIP, STATELESSNESS, AND RELATED STATUS ISSUES IN EUROPE 3 (2007) (explaining how the dissolution of Czechoslovakia, the Soviet Union, and Yugoslavia “generated many stateless persons, among them many Roma, as successor states refused to recognise as citizens of the new states certain categories of persons, often on an ethnic basis”); Warnke, *supra* note 18, at 356 (quoting UN HIGH COMM’R FOR REFUGEES, THE STATE OF THE WORLD’S REFUGEES 1997–1998: A HUMANITARIAN AGENDA 229 (1997) (discussing the contexts from which statelessness arises, including “dissolution of multinational or multiethnic federal states and the formation of new political entities,” and applying these contexts to Roma)); JASMINKA DEDIĆ, EUROPEAN PARLIAMENT COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS, ROMA AND STATELESSNESS (June 26, 2007), available at [http://www.europarl.europa.eu/hearings/20070626/libe/dedic\\_en.pdf](http://www.europarl.europa.eu/hearings/20070626/libe/dedic_en.pdf) (“In all ‘new’ countries where a Roma population is present, the nationality laws have had the most devastating impact on the Romani communities . . .”).

25. See Warnke, *supra* note 18, at 348–51 (examining how post-communist freedoms “frequently find expression as discrimination and hate crimes against Roma” in the Czech Republic and Slovakia, and how Hungarian Roma face violence and harassment from “the authorities, racist fringe groups, and community groups,” including skinheads, and describing “arbitrary and repeated identification checks by the police, conducted in a selective and harassing manner,” and police brutality that is reportedly encouraged by government officials); see also RONI STAUBER, STEVEN ROTH INST. FOR THE STUDY OF CONTEMPORARY ANTISEMITISM AND RACISM, VIOLENCE AGAINST THE ROMA MINORITY IN HUNGARY AND THE CZECH REPUBLIC AND ITS REPERCUSSIONS 2–3 (2009) available at <http://www.tau.ac.il/Anti-Semitism/articles/roma.pdf> (reporting on violent attacks against Romani individuals and families in Eastern Europe). See generally Letter from the European Roma Rights Centre to Giuseppe Pisanu, Minister of the Interior, Italy (June 1, 2004), available at <http://www.errc.org/cikk.php?cikk=1923> (expressing concern regarding police brutality against Roma in Italy).

26. See CAHN & GUILD, *supra* note 18, at 49–50 (“Forced expulsions to Serbia have been ongoing for a number of years, particularly from Denmark, Germany, Switzerland and Sweden . . .”). See generally Sergio Carrera & Anaïs Faure Atger, *L’affaire des Roms, A Challenge to the EU’s Area of Freedom, Security and Justice*, CTR. FOR EUROPEAN POLICY STUDIES (Sept. 29, 2010), <http://ceps.eu/book/%E2%80%99affaire-des-roms-challenge-eu%E2%80%99s-area-freedom-security-and-justice> (examining the political conflict resulting from the expulsion of nearly 1000 Roma living in France during Summer 2010).

27. See Warnke, *supra* note 18, at 347 (attributing the isolation of Romani communities in Hungary to Communist housing policies that outlawed the traditional nomadic existence of some Roma, and the flight of wealthier Hungarians to wealthier towns); Yuille, *supra* note 20, at 396 (“Today, Italian regional authorities legally

exact number of stateless Roma, all of these issues are compounded by the fact that many Roma are stateless, despite the fact that Member States have signed or become parties to several international agreements that obligate them to reduce and avoid statelessness.<sup>28</sup>

### *B. International Agreements Concerning Statelessness, EU Legislation, and Member State Laws*

The legal framework surrounding stateless Roma in the EU is composed of a combination of international agreements, EU legislation, and Member State law. Subsection 1 outlines the international agreements concerning statelessness, including the 1954 Convention, the 1961 Convention, the European Convention on Nationality, and the Universal Declaration of Human Rights. Subsection 2 considers the doctrine of sovereignty in the context of relevant EU legislation, including the Treaty of Amsterdam, EC Treaty Article 13, and the Race Directive. Subsection 3 lays out the nationality laws and practices of particular Member States and explores the doctrine of Member State sovereignty over matters of nationality law.

#### 1. International Agreements Concerning Statelessness and Nationality

The EU and its separate Member States have, in many ways, committed themselves to reducing and avoiding statelessness. The Treaty of Amsterdam, one in a series of treaties establishing and governing the EU, requires the EU to respect human rights.<sup>29</sup> Furthermore, EU Member States are parties or

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segregate Roma into camps ... [which are] situated in the least desirable locations possible."); see also Olivier De Schutter & Annelies Verstichel, *The Role of the Union in Integrating the Roma: Present and Possible Future*, in 2 EUROPEAN DIVERSITY AND AUTONOMY PAPERS 5 (2005) (noting segregation practices in housing, employment, and education in both new and old Member States); *D.H. v. Czech Republic*, App. No. 57325/00, 47 Eur. H.R. Rep. 3 (2008) (holding that arbitrary placement of Romani children in special needs schools was an illegal violation of human rights). See generally EUROPEAN ROMA RIGHTS CENTRE, STIGMATA: SEGREGATED SCHOOLING OF ROMA IN CENTRAL AND EASTERN EUROPE (2004) (describing the historical practice of segregating Romani children from non-Romani children in public schools).

28. See *infra* Part I.B.

29. See Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities, and Certain Related Acts, art. 1, 1997 O.J. C 340/1, at 8 [hereinafter Treaty of Amsterdam] ("The Union is founded on the

signatories to several international agreements that aim to reduce or prevent statelessness.<sup>30</sup>

The United Nations ("UN") created one of these international agreements, the 1954 Convention Relating to the Status of Stateless Persons ("1954 Convention") in order to define statelessness and regulate national treatment of stateless persons.<sup>31</sup> The 1954 Convention defines a stateless person as "a person who is not considered as a national by any State under the operation of its law."<sup>32</sup> The UN High Commissioner for Refugees expanded on the 1954 Convention by creating the Convention on the Reduction of Statelessness of 1961 ("1961 Convention") in order to address means of avoiding statelessness and resolve conflicts concerning nationality.<sup>33</sup> The 1961 Convention provides that "[a] Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless."<sup>34</sup> The 1954

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principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. The Union shall respect fundamental rights . . .").

30. See *infra* notes 29–44 and accompanying text (citing several international agreements regarding statelessness to which EU Member States are parties or signatories).

31. See UN High Comm'r for Refugees, *Objectives and Key Provisions of the 1954 Convention Relating to the Status of Stateless Persons*, (Oct. 1, 2001), <http://www.unhcr.org/3bd7d3394.html> (explaining the goals and objectives of the 1954 Convention). EU Member State signatories include Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Netherlands, Romania, Slovakia, Slovenia, Spain, and Sweden. See UN HIGH COMM'R FOR REFUGEES, *STATES PARTIES TO THE 1954 CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS* (2009) (listing each individual country that has signed the convention as of October 15, 2009); see also *Convention Relating to the Status of Stateless Persons*, Apr. 26, 1954, 189 U.N.T.S. 150 [hereinafter 1954 Convention].

32. 1954 Convention, *supra* note 31, art. 1.

33. See *Convention on the Reduction of Statelessness of 1961*, art. 1, Aug. 30, 1961, 989 U.N.T.S. 175 [hereinafter "1961 Convention"]; UN High Comm'r for Refugees, *Objectives and Key Provisions of the 1961 Convention relating to the Status of Stateless Persons*, (Oct. 1, 2001), <http://www.unhcr.org/3bd7d3914.html> (noting that the 1961 Convention builds on the 1954 convention and explaining the goals and objectives of the 1961 Convention). EU Member State signatories include Austria, Denmark, France, Germany, Ireland, Latvia, Netherlands, Romania, Slovakia, Sweden, and the United Kingdom. See UNITED NATIONS TREATY COLLECTION, *Convention on the Reduction of Statelessness*, <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsgno=V-4&chapter=5&lang=en> (last visited July 5, 2011) (listing the individual countries that are parties or signatories to the 1961 Convention as of January 2011).

34. 1961 Convention, *supra* note 33, art. 1.

Convention and the 1961 Convention are both binding on all signatories, including the Member States.<sup>35</sup>

The Council of Europe adopted the European Convention on Nationality to address “all major aspects related to nationality: principles, acquisition, retention, loss, recovery, procedural rights, multiple nationality, nationality in the context of State succession and nationality, military obligations and co-operation between States Parties.”<sup>36</sup> Article 4 provides that “everyone has the right to a nationality,” “statelessness shall be avoided,” and “no one shall be arbitrarily deprived of his or her nationality.”<sup>37</sup> Article 6 contains four important requirements that Member States must follow regarding providing nationality to individuals. First, nationality shall be provided to “foundlings in its territory who would otherwise be stateless.”<sup>38</sup> Second, nationality shall be given by a state to “children born on its territory who do not acquire at birth another nationality.”<sup>39</sup> Third, nationality shall be given to “persons who were born on its territory and reside there lawfully and habitually.”<sup>40</sup> Fourth, Article 6 obliges state parties to provide nationality for “stateless persons and recognized refugees lawfully and habitually resident on its territory.”<sup>41</sup>

The UN created the Universal Declaration of Human Rights in order to provide “a common standard of achievements for all peoples and all nations,” which “sets out, for the first time,

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35. See OFFICE OF THE UN HIGH COMM’R FOR HUMAN RIGHTS, *International Law*, <http://www2.ohchr.org/english/law/> (last visited Jan. 21, 2011) (providing a comprehensive list of human rights agreements, including the 1954 Convention and the 1961 Convention, and stating “conventions are legally binding for those States that ratify or accede to them”).

36. Council of Europe, European Convention on Nationality, Explanatory Report, Nov. 6, 1997, E.T.S. 166, 2135 U.N.T.S. 213. Twenty-two EU Member States have signed this Convention. See European Convention on Nationality: CETS No.: 166, Council of Europe, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=166&CM=&DF=&CL=ENG> (last visited Aug. 3, 2011) (presenting a comprehensive chart noting the status of the Convention in each Council of Europe country, and listing Belgium, Ireland, Lithuania, Slovenia, Spain, and the United Kingdom as the only EU Member States that have not signed the Convention). For an extensive analysis of the provisions of the Convention, see Gerard Ren  de Groot, *Towards a European Nationality Law*, 8.3 ELEC. J. COMP. LAW (Oct. 2004), available at <http://www.ejcl.org/83/art83-4.html>.

37. European Convention on Nationality, *supra* note 36, art. 4.

38. *Id.* art. 6.

39. *Id.*

40. *Id.*

41. *Id.*

fundamental human rights to be universally protected.”<sup>42</sup> The declaration states that everyone has a right to a nationality and a right not to be arbitrarily deprived of it.<sup>43</sup> Many of the parties that have signed the Universal Declaration of Human Rights, however, still have laws and practices that ignore the recognition of the right to a nationality.<sup>44</sup>

## 2. EU Legislation and the Doctrine of Sovereignty

Scholars propose that despite international agreements aimed at reducing and avoiding statelessness, the existence of statelessness in the EU is possible because acquisition of EU citizenship is contingent on acquisition of Member State nationality.<sup>45</sup> The Court of Justice has described EU citizenship as the fundamental status of nationals of the Member States.<sup>46</sup> Many in the international community recognize Member State sovereignty regarding conferral of nationality as a legitimate legal doctrine.<sup>47</sup> The EU reinforced this doctrine with the creation of

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42. Universal Declaration of Human Rights, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://www.ohchr.org/en/udhr/pages/introduction.aspx> (last visited July 5, 2011) (providing a general introduction and background on the Universal Declaration of Human Rights).

43. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 15, U.N. Doc. A/Res/217(III) (Dec. 10, 1948).

44. See notes 54–68 and accompanying text (outlining several Member State nationality laws).

45. See DEDIĆ, *supra* note 24 (enumerating reasons for Roma statelessness in the EU and expressing concern that if “EU citizenship continuous [sic] to be granted only to the nationals of member states . . . the discriminatory practices concerning citizenship within some member states will be legitimized at the EU level”). See generally CAHN & SKENDEROVSKA, *supra* note 24 (articulating the problematic practices regarding inclusion and exclusion of Roma from the polity of EU Member States made possible by the derivative nature of EU citizenship).

46. Case C-184/99, Rudy Grzelczyk v. Centre Public d’Aide Sociale d’Outignies-Louvain-la-Neuve, 2001 E.C.R. I-6193, ¶¶ 31–33 (holding that Member States cannot discriminate on the basis of nationality with respect to whether an EU citizen is able to take advantage of the right of freedom of movement and stating “Union citizenship is destined to be the fundamental status of nationals of the Member States”).

47. See Jeffrey L. Blackman, *State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law*, 19 MICH. J. INT’L L. 1141, 1151 (1998) (“[I]t has long been axiomatic that under international law—a body of law created by states and for states—questions of nationality fall within the domestic jurisdiction of individual states.”); Erika Szyszczak, *To Be a Citizen?*, 2 ROMA RIGHTS J.3, 4 (“The Member States retain the right to determine their own nationality laws, although they must exercise this right in conformity with EU law.”); James A. Goldston, *Europe’s Union Riven by Government Attacks on Minorities*, GUARDIAN, Aug. 23, 2010,

the Race Directive.<sup>48</sup> The EU promulgated the Race Directive on the basis of Article 13 of the European Community Treaty, which enables the EU to take measures to combat discrimination based on gender, ethnicity, religion, disability, age, or sexual orientation.<sup>49</sup> Article 13 is generally recognized by scholars and politicians as a non-discrimination article because it lists several grounds on which the Council can legislate to combat discrimination, including race or ethnicity.<sup>50</sup> The Race Directive provides the framework for combating racial or ethnic discrimination based on the principle of equal treatment.<sup>51</sup>

The Race Directive, however, contains a caveat: it does not apply to differential treatment based on nationality, to conditions relating to the entry and residence of third-country nationals and stateless persons on Member State territory, or any treatment arising from the legal status of such persons.<sup>52</sup> Some scholars criticize the Race Directive because of the inclusion of this caveat

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<http://www.guardian.co.uk/law/2010/aug/23/european-union-minorities-law> (“[I]nternational law accords states broad discretion in granting access to citizenship.”).

48. See Council Directive 2000/43/EC, art. 3(2), Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 180) [hereinafter Race Directive]. See generally De Schutter & Verstichel, *supra* note 27 (discussing the insufficiencies of the Race Directive as it pertains to Roma, including how it affects stateless Roma).

49. Consolidated Version of the Treaty Establishing the European Community art. 13, 2006 O.J. C 321 E/37, at 48 [hereinafter EC Treaty] (“[T]he Council . . . may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”). See generally Makbool Javaid, *EU Race Directive*, available at <http://www.leginecty.com/articles/EU%20Race%20Directive.pdf>, last accessed Aug. 30, 2011 (identifying Article 13 as the legal basis for the Directive and outlining aspects of the Directive).

50. See Erika Szyszczak, *Antidiscrimination Law in the European Community*, 32 FORDHAM INT’L L.J. 624, 637 (2009) (“The most developed area of antidiscrimination law is the development of the principle in relation to non-discrimination . . . [which] by virtue of Article 13 [of the EC Treaty], extended to the suspect classes of race, sexual orientation, age, religion or belief, and disability.”); see also Lisa Waddington, *Testing the Limits of the EC Treaty Article on Non-Discrimination*, 28 Indus. Law J. 133, 133 (1999) (referring to Article 13 as “the new general non-discrimination article”).

51. See Race Directive, *supra* note 48, art. 1. Prohibition of discrimination on the basis of nationality is covered by Article 12 of the EC Treaty. See EC Treaty, *supra* note 49, art. 12, at 48.

52. See Race Directive, *supra* note 48, art. 3(2). See generally De Schutter & Verstichel, *supra* note 27 (discussing the insufficiencies of the Race Directive as it pertains to Roma, including how it affects stateless Roma).

since it allows Member States to grant nationality discriminately on the basis of race or ethnicity.<sup>53</sup>

### 3. Member State Nationality Laws

The respect for Member State sovereignty in nationality laws, along with the Race Directive caveat provide the legal framework by which some Member States exclude Roma from becoming Member State citizens, and consequently EU citizens.<sup>54</sup> Member State laws and practices that exclude Roma from becoming nationals result in two main types of statelessness: *de jure* and *de facto*.<sup>55</sup> *De jure* statelessness occurs when the law prohibits certain people or groups from becoming nationals of a Member State.<sup>56</sup> *De facto* statelessness occurs where a person is effectively denied the rights conferred on them by their nationality due to discrimination and often a lack of means to

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53. See, e.g., Written Comments from the European Roma Rights Centre to the European Commission, "Green Paper: "Equality and Non-Discrimination in an Enlarged European Union" (Aug. 16, 2004), available at <http://www.errc.org/cikk.php?cikk=2009> (arguing that the caveat creates

both a void of legal protections as well as glaring opportunities for pre-textual racial discrimination, [and] is of particular concern in light of strong anti-foreigner sentiment in Europe, and widespread reports of discrimination against foreigners — particularly dark-skinned and Romani foreigners. It is also of concern insofar as there are clear indications that in the field of non-discrimination, lawmakers in the Member States currently appear to undertake only the bare minimum required under EU law (and sometimes not even that), and frequently seek to avoid international law obligations altogether. Thus, the failure by the EU adequately to address issues of discrimination as they relate to non-citizens has meant, in practice, an erosion of protections for non-citizens.);

James A. Goldston, *Roma Rights Workshop in Italy*, EUROPEAN ROMA RIGHTS CENTRE (July 7, 2004), <http://www.errc.org/cikk.php?cikk=688>. See generally De Schutter & Verstichel, *supra* note 27 (outlining the insufficiencies of the Race Directive as it pertains to Roma, including how it affects stateless Roma).

54. See *infra* notes 56–68 and accompanying text (noting several Member State laws conferring nationality on individuals).

55. See *infra* notes 56–63 and accompanying text (defining and discussing *de jure* and *de facto* statelessness).

56. See 1954 Convention, *supra* note 31, art. 1 (defining a *de jure* stateless person as one "who is not considered as a national by any State under the operation of its law"); Warnke, *supra* note 18, at 352 (explaining how *de jure* statelessness can result from a "person's inability to establish citizenship, or to be considered a national by any State under operation of law").

prove their nationality in the form of denial of access to documentation.<sup>57</sup>

Several EU Member States have citizenship laws that result in *de jure* statelessness for many Roma.<sup>58</sup> Germany, for example, provides citizenship on the basis of blood ("*jus sanguinis*"), whereby children acquire nationality only where one parent is also a German national; the result is that Roma who have been in Germany for generations have only a temporary status that must be frequently renewed, known as *duldung* status.<sup>59</sup> Recently, however, Germany amended this law to provide citizenship to people born on German soil ("*jus soli*"), but only under very limited circumstances.<sup>60</sup> Many Roma have been unable to take advantage of the changes.<sup>61</sup>

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57. See Warnke, *supra* note 18, at 351 (describing *de facto* statelessness as a lack of "effective nationality" by virtue of an inability to enjoy the rights of citizenship [due to State refusal] to recognize the citizenship of that person, or . . . to confer upon that person rights which are available to other citizens of that country"); CAHN & SKENDEROVSKA, *supra* note 24, at 5–6 (acknowledging that failure by states to adequately recognize "genuine and effective links" between an individual and a Member State and lack of access to personal documentation create a barrier to "the realisation of a number of fundamental rights and freedoms" for many stateless Roma).

58. See *infra* notes 59–63 and accompanying text (presenting *de jure* citizenship laws of some Member States).

59. See Staatsangehörigkeitsgesetz [StAG] [Nationality Act], July 22, 1913, REICH LAW GAZETTE I at 583, last amended by Act of 23 July 1999, Federal Law Gazette I, at 1618 (Ger.), translated in <http://www.legislationonline.org/> [hereinafter German Nationality Act]; CAHN & SKENDEROVSKA, *supra* note 24, at 8–9 (describing the practice of ascribing *duldung* status to Roma, a status that must be frequently renewed and containing significant restrictions on freedom of movement, employment, and social protection); *Germany Criticised at United Nations Children's Rights Hearing Over Expulsions of Roma*, EUROPEAN ROMA RIGHTS CENTRE (Jan. 16, 2003), <http://www.errc.org/cikk.php?cikk=351> (describing how *duldung* status is nothing more than a stop on expulsion that must be frequently renewed and results in a denial of access to basic services).

60. See German Nationality Act, *supra* note 59 ("As before the principle still applies: a child becomes a German at birth if at least one parent is a German national (principle of descent). As from 1 January 2000 there will also be entitlement by birth. From that point onwards, children born in Germany of foreign parents will automatically become Germans at birth if one parent has been permanently and legally resident in Germany for at least eight years at the time of the birth, and has an entitlement to residence or has had for at least three years an unrestricted residence permit."). For a detailed description of Germany's citizenship law, see CAHN & SKENDEROVSKA, *supra* note 24, at 3 n.8. This law has resulted in "cases of stateless persons among persons born on the territory and with long-term family ties to the territory." *Id.* at 3.

61. See CAHN & SKENDEROVSKA, *supra* note 24, at n.8 ("Many Roma were either not apprised in a timely fashion of the changes, and/or were born in Germany to refugees



Austria also has a *jus sanguinis* nationality law that results in *de jure* statelessness for many Roma. Austrian law confers nationality on individuals born to Austrian parents, regardless of place of birth, and there is no provision for granting nationality to individuals born in the territory.<sup>62</sup> Finally, scholars criticize the Italian nationality law for being blood-based and thereby creating *de jure* statelessness among many ethnic groups, including Roma.<sup>63</sup>

Several EU Member States perpetuate *de facto* statelessness among Roma.<sup>64</sup> For example, many Roma in Hungary are *de facto* stateless as a result of systematic discrimination despite the fact that Hungary automatically gives citizenship to its Roma population.<sup>65</sup> This discrimination involves poor-quality and often segregated education, high unemployment rates, and vulnerability to violent hate crimes.<sup>66</sup> Roma in Slovakia

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or persons of other status who fled conflicts in the former Yugoslavia. Such persons have in the main not managed to secure German citizenship.”).

62. See STAATSBÜRGERSCHAFTSGESETZ [Austrian Citizenship Act] July 30, 1985 Fed. Law Gazette of the Republic of Austria [FLG] No. 311/1985, art. 7 as amended by FLG No. 386/1986, FLG No. 85/1988, FLG No. 521/1993, FLG No. 505/1994, FLG I No. 109/1997, FLG I No. 30/1998, FLG I No. 123/1998 and FLG I No. 124/1998 (“(1) Children born in wedlock acquire nationality at birth, if a) at this time one parent is a national or b) one parent, who died earlier, was a national on the day of death. . . . (3) Children born out of wedlock acquire nationality at birth if the mother is a national at this time.”).

63. See STATELESSNESS AND CITIZENSHIP: A COMPARATIVE STUDY ON THE BENEFITS OF NATIONALITY 7 (Blitz et al. eds., 2009) (naming Italy as one of several countries where “nationality policies built on the principle of blood origin (*jus sanguinis*) rather than birth on the territory (*jus soli*) have made the incorporation of minorities, especially children of migrants, particularly difficult”); CAHN & SKENDEROVSKA, *supra* note 24, at 3 (referring to Italy as one of several countries with “no *jus soli* provisions or only weak *jus soli* provisions for allocating citizenship, with large migrant Romani communities, including inter-generational migrant communities”).

64. See *infra* notes 65–68 and accompanying text (describing *de facto* statelessness in certain Member States).

65. See Warnke, *supra* note 18 (providing an in-depth look at the forces of exclusion of Roma from mainstream Hungarian society); see also Yuille, *supra* note 20, at 412 (“In Hungary, discrimination—from segregation in education and exclusion from the labor market to violent hate crimes inadequately investigated by police—effectively denies [Roma] the benefits of Hungarian citizenship.”).

66. See Warnke, *supra* note 18, at 359–60 (citing the results of the failure of the educational system for Roma and the apathy of the government and the police in regulating hate crimes against them in analyzing the causes of and potential solutions to Romani statelessness). See generally Hungary – Submission to the UN Universal Periodic Review, 11th Session of the UPR Working Group of the Human Rights Council (Nov. 2010), available at <http://www.errc.org/cms/upload/file/hungary-upr-08112010.pdf> (describing the current situation of Roma in Hungary with reference to education,

experience *de facto* statelessness in the same way as Hungarian Roma.<sup>67</sup> Additionally, because Roma are often relegated to the outskirts of society and have little or no access to, or knowledge of, administrative procedures, lack of access to personal documents is a prevalent cause of *de facto* statelessness.<sup>68</sup>

The historical pattern of social marginalization of Roma in the EU created a situation in which many Roma find themselves stateless. EU Member States are parties or signatories to several agreements that obligate them to reduce and prevent statelessness.<sup>69</sup> These agreements have been generally ineffective for stateless Roma, due in large part to the fact that Member States retain a great deal of sovereignty regarding their

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unemployment, and hate crimes). The far-right political movement promotes the anti-gypsy sentiment in Hungary. See Daniel McLaughlin, *Far-Right Party Calls for Camps for Hungary's Roma*, IRISH TIMES, Sept. 3, 2010, <http://www.irishtimes.com/newspaper/world/2010/0903/1224278127884.html> (explaining how the leader of Hungary's Jobbik party promotes the idea of putting Romani families into camps until they can prove themselves worthy of integrating into mainstream society).

67. See Warnke, *supra* note 18, at 361 (exploring how mainstream society relegates Roma to the least desirable areas, the norm of violence against Roma by non-Roma, and how Romani children are segregated into "special schools," which results in high unemployment) (citing Greg Niewnsma, *Lessons in Democracy: Slovakia, Its Minorities and the European Union*, 1 CENT. EUR. REV. 20 (last modified Nov. 7, 1999), <http://www.cc-review.org/99/20/nieuwsma20.html>; see also Amnesty Int'l, *Roma Children Still Lose Out*, Index EUR 72/004/2009 (June 2009), available at [http://www.amnesty.org/en/library/asset/EUR72/004/2009/en/1015c34e-304f-473d-9a1e-9d2a1548c4da/eur720042009\\_en.pdf](http://www.amnesty.org/en/library/asset/EUR72/004/2009/en/1015c34e-304f-473d-9a1e-9d2a1548c4da/eur720042009_en.pdf) (thoroughly describing the segregation of Romani children from non-Romani children in Slovakia); Nick Thorpe, *Slovakia's Separation Barrier to Keep Out Roma*, BBC NEWS, Mar. 9, 2010, <http://news.bbc.co.uk/2/hi/europe/8548417.stm> (reporting on the a specific example of discrimination resulting in *de facto* statelessness for Slovakian Roma—construction of a wall around a Romani village ).

68. See CAHN & SKENDEROVSKA, *supra* note 24, at 6 (attributing some of the problem of lack of access to personal documents to at-home birth and naming Italy, Greece, and Romania as EU Member States where this problem is particularly egregious); UNHCR *Action to Address Statelessness: A Strategy Note*, 22 INT'L J. REFUGEE L. 297, 308 (2010) (noting that "[l]ack of birth registration and personal documentation" creates a risk of statelessness); *id.* at 307 (pointing out administrative obstacles to obtaining documentation of nationality); Thomas Hammamberg, *Many Roma in Europe are Stateless and Live Outside Social Protection*, PUB. INT'L LAW (July 6, 2009), <http://oppenheimer.mcgill.ca/Many-Roma-in-Europe-are-stateless> ("Many Roma lack personal identity documents which hinders their access to basic human rights, such as education and health services, and increases their susceptibility to continued statelessness.").

69. See *supra* notes 29–44 and accompanying discussion (describing these agreements).

nationality laws.<sup>70</sup> This perpetuates the existence of laws that prevent many Roma from becoming Member State nationals, and thereby EU citizens.<sup>71</sup> This doctrine of sovereignty has shown signs of erosion, however, and international agreements to reduce and avoid statelessness should have a stronger effect in light of this fact.<sup>72</sup>

## II. *THE EROSION OF MEMBER STATE SOVEREIGNTY AND SUGGESTED SOLUTIONS TO ROMA STATELESSNESS*

Despite being signatories and parties to agreements created to reduce and avoid statelessness, Member States are often excused by EU institutions from compliance because of the concept of national sovereignty concerning nationality laws.<sup>73</sup> Lately, however, this doctrine has been eroding and scholars have developed several solutions to the issue of Roma statelessness in the EU in light of this erosion. Section A discusses the erosion of the doctrine of Member State sovereignty concerning determination of laws for the acquisition and deprivation of Member State nationality. Section B examines several solutions to the dilemma of Roma statelessness in the EU, including establishing a “stateless nation,” eliminating the *ius tractum* nature of EU citizenship, harmonization of national laws based on international agreements to reduce and avoid statelessness, and the proposed Roma Integration Directive.

### A. *The Erosion of the Doctrine of Member State Sovereignty*

National sovereignty’s role in determining the basis in which certain individuals can and cannot become nationals of a Member State is a widely recognized international legal

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70. See *supra* notes 45–53 and accompanying discussion (explaining the aspects and ramifications of the doctrine of sovereignty).

71. See *supra* notes 54–68 and accompanying discussion (citing specific examples of Member State laws).

72. See generally Kochenov, *supra* note 3 (discussing the possibility that sovereignty is illusory) (citing Mario Vicente Micheletti v. Delegacion del Gobierno en Cantabria, Case C-369/90, 1992 E.C.R. I-4239, ¶ 10); de Groot, *supra* note 36 (discussing limitations on Member State sovereignty)..

73. See *supra* notes 46–72 and accompanying text (discussing the doctrine of sovereignty and specific Member State laws).

doctrine.<sup>74</sup> Scholars recognize, however, that certain limitations of this doctrine have developed in recent years.<sup>75</sup> The Court of Justice recently issued a ruling in *Rottman v. Bayern*, which called into question Member State autonomy in matters of nationality.<sup>76</sup> German authorities stripped Rottman, a former Austrian national who was naturalized in Germany, of his German naturalization when they discovered that he had fraudulently obtained it.<sup>77</sup> Under German law, naturalization requires the renunciation or loss of any previous nationality.<sup>78</sup> Additionally, Austrian law states that when an Austrian national becomes naturalized in another country, that person loses his Austrian nationality.<sup>79</sup> When Rottman was naturalized in Germany, he lost his Austrian nationality.<sup>80</sup> Upon losing both German nationality and Austrian nationality, he no longer possessed EU citizenship.<sup>81</sup> Rottman went to court in Germany to fight against the withdrawal of his German naturalization and lost.<sup>82</sup> He then appealed, and the German court referred the case to the Court of Justice to determine whether EU law would allow deprivation of nationality and subsequently EU citizenship where naturalization was obtained by deception and where such deprivation would result in statelessness.<sup>83</sup> The Court of Justice

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74. See *supra* notes 45–52 and accompanying text (discussing the nature of EU citizenship and Member State sovereignty).

75. See Kochenov, *supra* note 3 (postulating that the lack of Member State discretion concerning respect for the nationality conferred on an individual by another Member State makes the doctrine of sovereignty illusory). See generally de Groot, *supra* note 36 (noting several limitations on Member State sovereignty in determining the laws for acquisition and deprivation of nationality).

76. Case C-135/08, *Rottman v. Bayern*, 2010 E.C.R. I \_\_\_\_\_ (delivered Mar. 2, 2010).

77. See *id.* at ¶ 28.

78. See *id.* at ¶ 7 (“According to the provisions of German law relating to nationality applicable to the case in the main proceedings, naturalisation of an alien depended, as a rule, on his giving up or losing his previous nationality.”).

79. See *id.* at ¶ 9 (“[T]he Law on nationality . . . provides: ‘Any person who acquires foreign nationality at his own request, or by reason of a declaration made by him or with his express consent, shall lose his Austrian nationality unless he has expressly been given the right to retain [it].’”).

80. See *id.* at ¶ 26.

81. See *id.* at ¶ 29.

82. See *id.*

83. See *id.* at ¶ 36 (describing the issue as “whether it is contrary to European Union law . . . to withdraw . . . nationality . . . acquired by naturalisation and obtained by deception [where] that withdrawal deprives the person concerned of the status of

held, based on relevant provisions of the 1961 Convention, the European Convention on Nationality, and the Universal Declaration of Human Rights, that deprivation of nationality, where naturalization was based on fraud, even if it resulted in statelessness, was legal according to EU law.<sup>84</sup> The Court of Justice also stated that the exercise by a Member State of the power to determine conditions for the loss and acquisition of nationality, where that exercise affects the rights conferred and protected by the EU, is subject to judicial review in light of EU law.<sup>85</sup> Some have argued that this limitation suggests that non-conferral of nationality, for instance, upon children born in a Member State other than that of the nationality of their parents could violate EU law.<sup>86</sup> Some have also argued that because EU

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citizen of the Union . . . , acquisition of that nationality having caused that person to lose the nationality of his Member State of origin”).

84. See *id.* at ¶¶ 52–53 (“[The European Convention on Nationality] provides that a person may be deprived of the nationality of a Contracting State if he has acquired that nationality by means of misrepresentation or by any other act of fraud. [The European Convention on Nationality] . . . does not prohibit a State Party from depriving a person of his nationality, even if he thus becomes stateless, when that nationality was acquired by means of fraudulent conduct . . . . That conclusion is, moreover, in keeping with the general principle of international law that no one is arbitrarily to be deprived of his nationality, [set forth in] the Universal Declaration of Human Rights and . . . the European Convention on nationality. When a State deprives a person of his nationality because of his acts of deception, legally established, that deprivation cannot be considered to be an arbitrary act.”).

85. See *id.* at ¶ 48. In this case, the relevant EU law was Article 17 EC, which establishes that every national of a Member State is a citizen of the EU. See EC Treaty, *supra* note 49, art. 17. The Court of Justice held *inter alia* that it was not contrary to Article 17 of the EC Treaty to refrain from withdrawing naturalization simply because the individual concerned had not regained the nationality of his country of origin. See *supra* note 77, at ¶ 48; see also Dora Kostakopoulou, *European Union Citizenship and Member State Nationality: Updating or Upgrading the Link?*, EU DEMOCRACY OBSERVATORY (July 6, 2010), <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=5> (quoting a statement by contributors to the Court of Justice that the *Rottman* judgment “enshrines the principle that the exercise [of the right to determine nationality laws] . . . is amenable to judicial review carried out in light of European law”); Gerard René de Groot & Anja Selling, *The Consequences of the Rottman Judgment on Member State Autonomy – The Court’s Avant-Gardism in Nationality Matters*, EU DEMOCRACY OBSERVATORY (July 1, 2010), <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=6> (explaining the active approach taken by the Court of Justice with respect to limiting Member State autonomy in this area).

86. See Kochenov, *supra* note 3, at 191 (arguing that failure to confer nationality can breach EU law where “children of a European citizen [are] born in a Member State other than that of the nationality of their parents,” since it could deter parents from

citizens have freedom of movement, such that possession of the nationality of a single Member State allows an individual to travel to, study in, and work in any other Member State, sovereignty with respect to nationality laws is becoming only marginally important.<sup>87</sup> This is, in part, because all Member States must recognize conferral of any Member State nationality to the extent that exercise of individual rights as an EU citizen, including freedom of movement, is allowed.<sup>88</sup> Some scholars propose that the limitable nature of the doctrine of sovereignty calls into question the validity of excluding Roma from Member State nationality because of their race or ethnicity.<sup>89</sup>

### B. *Proposed Solutions to Roma Statelessness in the EU*

In light of the limits on Member State sovereignty concerning nationality laws and the growing perception of its

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exercising their EU citizenship rights) (citing Catherine Jacqueson, *Union Citizenship and the Court of Justice: Something New Under the Sun? Towards Social Citizenship*, 27 EUR. L. REV. 260, 262 (2002)); Garath T. Davies, *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, EU DEMOCRACY OBSERVATORY (Apr. 15, 2010), <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=2> (suggesting that “the principle . . . that EU law applies to national measures which impact upon, or attempt to limit, . . . EU law and its associated rights” logically leads to the conclusion that denying national citizenship and thereby EU citizenship “for some outrageous and disproportionate reason” would be prohibited by the logic of *Rottman*).

87. See Kochenov, *supra* note 3, at 236 (arguing that the expansion of the internal market and the encouragement of freedom of movement operates as a “de facto” loss of sovereignty in the area of immigration, and that nationality of a Member State “will instantly disappear as a meaningful legal concept”); Yuille, *supra* note 20, at 429 (“[I]n the face of the deepening and widening of the European Union, at every turn the powers associated with state sovereignty seem to be cut down and contained.”); see also Satvinder S. Juss, *Free Movement and the World Order*, 16 INT’L J. REFUGEE L. 289, 321 (“State power cannot be described in terms of sovereignty . . . it is not a fact. It is simply a doctrine.”).

88. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, art. 27., 2004 O.J. L 158, at 113.

89. See Kochenov, *supra* note 3, at 236 (describing how the *ius tractum* nature of EU citizenship results in a situation whereby some people “who, ‘although long-term residents in the EU, are not in possession of any of the twenty-seven Member States’ nationality” and proposing that the exclusion of these people from EU citizenship is difficult to justify in light of the idea that “sovereignty in the area of immigration has already been de facto lost by all the Member States”); Yuille, *supra* note 20, at 422–23 (proposing that a human rights approach to the problem of statelessness is faulty in that it does not address the problems created by the idea of unlimited sovereignty, and that in order to solve the problem of Roma statelessness, the antecedent of sovereignty must be attacked).

reduced significance, scholars and politicians have proposed various solutions aimed at reducing and preventing Roma statelessness in the EU.<sup>90</sup> One such solution is the establishment of a so-called “stateless nation” for Roma.<sup>91</sup> The stateless nation would give Roma a legally recognized nationality despite the absence of a geographical state, which would apply uniformly to all Roma in any country throughout the EU.<sup>92</sup> This solution would ostensibly solve the problem of Member State refusal to confer nationality on Roma who do not fall within the purview of the local nationality law since such individuals would no longer be technically stateless.<sup>93</sup> Romani rights activists and other proponents have also argued that recognition of a Romani stateless nation would allow Roma to be represented in and

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90. See *infra* notes 91–105 and accompanying text (outlining and analyzing several proposed solutions).

91. See Erin Jenne, *The Roma of Central and Eastern Europe: Constructing a Stateless Nation*, in *THE POLITICS OF NATIONAL MINORITY REPRESENTATION IN POST-COMMUNIST EUROPE: STATE BUILDING, DEMOCRACY, AND ETHNIC MOBILIZATION* 189, 207 (Jonathan P. Stein ed., 2000) (“Romani activists are intently engaged in an attempt to construct a ‘Romani Nation.’”); Warnke, *supra* note 18, at 364–66 (“Establishing a stateless nation for the Roma would not only allow for autonomy, but also for participation and contribution by the Roma to local societies.”). The term “stateless nation” is often used to describe distinct cultures that exist within an autonomous Member State and wish to secede from that Member State and form their own separate geographical nation. See generally David Adam Landau & Lisa Vanhala, *Circumventing the State? The Demands of Stateless Nations, National Minorities, and the European Constitution*, in *REDEFINING EUROPE* 149, 150 (Joseph Drew ed., 2005) (discussing state-minority and supranational-minority relationships in the context of the unratified European Constitution, calling stateless nations “geographically concentrated populations sharing common identities but which are situated within some larger composite state or states,” and citing Kurds in Turkey and Iraq as examples); Josep Desquens, *Europe’s Stateless Nations in the Era of Globalization: The Case for Catalonia’s Secession from Spain*, BOLOGNA CENTER FOR INT’L AFFAIRS (Spring 2003), <http://www.jhubc.it/bcjournal/articles/desquens.cfm> (referring to Catalonia as a stateless nation and arguing for secession from Spain). With reference to Roma, however, the argument for establishing a stateless nation refers to the creation of a recognized political body that transcends the existence of a concentrated geographical territory. See Warnke, *supra* note 18, at 365–66 (examining and evaluating the stateless nation option as a “measure of self-government [for] ethnic groups *within* a larger state. . . .” (emphasis added)).

92. See Jenne, *supra* note 91, at 207 (describing how the Romani Nation would transcend physical boundaries); Warnke, *supra* note 18, at 365, n.218 (“The ‘stateless nation’ concept has been described as divorcing ‘sovereignty as power over people [from] sovereignty as power over territory.’”).

93. See *supra* notes 58–63 and accompanying text (noting several Member State *de jure* citizenship laws).

participate politically in EU institutions.<sup>94</sup> Others, however, question the viability of such a solution because it would require the interplay of several currently separate communities that are unlikely to coalesce due to the geographical separation and regional variations of Romani communities throughout Europe.<sup>95</sup> Furthermore, previous attempts at requiring the EU to officially recognize certain minority groups as separate nations were unsuccessful.<sup>96</sup>

A second solution proffered by scholars is to eliminate the derivative nature of EU citizenship by allowing individuals to become EU citizens with or without a Member State nationality.<sup>97</sup> Proponents argue that this would allow Roma and other stateless persons to bypass the obstacles to acquiring Member State nationality and go straight to attaining EU citizenship and the benefits attached to it.<sup>98</sup> Opponents point out that this proposal is difficult to reconcile with the EU's statement in the Treaty of Amsterdam that EU citizenship is complementary to, but not a substitute for, Member State nationality.<sup>99</sup>

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94. See *Call for Roma to Have Seat in Parliament*, EUROPEANVOICE.COM (Aug. 2, 2001), <http://www.europeanvoice.com/article/imported/call-for-roma-to-have-seat-in-parliament/43193.aspx> (explaining why the International Romany Union is campaigning for a Roma seat in the EU parliament and how this would be facilitated by recognition of a stateless nation). See generally Jenne, *supra* note 91 (discussing the unique nature of "Romani nationalism," its possible benefits for Roma in the EU, and the factors that impede mobilization).

95. See Jenne, *supra* note 91, at 102 ("[W]ith contemporary European Romani politics possessing very little historical grounding, impeded by geographical dispersion, and beset the pathologies of subaltern status, negotiating the still-evolving agendas of Romani identity will be a profound challenge for even the most capable leadership."); Warnke, *supra* note 18, at 366 (observing that many Roma reject the idea of establishing a stateless nation due to "a basic distrust founded in centuries of abuse").

96. See Landau, *supra* note 91, at 158 (examining reasons for rejecting internal enlargement of the EU via secession of, for example, Catalonia, given that "the seceding group's host-state would likely oppose such a vote and . . . other states vulnerable to secessionist movements would vote against [EU] membership to avoid setting a precedent for minority groups within their own states").

97. See DEDIĆ, *supra* note 24 (arguing that the EU should consider creating EU citizenship status that is not contingent upon the possession of Member State nationality); Kochenov, *supra* note 3, at 236–37 (contending that conferral of EU citizenship based on Member State nationality is moot and that conferral should be based instead on residence in the EU).

98. See *supra* note 97 and accompanying text.

99. Treaty of Amsterdam, *supra* note 29, art. 8(1), ("Citizenship of the Union shall complement and not replace national citizenship."); see Szyszczak, *supra* note 47, at 7 ("The common theme behind Citizenship in the EU is the creation of the concept and a



A third solution proposed by scholars and politicians is to have the EU evaluate and harmonize practices granting nationality based on international agreements for the reduction and prevention of statelessness.<sup>100</sup> Proponents view this as a desirable solution to the issue of disjointed immigration and citizenship laws and the effect that these laws will have on people who try to obtain Member State nationality.<sup>101</sup> Others, however, point out that while harmonization may be a desirable answer to the question of *de jure* statelessness, it does not address the problem of *de facto* statelessness because, even if maximum requirements for acquisition of nationality and other qualifying criterion are harmonized in the EU, many Roma will still face *de facto* statelessness as a result of entrenched societal discrimination, including denial of access to basic services and lack of access to administrative documents.<sup>102</sup>

A fourth solution is the proposed Roma Integration Directive, which is supported by some Romani rights activists and was originally suggested by the EU Network of Independent Experts on Fundamental Rights, but it has not been formulated at the EU institutional level.<sup>103</sup> The Roma Integration Directive

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layer of citizenship stemming from EU law and complementary to national laws.” (emphasis omitted)).

100. See DEDIĆ, *supra* note 24 (arguing that the EU “should adopt the mechanisms for the evaluation of the practices granting nationality in the member states based on the UN and the Council of Europe standards for the prevention of statelessness and the protection of stateless persons”); Bauböck, *supra* note 3 (advocating putting “the harmonization of rules for acquisition, transmission and loss of national citizenships on the agenda of the Union . . . [via] a European guideline fixing maximum requirements for naturalization and for citizenship acquisition at birth”); Carol E. Farrand, *Invisible Citizens: Statelessness in Europe*, FOREIGN POLICY DIGEST (June 2010), <http://www.foreignpolicydigest.org/2010/06/01/invisiblecitizens-statelessness-in-europe/> (suggesting that EU harmonization of “relevant human rights and statelessness conventions” is a viable solution).

101. See *supra* notes 95–96 and accompanying text (analyzing the “stateless nation” solution with respect to the lack of political cohesion in the Romani community).

102. See *supra* notes 64–68 and accompanying text (noting causes of *de facto* statelessness). See generally Warnke, *supra* note 18 (suggesting that separate solutions tailored to address both *de jure* and *de facto* statelessness in their particular contexts are necessary).

103. See De Schutter & Versüchel, *supra* note 27, at 33–34 (exploring the possibility of a Roma Integration Directive as proposed by the EU Network of Independent Experts on Fundamental Rights); see also MARK BELL, EXTENDING EU ANTI-DISCRIMINATION LAW: REPORT OF AN ENAR AD HOC EXPERT GROUP ON ANTI-DISCRIMINATION LAW (2006) (suggesting a new directive aimed at combating discrimination that does not contain an exception for difference of treatment based on immigration status or

would include provisions for widespread integration of the Romani community in the EU, not just limited to issues of statelessness, but also with respect to, *inter alia*, housing, education, and access to health care and other services.<sup>104</sup> Some argue, however, that it is legally unclear whether the European Community Treaty Article 13 mandate to combat discrimination allows for such a broad affirmative promotion of overall societal integration in so many areas.<sup>105</sup>

Traditionally, EU institutions have deferred to Member State nationality legislation despite the fact that many Member State laws perpetuate Roma statelessness.<sup>106</sup> Recently, however, the Court of Justice and international scholars have begun to view Member State sovereignty as limited.<sup>107</sup> Several solutions to the problem of Roma statelessness have developed in light of the erosion of the sovereignty doctrine.<sup>108</sup>

### III. THE INADEQUACIES OF SUGGESTED SOLUTIONS AND A NEW ALTERNATIVE

Previously proposed solutions to the issue of Roma statelessness in the EU are well-intentioned but inadequate, as they fail to require active oversight by the EU. Section A analyzes the shortcomings of the solutions discussed in Part II. Section B proposes an alternative solution—a directive based on Article 13 requiring facilitation of acquisition of nationality based on the 1954 and 1961 Conventions, the Convention on Nationality, and the Universal Declaration of Human Rights.

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nationality); *EU Experts Recommend Directive on Roma Integration*, SOCIAL RIGHTS BULGARIA (June 9, 2004), <http://www.socialnprava.info/article607.html> (listing proposed aspects of the directive); Alexandra Xanthaki, *The Proposal for an EU Directive on Integration*, EUROPEAN ROMA RIGHTS CENTRE (Mar. 24, 2005), <http://www.errc.org/cikk.php?cikk=2211> (discussing potential aspects of such a directive).

104. See generally *EU Experts Directive on Roma Integration*, *supra* note 103 (examining specific aspects of the proposed directive); *The Proposal for an EU Directive on Immigration*, *supra* note 103 (evaluating the directive in the context of segregation).

105. See De Schutter & Verstichel, *supra* note 27, at 34 (“The argument has sometimes been put forward that a directive *promoting integration* has an objective distinct from *combating discrimination*, and that, therefore, it would not be possible, on the basis of Article 13(1) EC, to adopt an instrument imposing the adoption of affirmative action measures or desegregation.”).

106. See *supra* notes 54–72 (describing Member State sovereignty and discussing specific Member State nationality laws).

107. See *supra* notes 74–89 (discussing this erosion).

108. See *supra* notes 90–05 (outlining and discussing several proposed solutions).

A. *The Inadequacies of Suggested Solutions*

As parties or signatories to several international agreements, all twenty-seven EU Member States have recognized that everyone has a right to have a nationality.<sup>109</sup> The situation of stateless Roma is unique in that, in many cases, statelessness is a product of centuries of racial or ethnic discrimination.<sup>110</sup> In light of international agreements regarding statelessness, keeping Roma from becoming citizens of Member States in which they were born or in which they are lawfully and habitually resident lacks a valid legal or political justification.<sup>111</sup> Several solutions to this problem have been suggested, but they are too narrow, not plausible, or too broad to be realized.

The proposal of a “stateless nation” for Roma is, at present, unrealistic given that the Romani community in the EU is extremely diverse and widespread and political organization is slim.<sup>112</sup> Establishing a stateless nation would require a level of social and political cooperation that the Romani community is not equipped to take on because they are spread throughout all of Europe, and separate Romani communities are highly heterogeneous.<sup>113</sup> In addition, it is unlikely that the EU would legitimize or recognize such a nation because it would require Member States to sacrifice some amount of territorial integrity, and Member States would likely fear that other minority groups would be inspired to fight for the same type of recognition.<sup>114</sup>

Given the nature of how individuals acquire EU citizenship, the proposal to eliminate the *ius tractum* nature of EU citizenship is also unrealistic.<sup>115</sup> The EU has reiterated on several occasions the idea that EU citizenship is complementary to, and not a

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109. See *supra* notes 30–44 and accompanying text (citing the relevant provisions of said international agreements).

110. See *supra* notes 22–27 and accompanying text (examining the history of Roma in the EU and the trend of discrimination against them).

111. See *supra* notes 30–44 and accompanying text (quoting international agreements to reduce and avoid statelessness).

112. See *supra* notes 91–96 and accompanying text (describing the lack of political cohesion in the Romani community across the EU).

113. See *supra* note 112.

114. See *supra* note 91 and accompanying text (warning of the possibility that other minority groups would seek recognition).

115. See *supra* notes 97–99 and accompanying text (explaining the contingent nature of EU citizenship as it relates to Member State nationality).

substitute for, Member State nationality and citizenship.<sup>116</sup> If acquisition of EU citizenship were possible regardless of the possession of Member State nationality, Member States would be required to respect the exercise of EU citizenship rights by nationals of non-EU states.<sup>117</sup> Allowing EU citizenship not based on Member State nationality would allow access to EU resources and rights for stateless individuals, but also for nationals of countries that have failed to comply with the requisite standards for accession to the EU.

The solution of evaluation and harmonization of practices granting nationality based on international agreements for the reduction and prevention of statelessness is inadequate because it would not address the issue of *de facto* statelessness.<sup>118</sup> For example, Roma in Hungary are technically Hungarian nationals but they are effectively denied the benefits of their nationality due to intense discrimination against them with respect to housing, education, employment, etc.<sup>119</sup> Even if all Member States' laws regarding acquisition of nationality were harmonized given the obligations of international agreements regarding statelessness, Roma would still face the problem of *de facto* statelessness in many cases, which involves denial of access to administrative procedures by which they can prove their nationality.<sup>120</sup>

The proposal of a Roma Integration Directive is at once too broad and too narrow. The Roma Integration Directive was first conceptualized in 2003 and still has not been officially drafted for submission to the appropriate EU institutions for approval.<sup>121</sup> In its conceptual form, the overall goal is full integration of Roma into EU economic, social, and political spheres.<sup>122</sup> It aims

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116. See *supra* notes 45–47, 99, and accompanying text (citing some instances of the EU's insistence on this premise).

117. See *supra* note 4 and accompanying text (noting the rights attached to EU citizenship).

118. See *supra* notes 100–02 and accompanying text (offering the pros and cons of this solution).

119. See *supra* notes 103–05 and accompanying text (explaining *de facto* statelessness among Roma in Hungary).

120. See *supra* notes 64–68 and accompanying text (describing *de facto* statelessness among Roma in Hungary).

121. See *supra* notes 103–05 and accompanying text (analyzing the Roma Integration Directive as proposed).

122. See *supra* notes 103–05 and accompanying text.

to eliminate, *inter alia*, educational segregation, labor discrimination, violence, obstacles to access to administrative documents, obstacles to access to health care.<sup>123</sup> While all of these goals are essential to eradicating the human rights abuses that Roma face daily, attaching the issue of statelessness to the Roma Integration Directive compiles several very complex issues into one directive. There is a danger that attempting to solve so many issues, including statelessness, would lead to overall failure and rejection of the Roma Integration Directive. Rather than trying to cover every issue with one directive, it would be more productive to address Roma statelessness in a directive that covers only that issue.

### B. *An Alternative Solution*

Given the shortcomings of the aforementioned solutions, an alternative solution is to create a directive addressing Roma statelessness based on Article 13 of the European Community Treaty.<sup>124</sup> In light of the evolving limitations on Member State sovereignty, the requirements of international agreements regarding statelessness and nationality, and the absence of a valid justification for preventing Roma who fall within the purview of the relevant agreements from becoming Member State citizens, Article 13 can act as the basis on which to frame the directive.<sup>125</sup> With respect to *de jure* statelessness, the directive should require Member States to affirmatively grant nationality to stateless Roma who were born on their territory or who reside there lawfully and habitually, as required by the Convention on Nationality.<sup>126</sup> With respect to *de facto* statelessness, the directive should require Member States to actively provide administrative access to documentation for Roma who do not have proof of their possession of a nationality, in addition to creating a mechanism for providing these documents to future generations of Romani children and their families.

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123. See *supra* notes 103–05 and accompanying text.

124. See *supra* note 49 and accompanying text (defining EC Treaty Article 13).

125. See *supra* notes 74–89 and accompanying text (chronicling the erosion of the doctrine of Member State sovereignty).

126. See *supra* notes 36–41 and accompanying text (citing relevant provisions of the European Convention on Nationality).

The rebuttal to this solution is to argue that a directive based on Article 13 cannot impinge on Member State sovereignty concerning nationality laws.<sup>127</sup> There are several answers to this rebuttal. First, the possible scope of legislation based on Article 13 is not established.<sup>128</sup> It is possible that Article 13 legislation can be broad enough to allow a directive like this one to be promulgated.<sup>129</sup> Second, even if Article 13 does not allow legislation to go beyond the competences of the EU, the doctrine of Member State sovereignty over nationality laws is eroding.<sup>130</sup> The Court of Justice has already placed limitations on Member State sovereignty and it is likely that they will continue to do so.<sup>131</sup> Third, Member States have signed binding international agreements that require them to do what the proposed directive would require them to do.<sup>132</sup> If the directive were promulgated, the EU would not be requiring anything more than what the Member States have already obliged themselves to do.<sup>133</sup>

This solution would not run into the same problems as the solutions mentioned in Section A. The proposed directive would not require the same problematic political decisions as the stateless nation solution because it would not ask any existing Member States to recognize a nation within their nation.<sup>134</sup> Further, the proposed directive would not require an implausible restructuring of the political nature of EU citizenship implicated by allowing EU citizenship that is not derivative of Member State nationality.<sup>135</sup> Compared to the harmonization solution, the proposed directive would more adequately address the issue of *de facto* statelessness by creating an affirmative mandate to provide

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127. See *supra* notes 45–53 and accompanying text (identifying Article 13 as the legal basis for the Race Directive and describing its relationship to the doctrine of sovereignty).

128. See *supra* notes 103–05 and accompanying text (discussing the proposal of a Roma Integration Directive based on a broad interpretation of the scope of Article 13).

129. See *supra* notes 103–05 and accompanying text.

130. See *supra* notes 74–89 and accompanying text (explaining the basis of this erosion).

131. See *supra* notes 74–89 and accompanying text.

132. See *supra* notes 29–44 and accompanying text (describing international agreements to reduce and avoid statelessness).

133. See *supra* notes 29–44 and accompanying text.

134. See *supra* notes 112–14 and accompanying text (describing the political implications of creating a stateless nation).

135. See *supra* notes 115–17 and accompanying text (explaining the disjointed political nature of the Romani community across the EU).

administrative access to *de facto* stateless Roma, in addition to providing nationality and thereby EU citizenship to *de jure* stateless Roma.<sup>136</sup> Further, the proposed directive does not face the same obstacles as the Roma Integration Directive because it separates the statelessness issue from the many other issues that the Romani community in the EU have yet to overcome, thereby narrowing the scope and increasing the odds of success.<sup>137</sup>

Given the erosion of the doctrine of sovereignty, scholars have proposed several different types of solutions to the problem of Roma statelessness. Unfortunately, these solutions are inadequate for varying reasons. An adequate solution is one that would address both *de jure* and *de facto* statelessness extensively. The suggested directive would require Member States to actively facilitate the acquisition of Member State nationality by Roma who fall within the purview of international agreements to reduce and avoid statelessness.

### CONCLUSION

Statelessness is a problem that the international community has recognized as intolerable for quite some time. The EU Member States must be held accountable for agreeing to reduce and avoid statelessness. The only way to make sure this happens is to have respect for the fact that the doctrine of sovereignty concerning conferral of nationality is not an absolute right. Stateless Roma in the EU that fall within the purview of the relevant international agreements should be given Member State nationality and EU citizenship so they can partake in the rights that come from such status. An affirmative mandate requiring Member States to adhere to the obligations contained in the international agreements they are parties or signatories to is necessary in order to ensure that stateless Roma are granted the rights to which they are entitled.

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136. See *supra* notes 118–20 and accompanying text (explaining the difficulties of the harmonization solution).

137. See *supra* notes 121–23 and accompanying text (commenting on the difficulty of getting such a broad measure passed).