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EU Citizenship: Why Can't the Advocates General Keep Sheila McCarthy's Family Together?

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EU CITIZENSHIP: WHY CAN'T THE ADVOCATES GENERAL KEEP SHEILA MCCARTHY'S FAMILY TOGETHER?

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INTRODUCTION

George McCarthy, a third-country (Jamaican) national, and husband wished to stay with his wife Sheila and their children in the United Kingdom.¹ The Court of Justice of the European Union (“CJEU”) in effect answered the UK court’s referral question about Mrs. McCarthy’s right to reside in the United Kingdom in the following way. Mrs. McCarthy as a citizen of the European Union has no independent right to reside in the United Kingdom under treaty provisions² because that would involve letting her husband stay in the United Kingdom. The heart of the case, according to the CJEU, is that “[n]o element of the situation of Mrs. McCarthy, as described by the national court, indicated that the national measure at issue . . . has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen.”³ Equally important to the Court was the contrast with *Ruiz Zambrano*: “the national measure . . . in the present case [leading to the deportation of George McCarthy] does not have the effect of obliging Mrs. McCarthy to leave the territory of the EU.”⁴ She and their children may choose to remain without the husband and father of the family, if she so wishes. The family’s break up, if Mrs. McCarthy chooses

1. Dimitry Kochenov & Richard Plender, *EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, 37 EUR. L. REV. 369, 389–90 (2012). Sheila McCarthy, a dual UK and Irish citizen working at home by taking care of the McCarthy children, did not receive help from the Court of Justice of the European Union (“CJEU”) to stay as an intact family in the United Kingdom. The McCarthy family situation sheds “some light on what was actually going on. Three children, one of them severely disabled and in need of constant care, went unreported.” *Id.* at 389–90. Kochenov and Plender speak of the citizen’s “right not to be pushed to leave the territory of the Union.” *Id.* at 387.

2. See Consolidated Version of the Treaty on the Functioning of the European Union art. 20, 2010 O.J. C 83/47, at 56 [hereinafter TFEU] (providing that “(1) Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. (2) Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby”). This provision was not part of the Treaty of Rome (1957) but was added as an amendment to Article 8 of the EC Treaty (one of the Treaties of Rome, 1957) in Maastricht in 1992. See also *id.* art. 21, at 57 (providing 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 the Treaties and by the measures adopted to give them effect”) (emphasis added).

3. *Sheila McCarthy v. Sec’y of State for the Home Dep’t*, Case C-434/09, [2011] E.C.R. I-03375, ¶ 49.

4. *Id.* ¶ 50.

to remain in the United Kingdom, is only collateral damage from the judicial decision.

In the judicial system of the European Union, the Court has as part of its operation the help of Advocates General who set forth a unique judicial perspective on the most pressing and important legal problems facing the Union. With judicial status themselves, the Advocates General contribute to the ongoing development of the jurisprudence of the CJEU. Clarity in EU citizenship is particularly important now when the European Union is facing a falling and aging population, the need for secure family unification (or reunification) of parents who are EU citizens married to third-country nations and the necessity for equality with respect to integration throughout the Union. In these circumstances an increase in EU citizenship cases is no surprise. The Advocates General have been perfectly positioned to develop the nuances of all the legal theories for the CJEU to take next step in the application of the principles of Union citizenship.

To explore the inconsistencies in recent EU citizenship cases and the potential for harmonization, this Article in Part I sets what might otherwise seem a crisis of jurisdiction regarding the European Union's competence in citizenship, formerly only a Member State competence, in the historical perspective of the long struggle of the Union and the Court to achieve that elusive treaty vision of "ever closer union."

Part II set forth the role Advocates General play in clarifying the underlying issues of fundamental rights reaching across the European Union versus an internal situation relevant only to one Member State at stake in *McCarthy* and future cases. This exploration of the function of the Advocates General is necessary to lay the foundation for determining whether a solution to the EU citizenship deficit can come from the judicial system itself. Part III explores several questions. What barriers obscure the vision and meaning of EU citizenship? Do babies and children in school now receive special protection that other citizens seemingly cannot? Is the EU citizen only a "traveling man?" Does the Court, by relying on the laws of Member State citizenship in accordance with the treaty, assume the bureaucratic deficiencies of the modern administrative state? Should the European Union now be subject to a normative

“market” construct? Is that framework too narrow in today’s environment when democratic governments desire to be subject to considerations of rights? In Part IV, the important question arises: What, if any, role can the Charter of Fundamental Rights of the European Union (“Charter of Rights”), made law by the Treaty of Lisbon in 2009,⁵ play in re-orienting the vision of the Court of Justice? What is the current vision of the Court, including both the judges and the Advocates General, as far as family (re)unification rights and EU citizenship are concerned? As it stands now, the Member States intervening in EU citizenship cases have put their thumbprints on the vision, clouding and obscuring the lens, with the result that fundamental rights recede into the background and Member States’ social welfare budgets loom larger on the horizon.

I. THE EU AND CITIZENSHIP

Today the European Union and citizenship are inextricably connected but EU citizenship was not even a glimmer in the minds of those searching for peace after the suffering during the Second World War (and the many preceding European wars).⁶ The idea of Europe took various verbally expressive forms along with different efforts to co-operate after the Second World War.⁷

5. The Charter of Fundamental Rights of the European Union has the force of law under the Treaty of Lisbon’s TEU art. 6. (2009). See Consolidated Version of the Treaty on European Union art. 6, 2010 O.J. C 83/13 [hereinafter TEU post-Lisbon]. Article 51 of the Charter of Fundamental Rights of the European Union makes it clear it does not, *rationae materiae*, “extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.” See Charter of Fundamental Rights of the European Union art. 51, 2010 O.J. C 83/389 [hereinafter Charter of Rights]. Braibant, one of the drafters of the Charter of Rights, provides a legislative history of Article 51. See GUY BRAIBANT, LA CHARTE DES DROITS FONDAMENTAUX DE L’UNION EUROPÉENNE: TÉMOIGNAGE ET COMMENTAIRES 251–53 (2001); see generally Grainne de Burca, *The Drafting of the European Union Charter of Fundamental Rights*, 26 EUR. L. REV. 126 (2001).

6. See Peter Spiegel & Richard Milne, *EU’s Stabilising Role Honoured*, FIN. TIMES, Oct. 13, 2012, at 2; Quentin Peel, *Should Bloc Have Won?*, FIN. TIMES, Oct. 13, 2012, at 2; Gideon Rachman, *Brussels Can Share Credit with Other Candidates*, FIN. TIMES, Oct. 13, 2012, at 2 (explaining that America, NATO, and modernity itself helped warlike Europe to keep the recent peace).

7. Staff Briefing, *Goodbye Europe: What Would Happen if Britain Left the EU?*, ECONOMIST 23 (Dec. 8–14, 2012). Unlike American secession followed by the Civil War, Britain would likely have no ability to return to the Union. “And one certainty: that having once

Throughout this period, the CJEU is considered to be among the best vehicles for holding Europe together as people puzzle through what Europe and the idea of Europe actually are and can be.⁸ The court started to set up a new legal order and construed the provisions of the Economic Community Treaty of Rome (1957), which specifically referred to such economic freedoms as the freedom of workers to travel from one Member State to another for work.⁹ Eventually this new freedom became a normative, market constraint. To this day, that early history still shapes the reasoning in the cases today. The court deliberately does not mention respect for family rights in different cases when it can avoid doing so as “a strategic omission” to permit the court to “avoid any charges of ‘new’ competence-creating.”¹⁰

departed, it would be all but impossible to get back in again.” *Id.* at 26. Similarly, David Cameron, the coalition Prime Minister, facing divisions in his Conservative Party, has suggested that if people re-elect him in 2015, he will re-negotiate the relationship between United Kingdom and the European Union and present the British people with a referendum. *See* Cassell Bryan-Low & Nicholas Winning, *U.K. Rethinks Ties to Europe*, WALL ST. J., Jan. 23, 2013, at A1. Business leaders expressed concern over the long-term uncertainty the prospect of the United Kingdom’s departure injects into the regulations businesses would have to follow if they were to invest in the United Kingdom at this time, suggesting that they might invest elsewhere until the matter is settled. *See* Cassell Bryan-Low, *U.K. Leader Tries to Calm EU Fears over Ties*, WALL ST. J., Jan. 25, 2013, at A7.

8. La Cour de Justice de l’Union Européenne (“CJUE”) has just celebrated its 60th anniversary December 3–4, 2012. A serious collection of articles has accompanied the celebration. *See* THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE: ANALYSES AND PERSPECTIVES ON SIXTY YEARS OF CASE—LAW—LA COUR DE JUSTICE ET LA CONSTRUCTION DE L’EUROPE: ANALYSES ET PERSPECTIVES DE SOIXANTE ANS DE JURISPRUDENCE (Allan Rosas, Egils Levits & Yves Bots eds., 2012).

9. *See* TFEU, *supra* note 2; *van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] E.C.R. I. *Van Gend en Loos* in effect opened the preliminary reference competence to the equivalent of “private attorneys general,” as in the American case, *Kardon v. National Gypsum*, 69 F. Supp. 512 (E.D. Pa. 1946), by implying a private right of action in order to carry out the purpose of the legislation (the Securities Exchange Act of 1934, 15 U.S.C. §78, at issue in *Kardon*, or the treaty which promoted the integration of Europe in *van Gend en Loos*). *Cf.* PETER L. LINDSETH, *POWER & LEGITIMACY: RECONCILING EUROPE AND THE NATION STATE* 137–38 (2010) (explaining that in *van Gend en Loos*, the CJEU “opened the door to extensive supranational judicial intervention into national legal orders” by “recognizing the standing of private parties to bring compliance claims” through a preliminary reference). For more on the preliminary reference procedure, see KOEN LENAERTS & D. ARTS, *PROCEDURAL LAW OF THE EU* 17–55, 229–43 (1999).

10. Niamh Nic Shuibhne, (*Some of the Kids Are All Right*: McCarthy & Dereci, 49 Common MKT. L. REV. 349, 375 (2012) (referring to *Ruiz Zambrano*). *See infra* notes 54–64.

The CJEU had built up its very considerable expertise in cases involving EU legislation dealing with the internal market. Thus over the decades since the 1960s, the court had fairly steadily developed the stance of an economic regulatory body. It naturally looked to the integration of the market for its jurisprudence. The CJEU became not just an expert at market regulation but it also achieved a high degree of excellence and a sound jurisprudence dealing with the sale and transport of goods, free movement of persons for jobs, education and professional credentialing, the provision and receipt of services and the establishment of businesses in host Member States. For all of these reasons the CJEU is a role model for other courts and enjoys genuine esteem for its work.

As the importance of the Court has grown, and seemingly along with it the scope of its competence, particularly over the Charter of Rights¹¹ after the Treaty of Lisbon in 2009, the court has not had an easy transition to covering new cases not based on the need for market regulation. Nonetheless, fundamental rights have always been implicated in economic values and this has proved true as well in the legal history of the Union. The EU has had competence in immigration law since the Treaty of Amsterdam in 1999.¹² Now, however, the court is at a crossroads

11. Charter of Rights, *supra* note 6.

12. Even before the Treaty of Amsterdam, the CJEU dealt with fundamental rights. See Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. C 340/1 [hereinafter Treaty of Amsterdam]. For an example of an area that bridges the gap between a market concept and the concept of fundamental rights, see Gillian More, *The Principle of Equal Treatment: From Market Unifier to Fundamental Right*, in THE EVOLUTION OF EU LAW 517 (Paul Craig & Grainne de Burca eds., 1999).

Since 1969, the CJEU has been concerned with fundamental rights arising out of regulation of the internal market. In *Stauder v. City of Ulm*, the ECJ said that “fundamental human rights are enshrined in the general principles of [EU] law and are protected by the Court.” *Stauder v. City of Ulm*, Case 29/69, [1969] E.C.R. 419 ¶ 7. The CJEU said that it would draw on the different constitutional traditions of the Member States when dealing as in this case with the privacy of welfare recipients of shares of excess butter. This approach was later codified in TEU art. 6. Thus the Court has been inspired by these Member State traditions to create its own rights.

It took until 1973 in *Nold v. Commission* for the court to deal more openly with fundamental rights. See *Nold v. Comm’n*, Case 4/73, [1974] E.C.R. 491. From the beginning, one especially sensitive point has been the conflict between Member State constitutional rights and EU law.

In *Nold*, EU fundamental rights were found to be very important. The ECJ upheld the rights but recognized that they are not absolute. Public interest exceptions not disturbing

because it has the Charter of Rights dangling before it as both the sword of Damocles and a siren call.

The Member States do not wish to increase the court's competence to review Member State legislation on fundamental rights, particularly concerning family law and immigration. In those areas the Member States wish to limit fundamental rights through general exceptions couched in terms of public safety or policy, despite their commitment to fundamental rights for the most part. They rely on the Commission and secondary legislation to limit the situations in which the CJEU can apply fundamental rights in the cases before it.

The legal history of the CJEU shows in detail the challenge before the court. Prior to the Treaty of Lisbon in 2009, the treaties did not yet refer to family rights, which for a time appeared to be only the province of the European Court of Human Rights.¹³ Family law in relation to fundamental rights in connection with EU citizenship presents the CJEU with a great challenge because of arguments over the court's competence under the Charter of Rights as well as the court's arguable lack of familiarity and expertise in this important field. The court takes up the challenge at the peril of legal uncertainty and even injustice in particular cases. This construction of fundamental rights as part of the Treaty of Lisbon (2009) is still very new to the CJEU. The CJEU and the courts of the Member States work closely together.¹⁴ Each Member State is already bound by the Treaty of Lisbon to observe the fundamental rights of its citizens. The Union itself is preparing to accede to the ECHR, to which all the Member States are already signatories. EU citizenship cases set forth the challenge to the CJEU to make the case for the observance of citizen's fundamental rights.

"the substance" of those rights were allowed. The court felt that Nold's trouble arose from the recession and not because of the Commission's decision. According to the court, Nold failed on the facts. In dealing with Sheila McCarthy's marriage and family life, the ECJ used virtually the same reasoning it had used in relation market and property rights in 1973 but in 2011 it wrote its judgment without even recognizing that these fundamental rights were central to Mrs. McCarthy's claims.

13. The European Court of Human Rights ("ECtHR") was established under the Convention for the Protection of Human Rights and Fundamental Freedoms, article 8. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

14. *See* Andrea Biondi, *How to Go Ahead as an EU Law National Judge*, 15 EUR. PUB. L. 225, 238 (2009) (noting the healthy relationship between the ECJ and the national courts).

If “[c]itizenship is the cornerstone of (democratic) legitimacy in a European polity (cf. arts. 9–11 TEU),”¹⁵ did the choice Mrs. McCarthy had (to split up her family [by staying in Britain] or to leave with her husband for Jamaica) “deprive citizenship of its practical meaning” for Mrs. McCarthy?¹⁶ Citizenship developed in reaction to “the pressing legitimacy question, as did fundamental rights in general.”¹⁷ There is no harmonization of citizenship among the Member States. The requirements of the Member States differ from each other but all citizens of each Member State also have Union citizenship which they share in common but paradoxically in some cases only when they move among Member States. In a legal analysis of Sheila’s situation, several considerations will be taken into account in order to piece together a sense of citizenship because the results of recent European cases are inconsistent.¹⁸ The role of the Advocates General assigned to *McCarthy* and other EU citizenship cases will be highlighted as an important part of the dialog within the Union’s judicial system.

It is time for the Court to take a step back and examine how to continue to factor fundamental rights into its jurisprudence, apart from the Charter of Rights which provides no new pathways for jurisdiction. One way the CJEU may be helped to shape its jurisprudence on further facets of EU citizenship is through the opinions of its Advocates General. The CJEU needs to be willing to deal more concretely with how family law and

15. Armin von Bogdandy, Matthias Kottman, Carlino Antpohler, Johanna Disckschen, Simon Hentrel & Maja Smrkolj, *Reverse Solange: Protecting the Essence of Fundamental Rights Against EU Member States*, 49 COMMON MKT. L. REV. 489, 502 (2012) (citing Anne Levadec, *Citoyenneté de l’Union Européenne et Identité Constitutionnelle*, 18 REV. DES AFFAIRES EUROPÉENNES 98 (2011)).

16. *Id.* at 501.

17. *Id.* at 506 (explaining that citizenship and fundamental rights are “two mutually strengthening concepts which essentially pursue the very same objective, i.e. to bring the Union closer to the individual” (citing Siofra O’Leary, *The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law*, 32 COMMON MKT. L. REV. 519, 549 (1995)). Siofra O’Leary, *The Past, Present and Future of the Purely Internal Rule in EU Law*, in EMPOWERMENT AND DISEMPOWERMENT OF THE EUROPEAN CITIZENS 37 (Michael Dougan, Niamh Nic Shuibhne & Eleanor Spaventa eds., 2012).

18. Contrast the different and arguably unfair result in *McCarthy* with the result in *Mary Carpenter* and *Catherine Zhu*’s cases when viewed from the point of view of the fundamental right to family life. See *Carpenter v. Sec’y of State for the Home Dep’t*, Case C-60/00, [2002] E.C.R. I-6279; *Zhu & Chen v. Sec’y of State for the Home Dep’t*, Case C-200/02, [2004] E.C.R. I-9925; see also Bogdandy, *supra* note 15, at 506.

immigration bring fundamental rights into the questions on the meaning of European citizenship and integration. The CJEU, with its experience in these issues from early cases dealing with free movement of persons, must forthrightly address rather shirk these duties to provide guidance to Member State courts which will continue to refer cases with ever greater frequency to the CJEU. *McCarthy* avoids fundamental rights entirely and the Grand Chamber soon afterwards treated the fundamental right of respect for family life as an after-thought which might concern Member State courts but not really the court itself. This Article suggests that the Court cannot avoid facing these questions for too much longer without risking loss of some of the independence central to its judicial function and strong reputation.

II. *THE ROLE OF THE ADVOCATES GENERAL*

Two prominent features of the EU legal system include: 1) the preliminary reference system under Article 267 of the TFEU by which any tribunal in a Member State may refer questions about the interpretation of provisions of the treaties relevant to the resolution of a case pending in that tribunal and 2) the use of advocates general who enjoy judicial status at the court and who play a unique role in the resolution of important cases in the CJEU.¹⁹ Briefly, the preliminary reference system allows the CJEU and the courts of the Member States to interact when a tribunal in a Member State asks the CJEU for an interpretation of a treaty provision or secondary Union legislation.

The Advocate General assigned to a case writes an opinion exploring all the issues and delivers it to the court, which can take the opinion into account in reaching its judgment. Is it the role of the Advocate General assigned to a case to consider such questions as alienation from government and the fiction that choice, even among bad alternatives, is deemed consent in order to prevent such a mistake from occurring? The judicial rank of the position of Advocate General comes from French

19. See *THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE*, *supra* note 9. For a good description of this process, see GEORGE BERMAN, ROGER J. GOEBEL, WILLIAM J. DAVEY & ELEANOR M. FOX, *CASES AND MATERIALS ON EUROPEAN UNION LAW* 321–48 (3d ed., 2011).

administrative law. Because the CJEU has no dissents, its judgments customarily do not provide expansive reasoning on the issues before the court. Much more leeway is available to the Advocate General who writes an individual opinion, expansively reasoned and sometimes including alternative arguments.²⁰

“The opinion contains a more detailed exposition of the factual and legal background to the case than that found in the judgment.”²¹ Part of the Advocate General’s discretion includes making “alternative arguments,”²² comparing the laws of Member States to derive “a principle appropriate to [Union] law,”²³ and in *dictum*, to assess case law, “identifying trends, pointing out inconsistencies which may exist, and outlining future possible developments. In that respect, his independence from the judges is of cardinal importance.”²⁴

A. *Wading Through the Technicalities: The “Purely Internal” Doctrine*

On the one hand, the Advocates General have set forth the fundamental rights embedded in the technicalities of regulations, directives, and other secondary legislation.²⁵ On the other hand, Advocates General can get too far ahead of the court and risk not being a factor in the court’s deliberations, as

20. Takis Tridimas, *The Role of the Advocate General in the Development of Community Law: Some Reflections*, 34 COMMON MKT. L. REV. 1349, 1361 (1997). Article 167 of the EC Treaty provided that (note the plural) Advocates General write an individual opinion. A few months later, the Court set forth its unanimous judgment. The court may refer to the Advocate General’s opinion on particularly persuasive issues. *Id.* at 1358.

21. *Id.* at 1358–59. Tridimas enumerates four functions for the Advocate General: assisting the court in preparing the case; proposing a solution to the case before the court; providing legal grounds to justify the solution by relating it to existing case law, and; opining on incidental points of law, in particular critically assessing case law or commentary on the development of the law in the area at issue.

22. *Id.* at 1359.

23. *Id.* at 1360.

24. *Id.* at 1361.

25. Bogdandy, *supra* note 15, at 505–06; *see*, Opinion of Advocate General Jacobs, Carlos Garcia Avello v. Etat Belge, Case C-148/02, [2003] E.C.R. I-11613, ¶ 27 (“assess[ing] the dispute about the composition of a surname in light of the right to a personal identity”); Opinion of Advocate General Geelhoed, Baumbast & R v. Sec’y of State for the Home Dep’t, Case C-413/99, [2002] E.C.R. I-7091, ¶ 58; Opinion of Advocate General Tizzano, Kunquian Catherine Zhu & Man Lavette Chen v. Sec’y of State for the Home Dep’t, Case C-200/02, [2004] E.C.R. I-09925, ¶ 94; Opinion of Advocate General Sharpston, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Case C-208/09, [2010] E.C.R. I-13693, ¶ 3, n.102.

described in Part II.B below. That delicate balance comes to the fore in cases involving rights subject to over-reaching or abuse by Member States which can “insulate a territory or a community of people residing in a particular place by treat them differently from others located in the same state.”²⁶

Member States desiring to pre-empt from their citizens or residents constitutional or fundamental rights they have sworn to uphold are happy to argue that EU law cannot interfere.²⁷ The CJEU would therefore have no competence (jurisdiction) to remedy the wrong or harm the Member State is perpetrating. Those residents or citizens preyed upon in their own Member States are said to suffer from reverse discrimination.²⁸ The classic description of the harm²⁹ the “purely internal” matter can cover over or hide is as follows. Reverse discrimination “should now be considered a difference in treatment that falls within the general scope of EU law, as it impedes the [EU’s] now all-important aim of ensuring that no discrimination arises as a result of the process of European integration.”³⁰

Despite the fact that the Advocates General can be more creative in their reasoning and discernment of the issues embedded in a case, Advocates General are still hemmed in by a

26. Fernanda Nicola, *Invisible Cities in Europe*, 35 *FORDHAM INT’L L.J.* 1282, 1297 (2012).

27. *Id.* (explaining that “while the 2009 Treaty of Lisbon and numerous directives and case law have strengthened the rights of European citizens, the ‘wholly internal’ situation doctrine has become an important shield to protect Member States from the expansion of EU powers”).

28. Alina Tryfonidou, *Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens’ Europe*, 35 *LEGAL ISSUES ECON. INTEGRATION* 43, 63 (2008). “Reverse discrimination arises as a result of the process of constructing an internal market and the limited scope of application of EU law . . .” *Id.* Art. 18 TFEU deals with discrimination and the concept of reverse discrimination fits in here. See Anne Pieter van der Mei, *The Outer Limits of the Prohibition on Grounds of Nationality: A Look through the Lens of Union Citizenship*, 18 *MAASTRICHT J. EUR. & COMP. L.* 62 (2011).

29. The purely internal Member-State situation is not always harmful to citizens such as when the Member State targets particularly needy groups and communities within the State for financial and educational grants. Students or grant seekers from other Member States who object successfully to that inequality in aid may only succeed in wiping out the limited amount of aid the State has available. Agustín José Menéndez, *European Citizenship after Martínez Sala and Baumbast: Has European Law Become More Human but Less Social?*, in *THE PAST AND FUTURE OF EU LAW: THE CLASSICS OF EU LAW REVISITED ON THE 50TH ANNIVERSARY OF THE ROME TREATY* 363, 388–92 (Miguel Poirares Maduro & Loic Azoulay eds., 2010); Nicola, *supra* note 26, at 1356–61.

30. Tryfonidou, *supra* note 28, at 64.

series of technicalities from the narrow competence of EU law compared to the national law of the Member States and from the conservative traditions developed in any institution such as the CJEU. In the area of freedom of the press and media (equivalent to the freedom in the First Amendment), the frustrations of an overly complicated law are due in some large part to the reluctance of Member States to cede the particular competence to the European Union and because of their desire not to honor those rights. The issues in several of these cases raise the same or similar constitutional issues as *McCarthy*. These frustrations include unenlightened policy of the Member State, driven by desire to avoid the costs of social welfare, which poor families might need, the inability of the Court to overcome or even to face the predicament and the ill consequences for democracy, transparency, and legitimacy.³¹

Centro Europa 7 illustrates this problem exquisitely.³² AG Miguel Poiras Maduro sets forth the problems of an independent communications company trying to operate in a Member State with a media mogul even more powerful than Rupert Murdoch, namely Silvio Berlusconi, at the relevant time for the difficulties in this case, Prime Minister of Italy. Mediaset is owned by the Berlusconi interests. The concept of media pluralism requires an end to the Berlusconi duopoly.³³ The media company that owns *Centro Europa 7* won broadcasting rights in a public tender procedure but the government never assigned the company the radio frequency from which to broadcast. At the same time the Italian government introduced

31. Other media cases with happier outcomes include: *Vereinigte Familiapress v. Bauer Verlag*, Case C-60/00, [1997] E.C.R. I-3689; *ERT v. DEP*, Case C-260/89, [1991] E.C.R. I-2925.

32. Opinion of Advocate General Miguel Poiras Maduro, *Centro Europa 7 Srl v. Ministero delle Comunicazioni e Autorità per le Garanzie nelle Comunicazioni*, Case C-380/05, [2008] E.C.R. I-349, ¶ 21 (explaining the possibility of a Member State's persistent violations of fundamental rights: "I do not discount, offhand, the idea that a serious and persistent breach of fundamental rights might occur in a Member State, making it impossible for that State to comply with many of its EU obligations and effectively limiting the possibility for individuals to benefit fully from the rights grant to them by EU law").

33. Media pluralism is honored in such CJUE judgments as: *Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v. Heinrich Bauer Verlag*, Case C-368/95, [1997] E.C.R. I-3689 (free expression); *Centro Europa 7 Srl v. Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni*, Eur. Ct. H.R. (2012) (addressing the deprivation of the right of property to broadcast on the assigned airway).

national legislation that let Mediaset continue to use the frequency. Is the national law incompatible with Article 10 of the ECHR? How enforceable are fundamental rights in the context of purely national situations with no cross-border element? Do EU fundamental rights come into play only when Member States implement EU law? This is the same troubling issue underlying *McCarthy* and the same disturbing answer leaves EU citizens unprotected.

Advocate General Maduro's analysis may be outlined as follows: in *Konstantinidis* Advocate General Francis Jacobs thought that any national who pursues economic activity in another Member State may invoke the protection of fundamental rights as a matter of European Union law.³⁴ The Court did not accept that any violation at all hampers the right to free movement.³⁵ Since the Treaty of Amsterdam, respect for fundamental rights is a formal legal requirement for membership in the European Union.³⁶ Article 6 of the Treaty on the European Union recognizes that the European Union founded on the principles of liberal democratic respect for human rights, fundamental freedom, and the rule of law, and provides for the accession of the European Union to the ECHR.³⁷ Article 7 allows imposition of sanctions.³⁸

But no extension of the scope of application of fundamental rights as a matter of EU law is allowed when it comes to any Member State measure. Yet it cannot be denied that respect for fundamental rights is intrinsic to the EU legal order.³⁹ One type of review is conventional: the court has jurisdiction to examine whether Member States provide the level of protection to fulfill their other obligations as members of the Union, which flows logically from the nature of the process of European integration. Another type of judicial review is possible: jurisdiction to review any national measure in the light

34. Opinion of Advocate General Francis Jacobs, *Christos Konstantinidis v. Stadt Altensteig*, Case C-168/91, [1993] E.C.R. I-1191, ¶ 46.

35. *See id.* ¶ 17.

36. *See generally* Treaty of Amsterdam Amending the Treaty on European Union, *supra* note 13 (emphasizing the rights of citizens and individuals).

37. TEU post-Lisbon, *supra* note 5, art. 6, 2010 O.J. C 83/13, at 19.

38. *Id.* art. 7, at 19–20.

39. *See id.* ¶ 19.

of fundamental rights but this is ancillary.⁴⁰ It is possible that fundamental rights are persistently breached in a Member State.⁴¹ But only a serious violation impinges on free movement.⁴² Those who do not fall under the competence of the CJEU have to go to the ECtHR.⁴³

Setting forth the carefully nuanced opinion in outline form places the limitations on justice in stark relief. Any rights not protected are deemed less “serious.” Nevertheless, AG Maduro’s opinion recognizes the importance of fundamental rights whether traveling from one Member State to another takes place or not. The legal commitment of the Member States in their own constitutions to honor fundamental rights makes it clear that more than traveling (the “freedom” of the EC Treaty) is at stake. Thus, there is still a cross-border implication (¶ 29).⁴⁴ In *Guimont*, the rules related to free movement but had no cross-border element.⁴⁵ Finally, the opinion recognizes the obligation of Member States and national courts to deal with delays that prevent the exercise of rights: national courts had better scrutinize this delay.⁴⁶

As far as Sheila McCarthy’s case is concerned, *Centro Europa 7* in 2007 is the proverbial canary in the coal mine, the early warning sign that not all is well for the protection of Sheila’s not so “serious” citizenship rights, like residence in her own Member State.⁴⁷ Perhaps the Member State, which at least since its preparations for accession to the EU and many times long before that, has undertaken to protect constitutional rights, does not wish to honor its commitments in every instance.

40. *See id.* ¶ 20.

41. *See id.* ¶ 21.

42. *See id.* ¶ 23.

43. *See id.* ¶ 24.

44. *See id.* ¶ 29.

45. *See id.* ¶ 30; *Criminal Proceedings v. Jean-Pierre Guimont*, Case C-444/98, [2000] E.C.R. I-10663, ¶ 4 (fined in the Department of Vaucluse for offering Emmentaler without rind for sale in violation of a 1998 French decree). The ECJ accepted jurisdiction when the case involved no cross-border travel. Cyril Ritter, *Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234*, 31 EUR. L. REV. 690 (2006) (explaining anti-federalist position emphasizing the competencies of the Member States).

46. *See* TEU post-Lisbon, *supra* note 5, art. 7, 2010 O.J. C 83/13, at 40.

47. EUI Working Papers, Robert Schuman Centre for Advanced Studies EUDO Citizenship Observatory, *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?* (Dec. 2011, Jo Shaw, ed.), http://eudo-citizenship.eu/docs/RSCAS_2011_62.pdf.

Perhaps the Court is leery of committing to a full defense of the Charter of Rights.⁴⁸ Or perhaps in the process of the EU's accession to the ECHR, the Court does not wish to create jurisdictional duplications. Nevertheless, it thereby weakens itself in *Centro Europa 7*, since the ECtHR itself is far from robust and also suffers from deference to the signatory states to that treaty. Lack of competence renders courts weak and fails to protect citizens from their state governments when that becomes necessary. The CJEU in this case looks more like the ECtH in its wide accommodation of the Member State at the expense of the rights in question that the complainant seeks to invoke.

Slightly more optimistic in her delineation of reverse discrimination arising from the purely internal doctrine, Advocate General Eleanor Sharpston has, just like Advocate General Poiares Maduro, helped the CJEU to reduce “the extent of the wholly internal situation doctrine *vis à vis* European citizens.”⁴⁹ In *Gouvernement de la Communauté Française et Gouvernement Wallon v. Gouvernement Flamand*, one of the several questions that arose had to do with whether EU law *ratione materiae* (by reason of subject matter jurisdiction) prevents a region of a Member State from making grants of care insurance (*zorgverzekering*) conditional upon residence in that region.⁵⁰ Thus a candidate for the insurance scheme had both to live and to work in Flanders because the Flemish government did not mean to provide, for example, for a candidate who works in Flanders but lives in Wallonia.

Advocate General Sharpston builds on the work of Advocate General Poiares Maduro. Due to the unusual separation but not divorce amongst the regions of the Kingdom of Belgium, she has better facts upon which to craft her argument about what

48. Admittedly much of the activity in the *McCarthy* case took place when the Charter of Rights was only a Declaration without force of law attached to the Treaty of Nice, 2000. See Charter of Rights, *supra* note 5. Once the Charter became legally binding, Member States limited the applicability of the Charter. See *infra* note 150.

49. Nicola, *supra* note 26, at 1297 (describing the invocation of a wholly internal situation, which “allows Member States to maintain reverse discriminatory schemes because they have no nexus to EU law”).

50. Opinion of Advocate General Eleanor Sharpston, *Gouvernement de la Communauté Française et Gouvernement Wallon v. Gouvernement Flamand*, Case C-212/06, [2008] E.C.R. I-1683. See Thomas A.J.A. Vandamme, *Case Annotation*, 46 COMMON MKT. L. REV. 287 (2009).

really amounts to fundamental rights.⁵¹ Advocate General Sharpston was able to make the transition in her reasoning from market concerns of free movement to political concerns about discrimination or the right to equal treatment. Therefore she can write that, “at least potentially,” the treaty’s provisions on citizenship challenge “the sustainability in its present form of the doctrine on purely internal situations.”⁵²

The irony is that the only Belgians trapped by the schema are those “who have not exercised a traditional right of freedom of movement, but who have exercised (and continue to exercise) a right to reside in a particular part of Belgium.”⁵³ Even more anomalous, this discrepancy arises “precisely because [EU] law intervenes to prevent adverse treatment” of those who exercised “classic economic rights of freedom of movement.”⁵⁴ In this case because only economic benefits were at stake, the right not to move was easier to see than in Sheila McCarthy’s case. Workers who work in Flanders deserve sick benefits, wherever they live. Advocate General Sharpston urged the CJEU to abandon its traditional approach to “reverse discrimination”⁵⁵ but even here she predicted that “the Court was unlikely to follow her train of reasoning, which it actually did not.”⁵⁶ It is

51. Opinion of Advocate General Sharpston, Government of the French Community and Walloon Government, Case C-212/06, [2008] E.C.R. I-1683, ¶ 141 (explaining that “the present case comes as close to a classic cross-border situation as a supposedly internal situation can. It thereby highlights the arbitrariness of attaching so much importance to crossing a national border”). Advocate General Sharpston points out “the self-contradictory character of aiming at or completing an internal market while continuing to attach importance to the crossing of national borders” (citation omitted). *Id.* ¶ 141, n.91. But surely that is exactly the point, that Member States cling to outmoded concepts because the reservation of national competence leaves them with powers they are more than reluctant to lose. “Clearly there is a problem, including inconsistencies among the cases. Protection for citizens is needed without infringing on the role of the Member States.” Bogdandy, *supra* note 15, at 500. See Paul Craig, *Competence and Member State Autonomy: Causality, Consequences and Legitimacy*, in *THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES* 11, 23 (Hans W. Micklitz & Bruno De Witte eds., 2012).

52. Opinion of Advocate General Sharpston, General Sharpston, Government of the French Community and Walloon Government, [2008] E.C.R. I-1683, ¶ 140.

53. *Id.* ¶ 151.

54. *Id.* ¶ n.103 (citing Opinion of Advocate General Poiras Maduro, Carbonati Apuani Srl v. Comune di Carrara, Case C-72/03, [2004] E.C.R. I-8027, ¶ 61–62).

55. SYBE DE VRIES ET AL., *BALANCING FUNDAMENTAL RIGHTS WITH THE EU TREATY FREEDOMS: THE EUROPEAN COURT OF JUSTICE AS ‘TIGHTROPE’ WALKER* 22 (2012).

56. Menéndez, *supra* note 29, at 383 n.150.

more difficult to see that Sheila who has always lived in UK has a continuing right to live there with her family because Member States had always been in control of citizenship. Every Member State might be upset not so much if Sheila received fair treatment because of her EU lawsuit but because the Member States jealously control citizenship insofar as it relates to the cost of welfare benefits for the Member State, which in turn interferes with the scope of Union citizenship.

B. The Duty Not to Get so Far out in Front of the Judges that an Advocate General's Opinions are Discounted or Even Disregarded in Judicial Deliberation

We expect to read opinions by Advocates General that are more expansive in reasoning than CJEU judgments. Opinions may contain arguments that go beyond the case to indicate the possible direction of the law or the larger consequences of following a principle. Judgments may prove more conservative in their reasoning and holdings. In this area of reverse discrimination concerning citizenship, Koen Lenaerts, Judge at the CJEU, has explored “how the [CJEU] has determined the existence of a cross-border element.”⁵⁷ Citizenship, rather than simply being a fifth economic freedom, one for “economically inactive free movers,” may provide protection “in the absence of a cross-border element,” even in the context of Article 51 of the Charter of Rights, a murky jurisdictional provision.⁵⁸ The following opinions by Advocates General illustrate narrow and broad constructions of both Article 51 and the rights of EU citizens.

In her opinion in *Ruiz Zambrano*, Advocate General Sharpston suggested that in an exclusive or shared competence, fundamental rights should be applied to the complainant’s claim.⁵⁹ *Ruiz Zambrano* deals with a family from Colombia whose

57. Koen Lenaerts, *Civis Europaeus Sum: From the Cross-border Link to the Status of Citizen of the Union*, ONLINE JOURNAL ON FREE MOVEMENT OF WORKERS WITHIN THE EUROPEAN UNION 6 (2011), available at cc.europa.eu/social/BlobServlet?docId=7281&langId=en [hereafter *Lenaerts, Civis*]; Charter of Rights, *supra* note 5, art. 51.

58. See *Lenaerts, Civis supra* note 57, at 6; Charter of Rights, *supra* note 5, art. 51, 2010 O.J. C 83/389, at 402.

59. DE VRIES ET AL., *supra* note 55, at 13; Opinion of Advocate General Sharpston, *Gerardo Ruiz Zambrano v. Office National de l’Emploi*, Case C-34/09, [2010] E.C.R. I-

first child, a son, was kidnapped by the guerillas for one week before he was returned to his parents who then went to Belgium and sought asylum.⁶⁰ Meanwhile, two more children, Diego and Jessica, were born into the family in Belgium, which later denied asylum although the family was not deported. The father had registered his family as residents, continued to work, and paid taxes and social security charges. His work contract was, however, suspended which led to the litigation in the CJEU.⁶¹

Mr. Ruiz Zambrano is free of “the confines of ‘market citizenship’” which is based on the protection of the right of a worker or recipient or provider of services to move from one Member State to another, the quintessential “traveling man.”⁶² The Ruiz Zambrano children did not move from one Member State to another. Diego and Jessica Ruiz Zambrano are allowed to be registered as Belgian citizens, even though no one has moved within the Member States and the family has remained in Belgium since their arrival from Colombia.

In her Opinion, Advocate General Sharpston “undertook a thorough critique of [] case law [on citizenship] and highlighted inconsistencies caused by the desire to expand EU fundamental rights protection.”⁶³ The first question dealt with whether a Union citizen can invoke rights derived “merely from residence in one’s Member State.” The logical contradictions of requiring travel as a trigger to rights of Union citizenship become clear in points 86 and 87 of Sharpston’s opinion. Thus

01177. Despite the fact that fundamental rights should be applied, Advocate General Sharpston did “not think that such a step can be taken unilaterally by the Court” because the Member States do not agree. *Id.* Azoulai suggests one rule of law in *Ruiz Zambrano* is that whenever the substance of a citizen’s rights is at risk, Article 20 could be invoked. See Loic Azoulai, *A Comment on the Ruiz Zambrano Judgment: A Genuine European Integration*, EUDO CITIZENSHIP, available at <http://eudo-citizenship.eu/citizenship-news/457-a-comment-on-the-ruiz-zambrano-judgment-a-genuine-european-integration> (last visited Apr. 4, 2013) (arguing that certain fundamental rights could be qualified as crucial for the enjoyment of citizenship rights). Member States disapprove.

60. *Ruiz Zambrano*, Case C-34/09, [2011] E.C.R. I-01177.

61. Michael A. Olivas & Dimitry Kochenov, *Case C-34/09 Ruiz Zambrano: A Respectful Rejoinder* (U. Hous. L. Ctr., Working Paper Series 2012-W-1, 2012).

62. Kay Hailbronner & Daniel Thym, *Case Law*, 48 COMMON MKT. L. REV. 1253, 1269 (2011).

63. Bogdandy, *supra* note 15, at 500 (explaining that Advocate General Sharpston used her Opinion in *Gouvernement de la Communauté Française*, Case C-212/06, [2008] E.C.R. I-1683, as a base to put the cases and principles involving citizenship law into a more coherent order).

one hypothetical, assuming that the Ruiz Zambrano family had to leave the Kingdom of Belgium at the end of the litigation for a third country, suggests that Diego and Jessica could go to any Member State consulate in that third country for protection and aid, even if their citizenship did not give them a right of residence in Belgium.

“Is this a purely internal situation?”⁶⁴ To address this question Sharpston examined the plain meaning of Articles 20-21 TFEU. “It would be artificial not [] to recognize [openly] that . . . Article 21 TFEU contains a separate right to reside that is independent of the right of free movement. Accordingly, I recommend that the Court now recognise the existence of that free standing right of residence.”⁶⁵

In another, harder question brought up by the facts of *Ruiz Zambrano*, Sharpston in a full and nuanced analysis saw much greater difficulties involved in the implementation of “the EU fundamental right to family life independently of any other provisions of EU law.”⁶⁶ Although fundamental rights are playing a more significant role as the European Union accedes to the ECHR, the CJEU has nevertheless hesitated in some otherwise compelling cases to apply fundamental rights. “The Court has, however, applied limits to the scope of EU fundamental rights—specifically, in relations to situations that it has held fell outside the scope of EU law.” A clear definition of the scope of the law of fundamental rights is necessary, quite apart from “the existence and scope of a material EU competence.” (¶ 164).

64. Advocate General Sharpston notes that several Member States and the Commission deem this a situation “that is purely internal.” Opinion of Advocate General Sharpston, *Ruiz Zambrano* [2010] E.C.R. I-01177, ¶ 2. Indeed, the “purely internal” argument would logically be the main stance for any Member State wishing to avoid the jurisdiction of the CJEU because purely internal situations are within the sole competence of the Member States.

65. *Id.* ¶¶ 100–01. “The Court attaches no significance to a literal reading of the Directive. Its reasoning is inspired by the will to guarantee the effectiveness of the right of residence of Union citizens through the protection of their family life.” Anastasia Iliopoulou Penot, *The Transnational Character of Union Citizenship*, in EMPOWERMENT AND DISEMPOWERMENT OF THE EUROPEAN CITIZENS 15, 27 (Michael Dougan, Niamh Nic Shuibhne & Eleanor Spaventa eds., 2012) (discussing *Metock*). But for the current, more cautious position the Court has now reached on family unification, see *infra* note 73 and accompanying text.

66. Opinion of Advocate General Sharpston, *Ruiz Zambrano* [2010] E.C.R. I-01177, ¶ 151.

Advocate General Sharpston exercised a broad interpretation of Article 51 of the Charter, in a federal approach, unlike Judge von Danwitz or Advocate General Kokott.⁶⁷ The Court avoided discussing fundamental rights in *Ruiz Zambrano*, contenting itself with the broader Article 20 TFEU, which confers the status of citizen of the Union on every person who is a national of a Member State.⁶⁸ The Court again held, echoing *Grzelczyk*, that “citizenship of the Union is destined to be the fundamental status of the nationals of Member States.”⁶⁹ Member States cannot “depriv[e] citizens of the Union of the subsequent enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.”⁷⁰

Because her proposition would entail far-reaching consequences for citizenship law and would embattle the CJEU in the face of strong opposition from Member States, Advocate General Sharpston suggested that the CJEU could not protect the full concept of EU citizenship in *Ruiz Zambrano*.⁷¹ Bogdandy emphasizes that even by following the Advocate General’s result, with which the Court agreed, the CJEU expanded citizenship law over the serious resistance of the Commission of the EU and nine Member States which intervened in *Ruiz Zambrano* to ask for dismissal.⁷² Advocate General Sharpston knew the right thing to do as far as fundamental rights are concerned but she also knew that politically it is impossible for the Court to protect fundamental citizenship rights. She forthrightly stated what the law and the citizen need and what government prevents.

67. *Id.* ¶ 158; Thomas von Danwitz & Katherina Paraschas, *A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights*, 35 *FORDHAM INT’L L.J.* 1396, 1399 (2012); Koen Lenaerts, *Federalism and the Rule of Law: Perspectives from the European Union Court of Justice*, 33 *FORDHAM INT’L L.J.* 1338 (2010); Piet Eckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 *COMMON MKT. L. REV.* 945 (2002); Lenaerts, *Civis*, *supra* note 57, at 18; *infra* Part IV.A

68. TFEU, *supra* note 2, art. 20, 2010 O.J. C83, at 56.

69. Opinion of Advocate General Sharpston, *Ruiz Zambrano* [2010] E.C.R. I-01177, ¶ 141.

70. Opinion of Advocate General Sharpston, *Ruiz Zambrano* [2010] E.C.R. I-01177.

71. *Id.* ¶ 171.

72. Bogdandy, *supra* note 15, at 503 (noting that “Union citizenship has become the ‘new frontier’ of EU law”). Searching for an understanding of this judicial risk-taking, Bogdandy found it a likely explanation that the Court, in light of the multiple crises Europe is facing, wants “to strengthen the legal concept on which the Union ultimately rests.” *Id.*

Sometimes an Advocate General can only delineate the problems without being able to set forth a satisfying solution acceptable to the Court.

The Court in its judgment in *Ruiz Zambrano* introduced “a new jurisdiction[al] test:” instead of travel based on free movement, “the severity of a Member State’s interference with EU citizenship” should be weighed.⁷³ In the end, however, this interference “only precludes expulsion of a third country national family member if this results in the Union citizen being *factually obliged* to leave the Union’s territory.”⁷⁴ In fact, however, it is “very difficult to cross that threshold.”⁷⁵

If Advocate General Sharpston emphasized the injustices of reverse discrimination, Advocate General Juliane Kokott focused on the substance of EU citizenship within the confines of limited competence for the Court. Thus, Advocate General Kokott took an entirely different analytical approach in her opinion in Sheila McCarthy’s case.⁷⁶ On the June 29th, 2010, not even five months before delivering her opinion in *McCarthy*, Advocate General Kokott spoke on the Charter at the European University Institute.⁷⁷ While important in its own right, her lecture, now a

73. Lenaerts, *Civis*, *supra* note 57, at 7. Lenaerts “supports the contention that Ruiz Zambrano has emancipated EU citizenship from the constraints inherent in its free movement origins.” *Id.* Stanislas Adam & Peter van Elsuwege, *Citizenship Rights and the Federal Balance between the European Union and Its Member States: Comment on Dereci*, 37 EUR. L. REV. 176, 177 (2012).

74. “[T]he substance of Union citizenship is protected by virtue of Article 20 TFEU [even] in the absence of any cross-border element.” Bogdandy, *supra* note 15, at 503. (citing *Dereci*, Case C-256/11, [2011] E.C.R. I___, 66 (delivered 15 Nov. 2011) (not yet reported)).

75. *Id.* at 504 (citing *McCarthy* to the effect that expulsion of a spouse did not fall under the substance).

76. See Opinion of Advocate General Kokott, *McCarthy*, Case C-434/09, [2011] E.C.R. I-03375. The Directive 2004/38/EC does not cover McCarthy because she did not move. She is not covered by the concept of beneficiary as provided for by Art. 3(1) of the Directive. See Directive 2004/38/EC of the European Parliament and of the Council on the Right of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of the Member States, art. 3(1), 2004 O.J. L 158/77. TFEU art. 21 does not apply if the citizen is confined in all relevant respects within a single Member State. See TFEU, *supra* note 2, art. 21, 2010 O.J. C83, at 56–57; see also Niamh Nic Shuibhne, *The Third Age of EU Citizenship: Directive 2004/38 in the Case Law of the Court of Justice*, in THE JUDICIARY, THE LEGISLATURE AND THE EU INTERNAL MARKET 331 (Phil Syrpis ed., 2012).

77. Juliane Kokott & Christoph Sobotta, *The Charter of Fundamental Rights of the EU after Lisbon*, EUI Working Papers No. 2010/06. Advocate General Kokott holds degrees from two distinguished American law schools, an LL.M. from American University and an S.J.D. from Harvard University. *Id.* at 1. Furthermore, AG Kokott wrote three important

working paper, is particularly relevant to *McCarthy*. As the abstract presages for her treatment of McCarthy's claim about the scope of McCarthy's citizenship, "close examination of the position of EU fundamental rights in the legal order of the Union reveals that Member States are bound by these rights only when they act within the scope of application of EU law. The Charter of Rights does not alter this system. . . ." McCarthy is not deprived under Articles 20–21 TFEU. Article 21 is directly effective and grants a conditional right of residence to all EU citizens but the TFEU Article itself provides that the operation of Article 21 is subject to secondary legislation such as directives. This jurisdictional pre-emption by the Member States arguably prevents the court from having a free hand.⁷⁸ Therefore, this case is not like *Ruiz Zambrano* or *Garcia Avello*.⁷⁹

Theoretically, Mrs. McCarthy's deprivation is centered on her status as a citizen of the Union. But an "impeding effect" of a national law deals with interfering in the citizen's right of free movement. It is a positive development to restrict interpretation of the expression "national measures which have the effect of depriving" because "otherwise the Court would run the risk of excessively loosening the requirement of a connecting factor for the application of the Treaty provisions on EU citizenship, thus disturbing the vertical allocation of powers sought by the Treaties."⁸⁰

articles delineating her position on the relationship between Member State laws and European integration: Juliane Kokout, *German Constitutional Jurisprudence and European Legal Integration: Part I*, 22 EUR. PUBLIC LAW 237 (1996); Juliane Kokout, *German Constitutional Jurisprudence and European Legal Integration: Part II*, 23 EUR. PUBLIC LAW 413 (1996); —, *Report on Germany*, in THE EUROPEAN COURTS AND NATIONAL COURTS 77 (Anne-Marie Slaughter *et al.*, eds. 1998). See BILL DAVIES, *RESISTING THE EUROPEAN COURT OF JUSTICE: WEST GERMANY'S CONFRONTATION WITH EUROPEAN LAW, 1949–1979*, 52 (Cambridge 2012).

78. TFEU, *supra* note 2, art. 21, 2010 O.J. C83, at 56–57.

79. *Garcia Avello v. Belgium*, Case C-148/02, [2003] E.C.R. I-11613 (involving names of the children who had dual nationality. Parents got the sir name they wish in Spain but Belgium would not accept that name. The Court said that the treaty requires Belgium to respect the parents' request because chaos would ensue with their traveling documents).

80. Advocate General Sharpston had raised the issue of whether fundamental rights can be "invoked as free standing rights against a Member State? Or must there be some other link with EU law?" Opinion of Advocate General Sharpston, *Gerardo Ruiz Zambrano v. Office National de l'Emploi*, Case C-34/09, [2011] E.C.R. I-01177, ¶ 152. American constitutional law provides two analogies that help explain some of the anomalous stance in *McCarthy*.

Nevertheless, Advocate General Kokott had written her opinion in *Teixeira* which, even though it requires the Member State to provide benefits, builds on longer established case law in *Baumbast* and on more favorable, older secondary legislation. Ms. Teixeira⁸¹ came in 1989 from Portugal, at this point divorced, and since her arrival, always remained in London. She had not worked since 2005, acting instead as the primary care giver of Patricia, who was born in 1991. Ms. Teixeira applied for social welfare benefits (housing assistance), on the basis of being the primary care giver of Patricia still in school;⁸² she was denied.

It is a well-known feature of American constitutional law that the due process clause of the Fourteenth Amendment to the United States Constitution has been used to apply federal standards to the states. See Adam & van Elsuwege, *supra* note 73, at 185, n.59 (citing GEOFFREY R. STONE, ET AL., *CONSTITUTIONAL LAW* 729–35 (6th ed. 2009)). It is a lesser known feature of American jurisprudence that when US Supreme Court judges do not wish to follow such a precedent, they decide that one constitutional right is not enough to warrant protection from the Supreme Court. The best-known use of this ploy was made in *Smith*. See *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990); see also Catherine M.A. McCauliff, *Religion and the Secular State: The First Amendment*, 58 AM. J. COMP. L. 31, 39 (2010). There the Court in effect said that free exercise of religion could not be protected unless another right was also involved.

Smith relied on a new interpretation of the facts in *Sherbert v. Verner*, 374 U.S. 398 (1963) (that the employee's job was at stake as well as the free exercise of her religion) for the proposition that employment as well as free exercise were involved and that free exercise of religious beliefs was by itself insufficient to trigger constitutional protection, although *Sherbert* itself set forth no such proposition. Thus, even with greater competence than the European treaties allow the CJEU, protection for a fundamental right might still be withheld. Popular backlash against *Smith* led to Congressional action to "restore" religious freedom but in the end the restoration applied only to the federal government after the Supreme Court declared the restoration act unconstitutional as applied to the states. McCauliff, at 39–40, nn.34–36.

81. *Teixcira v. London Borough of Lambeth*, C-480/08, [2010] E.C.R. I-01107; Peter Starup & Matthew Elsmore, *Taking a Logical Step Forward? Comment on Ibrahim and Teixeira*, 35 EUR. L. REV. 571 (2010) (noting that these were school-age children of former workers, therefore precluding the requirement of economic self-sufficiency).

82. Patricia was then enrolled in secondary education under *Baumbast*, taking a child care course in 2006 but her right lasts through tertiary education. See *Baumbast & R v. Sec'y of State for the Home Dep't*, Case C-413/99, [2002] E.C.R. I-07091. Mrs. Baumbast is a Colombian who married a German national in the United Kingdom in 1990. She has two daughters, a Colombian national and one with her husband who found employment in a German company doing business in China and Lesotho. The Baumbasts owned a house in UK and the child went to school in England but the family medical insurance was in Germany. In May 1995, Mrs. Baumbast applied to remain in the United Kingdom. In January 1996, the Social Security department denied her application; in 1998 she was brought to the Immigration Adjudicator who said she did not work or have a right under Directive 90/364 to reside in England. When this suit was initiated, Mr. Baumbast was still trying to get a job in the UK. In the end, Mrs. Baumbast could stay because her younger daughter was in school in the UK.

Because she was not self-sufficient, Ms. Teixeira did not satisfy the criteria for residence under the Citizenship and Residence Directive of 2004.⁸³ The new Directive involved the repeal of Articles 10 and 11 of the prior (EEC) Regulation 1612/68. Therefore an important issue in *Teixeira* is: does the new self-sufficiency requirement now apply to Article 12? The CJEU held, as in *Baumbast*, that an EU citizen who is not working and does not have a right of residence any longer can still benefit from direct application of Article 21 TFEU.⁸⁴ The Court held that the right of residence is not dependent on self-sufficiency in these cases.⁸⁵

Advocate General Kokott stated in her Opinion that Patricia has a right of access to education in UK because she has resided since birth in that Member State. Thus the Grand Chamber confirmed and extended the ruling of *Baumbast* that children get the right to reside to attend general education, pursuant to Article 12 of Regulation 1612/68.⁸⁶ Patricia can claim a right of residence on the sole basis of Article 12 without being required to satisfy the conditions laid down in the directive (having sufficient resources and being subject to the maintenance grant

83. Parliament and Council Directive on Citizens Free Movement and Residence Rights, *supra* note 70. It stipulates financial requirements and lists types of family member who may reside in the host Member States. Different articles of the Directive might have covered Ms. Teixeira but as Advocate General Kokott famously noticed, Ms. Teixeira accepted that she was not eligible for permanent residence in the United Kingdom. Opinion of Advocate General Kokott, *Teixeira*, [2010] E.C.R. I-107, ¶119–20. Nic Shuibhne, *supra* note 76, at 355 (noting that Advocate General Kokott suggested the consideration of other articles which might cover Ms. Teixeira). Art. 38 of Directive 2004/38 did not repeal Regulation 1612/68, Art. 12, 1968 O.J. 257/2. (A child gets her right to education from Art. 12). Art. 10, which is deemed not related to Art. 12, was repealed. If a child needs a parent during tertiary education, the parent can stay.

84. *Teixeira*, [2010] E.C.R. I-107, ¶ 36–39.

85. *Id.* ¶ 67.

86. *Baumbast*, [2002] E.C.R. I-7091. The United Kingdom invokes the public burden exception so proportionality applies. Under the regulation, children can attend school. Once a child starts school, (s)he has the right to finish even if the parents later divorce or only one parent is an EU citizen or the parent no longer works in this Member State and the child is not a citizen of this Member State, the child can continue until graduation from the highest level of education appropriate. The primary care-giving parent can stay with the child but not if the child is born after the parent is no longer working and living in that Member State. The ECJ held that an EU citizen who is not working and does not have a right of residence any more can still have direct applicability of Art. 21 TFEU, then Art. 18. See David Martin, *Comments on D'Hoop, Grabner, MRAX and Baumbast*, 5 EUR. J. MIGRATION & L. 143, 161 (2003).

exclusion). The parent's right of residence does not depend on a parent being a migrant worker on the date the child started the educational program. Could the parent during all that time therefore gain lawful residency during that time even without fulfilling the three requirements in the Directive? Ms. Teixeira does not have to fulfill Directive 2004/38 because her right to residence stems from her role as a caregiver to her daughter Patricia.⁸⁷

A fair sampling of these wide-ranging opinions might indicate that the CJEU has ample foundation at its disposal for developing a solid jurisprudence on citizenship, family life and integration. Basically, the division of positions deals with the recognition of fundamental rights embedded in EU considerations of citizenship and the fidelity to the exception to EU law expressed in a "purely internal" concern. This is in some senses the same dilemma at the heart of *van Gend en Loos*. Had the CJEU not chosen to expand then, this new legal order would not have been developed. Today, however, by making the applicability of Article 21 TFEU dependent on secondary legislation, the Member States have specifically reserved for themselves competence in the issue of what they deem the purely internal treatment of an EU citizen and at the same time undermine the commitment of the EU citizen to the Union.

III. A PERSONAL STAKE IN THE VENTURE OR CHOICE AS A SUBSTITUTE FOR CONSENT?

A citizen of any nation today faces life in the modern administrative state. Sometimes as in *McCarthy*, the regulatory state bears down upon citizens imposing a sense of dissociation from government that many persons, some occasionally and others more frequently, feel whether it is from a nation state, an international governmental organization, a city or the unique legal order of the European Union. Here the McCarthys are facing the undesirable choices of remaining in United Kingdom without the husband and father of the family or moving from the place the children and mother know and where all wish to be to a place only the father knows. Such a choice is all that remains open to them if they wish to keep the family intact,

87. *Teixeira*, [2010] E.C.R. I-107, ¶ 67-70.

once the United Kingdom has received judicial blessing to split them up.

On the one hand, the administrative, or regulatory, state (*Zweckverband*) leads to the legitimacy question.⁸⁸ The market of free choice is less impartial than it is indifferent when it comes “to how market situations affect individual lives. [The market] overrides moral intuitions concerning well-being or justice that might beset people when they learn about ill-fated neighbors or friends.”⁸⁹ On the other hand, “[r]ational deference is the bedrock of the administrative state. Its claim to authority rests on the idea that insight into [people’s] limited knowledge and problem-solving capacity gives [them] a reason to yield to the determinations made by expert bodies.”⁹⁰ Insofar as that is so, it behooves expert bodies to address real problems justly in order to avoid the *anomie* many citizens feel.

One thoughtful commentator on the meaning of citizenship states that “the normative core of citizenship” is

88. van der Mei, *Outer Limits*, *supra* note 28, at 78–80 (expressing concern that the ECJ’s consideration of reverse discrimination would intrude into national competences and put the court’s legitimacy into question). For an example of smugness in the face of inefficiency and possible injustice regarding claimants’ rights in the American justice system see Adam Liptak, *Sidebar*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/l/adam_liptak/index.html (last visited Apr. 8, 2013).

In 2006, Justice Antonin Scalia stated that “Like other human institutions, courts and juries are not perfect.” In 2009, he wrote “chillingly but accurately” that the Supreme Court “has *never* held that the Constitution forbids the execution of a convicted defendant who had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent.” Adam Liptak, *Case Asks When New Evidence Means a New Trial*, N.Y. TIMES, Nov. 12, 2012, at A16. Thus even the right to life of an “actually” innocent man receives short shrift from the justice system in the modern administrative state seemingly without distress and impetus to find a better solution.

89. Alexander Somck, *From Emancipation to Empowerment: The European Union and the Individual*, U. OF IOWA LEGAL STUD. RES. PAPER SERIES (University of Iowa), Mar. 7, 2013, No. 13-16, at 37–38 [hereinafter *Somek*, *Emancipation*]. See generally GOOD GOVERNANCE IN EUROPE’S INTEGRATED MARKET (Christian Joerges & R. Dehousse eds., 2002); THE LAW OF THE SINGLE EUROPEAN MARKET: UNPACKING THE PREMISES (Catherine Barnard & J. Scott eds., 2002). Francesca Strumia, *Remedying the Inequalities of Economic Citizenship in Europe: Cohesion Policy and the Negative Right to Move*, 17 EUR. L. J. 725 (2011).

90. Somck, *supra* note 89, at 44–45. For further on this question of expert bodies see Alexander Somek, *Accidental Cosmopolitanism*, 3 TRANSNAT’L LEGAL THEORY 371, 378 (2012) [hereinafter *Somek*, *Cosmopolitanism*] (“The presence of others translates not into demands addressed to an already ‘encumbered self’ but rather to aggregate effects that constitute externalities. They require some regulatory response. Rational yielding to regulations, therefore, is the key to understanding what becomes of citizenship—and how collective self-determination works—under conditions of accidental cosmopolitanism. . .”).

“collective self-determination.”⁹¹ Citizenship implies belonging and living in society. Thus, “as citizens, people have conceived of themselves as part of a common world. This is the key to seeing self-determination mediated by living among othersone is collectively autonomous if (and only if) one yields to those others to whom one belongs.”⁹² In other words, the citizen cannot live the mythical life of the Lone Ranger who fails in some ways even to recognize the shadowy presence of Tonto, his fellow traveler on the trails. In today’s world, the citizen lives in a market society, “subject to the incessant recurrence of smart choices between and among non-chosen options. Advocates of a free society do not see a problem in this. What matters to them is that [so] long as one is not *coerced* into doing or forbearing something one is free regardless of whether one finds the options unattractive.”⁹³

A. *The CJEU and the “Purely Internal” Doctrine*

Indeed, the EU citizen is a “market citizen” in the still-fluid ambit of EU citizenship law.⁹⁴ Nevertheless, the CJEU attempted to render Union citizenship a new status, not dependent on the older treaty freedoms of movement, by stating that the Union citizen’s right to move and reside in a Member State is a

91. Somek, *Cosmopolitanism*, *supra* note 90, at 4.

92. *Id.* A compelling definition of citizenship was eloquently set forth for Americans. “We are citizens. It’s a word that doesn’t just describe our nationality or legal status. It describes the way we are made. It describes what we believe. It captures the enduring idea that this country only works when we accept certain obligations to one another and to future generations; that our rights are wrapped up in the rights of others; . . .” President Barack Obama, State of the Union Address before Congress, (Feb. 12, 2013).

93. Somek, *Emancipation*, *supra* note 89, at 29 (citation omitted). Somek opines that choice may not be fathomable because unpalatable choices are presented as satisfying society “perhaps, for the simple reason that in their view the value of choices resides in choosing itself.” *Id.*

94. Michelle Everson, *The Legacy of the Market Citizen*, in *NEW LEGAL DYNAMICS OF EUROPEAN UNION* 73 (Jo Shaw & Gillian More eds., 1995). Alexander Somek, *INDIVIDUALISM: AN ESSAY ON THE AUTHORITY OF THE EUROPEAN UNION* 137 (2008) (explaining that market holism involves “a vertical convergence between the Union’s regulatory power and the most fundamental freedom—more precisely, the benefits associated with European citizenship. . . . [these rights] accrue without regard to whether the subject matter is explicitly with the scope of the application of the Treaty”). Ferdinand Wollenschleger, *A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of EU Integration*, 17 *EUR. L.J.* 1 (2011). Loic Azoulaï, *The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization*, 45 *COMMON MKT. L. REV.* 1335, 1337 (2008).

different status from the older market notion of citizenship.⁹⁵ AG Jan Mazak wrote that “Union citizenship, as developed by the case-law of the Court, marks a process of emancipation of [EU] rights from their economic paradigm.”⁹⁶

The Court in *McCarthy* recognizes in some sense that Sheila McCarthy’s situation is not a purely internal situation even though she is not a traveling woman.⁹⁷ But is Union citizenship yet *une nationalité sans frontières*?⁹⁸ Not for Sheila McCarthy. Perhaps the Union citizen is still a traveler but now the reasoning behind the travel requirement is no longer the market.⁹⁹ Nevertheless, a citizen who does not wish to travel is at a serious disadvantage in claiming certain EU rights.¹⁰⁰ Rights of residence are still struggling to break free of prior travel as a trigger.¹⁰¹ What still attracts the law of EU citizenship to travel?

95. *Martinez-Sala v. Freistadt Berlin*, Case C-85/96, [1998] E.C.R. I-2691. See Marlene Wind, *Post-National Citizenship in Europe: The EU as a “Welfare Rights Generator”?*, 15 COLUM. J. EUR. L. 239, 243 (2009); Dora Kostakopoulou, *Ideas, Norms and European Citizenship: Explaining Institutional Change*, 68 MOD. L. REV. 233, 239 (2005).

96. Opinion of Advocate General Mazak, *Jacqueline Foerster v. Hoofddirectie van de Informatie Beheer Groep*, Case C-158/07, [2008] E.C.R. I-8507, ¶ 54 (equal access to educational funding).

97. *Sheila McCarthy v. Sec’y of State for the Home Dep’t*, Case C-434/09, [2011] E.C.R. I-3375, ¶ 42. The fact that Mrs McCarthy did not travel has no effect on consideration of her situation as purely internal. *Id.* ¶ 46. See generally Mislav Metajija, *Internal Situations in Community Law: An Uncertain Safeguard of Competences within the Internal Market*, in CROATIAN YB. EUR. L. & POL’Y 31 (2009).

98. Ségolène Barbon des Placés, *Nationalité des Etats Membres et Citoyenneté de l’Union dans la Jurisprudence Communautaire: La Consécration d’une Nationalité sans Frontières*, 18 REV. DES AFFAIRES EUROPÉENNES (2011).

99. Scholarly commentary and the jurisprudence of the CJUE have addressed “purely internal” situations unaccompanied by personal movement, in particular the notion of market freedoms as well as the political basis of Union acts. “At any rate, the legal doctrines that the [Court] built after *Martinez Sala* and *Baumbast* do necessarily imply a reduction of the breadth of purely internal situations.” Menéndez, *supra* note 29, at 383.

100. Camille Dautricourt & Sébastien Thomas, *Reverse Discrimination and Free Movement of Persons under Community Law: All for Ulysses, Nothing for Penelope?*, 34 EUR. L. REV. 433, 434 (2009); Tryfonidou, *supra* note 28, at 63–64 (explaining that the Union aims to ensure “that no discrimination arises as a result of the process of European integration”); Niamh Nic Shuibhne, *Free Movement of Persons and the Wholly Internal Rule: Time to Move On?*, 39 COMMON MKT. L. REV. 731 (2002).

101. Myriam Benolo Carabot, *Vers une Citoyenneté Européenne de Residence*, 18 REV. DES AFFAIRES EUROPÉENNES 7 (2011). After *Ruiz Zambrano* and *McCarthy*, it remained unclear “whether the right of residence in the Union follows from the right of ‘movement and residence’ enshrined in arts. 20 and 21 TFEU or whether it belongs to a distinct category of substantial citizenship rights that are not necessarily spelled out in one of the articles.” Anya Wicsbrock, *Disentangling the “Union Citizenship Puzzle”?* *The McCarthy Case 2011*, 36 EUR. L. REV. 861, 867 (2012).

This attraction may come not only from the lingering idea of the economic freedoms of the early community but also from a “negative” rather than a “positive” conceptualization of rights. The Court “still does not speak of a *positive* right to live in the Union territory, . . . it prefers a *negative* casting of the right not to be forced to leave it.”¹⁰²

What is lost in the Court’s negative application of the principles of citizenship? In *Dereci*,¹⁰³ decided soon after *McCarthy*, the Court said that the substance of Union citizenship was not activated by “the mere fact that it might appear desirable” for an EU citizen to live with his family “in the territory of the Union.” This finding was “without prejudice” to the question whether the claimants could rely on the right to family life.¹⁰⁴ The referring court had to verify whether the case fell within the scope of EU law, apply Article 7 of the Charter and consider Article 8 of the European Convention for the Protection of Human Rights (ECHR or Convention),¹⁰⁵ harking back to *Carpenter*.¹⁰⁶ The CJEU continued its negative approach in the Grand Chamber in *Dereci*, following closely on the judgment in *McCarthy*:

102. Nic Shuibhne, *supra* note 10, at 366.

103. Opinion of Advocate General Mengozzi, *Murat Dereci v. Bundesministerium für Inneres*, Case C-256/11, [2011] E.C.R. I____, (delivered Sept. 29, 2011) (not yet reported) (holding that the national court is to decide this but CJUE gives them very little room to maneuver). Advocate General Paolo Mengozzi opined that the recent approach to EU law and the substance of rights is not “limited to the case of minor Union citizens who are dependent on one of their parents.” *Id.* ¶ 46.

104. *Dereci*, [2011] E.C.R. I____ (delivered Nov. 15, 2011).

105. Charter of Rights, *supra* note 5, art. 7, 2010 O.J. C 83/389; Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 13.

106. *Dereci*, [2011] E.C.R. I____ (delivered Nov. 15 2011) ¶¶ 68–72. Mary Carpenter applied for six months’ residence as a visitor in UK from the Philippines and did not bother to apply to extend her stay. *Carpenter v. Sec’y of State for the Home Dep’t*, Case C-60/00, [2002] E.C.R. I-6279. The old directive did not apply to Carpenter; arguably neither does 2004/38. Advocate General Christine Stix-Hackl would have allowed Directive 73/148 to cover Mrs. Carpenter’s situation. See Opinion of Advocate General Christine Stix-Hackl, Case C-459/99 (delivered Sept. 13, 2001). EU law was more protective than domestic law but the decision was criticized as an “internal” case. See *infra* note 104 and accompanying text. Later she married Peter Carpenter who had minor children and sold ad space in continental magazines. Mary applied for leave to stay as the wife of a UK national but a deportation order followed. She appealed. Mary looked after the children while Peter traveled on the continent. The appeal tribunal asked for interpretation of Article 49. The CJEU read Article 49 in light of the fundamental right to respect for family life under Article 8 of the European Convention on Human Rights.

[T]he mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.¹⁰⁷

Despite these unfortunate words from the court, the role of courts themselves in holding a society together in non-totalitarian systems is generally positive, and that is true of the CJEU as well. People are happy to put their faith in a neutral decider who is not vested in the interests of one party or the other. Thus a court does justice in at least two ways (1) by serving the system; and (2) by providing individual justice between the parties. Often individual, or retail, justice between particular parties is deemed less important than clarifying principles so that all participating courts in any judicial system are operating in harmony. Insofar as a court is part of the modern administrative state, the role of retail justice takes on additional urgency in contributing to a less frustrating, more legitimate experience for the citizen, for whom the government should operate.

For the court system, *McCarthy* was a lost opportunity to set forth the scope of EU citizenship. As Advocate General Kokott stated in her Opinion in *McCarthy*, “EU law provides no means of dealing with this problem” [when a citizen has not left the home Member State].¹⁰⁸ Therefore a Union citizen who has not left her home Member State “cannot rely on EU law in order to obtain for him or herself and his or her family members a right of residence in the Member State in which that Union citizen

107. *Dereci*, [2011] E.C.R. I___ (delivered Nov. 15 2011) ¶ 68. In keeping with the CJEU’s judgments in *McCarthy* and *Dereci*, AG Yves Bot is clearly relying on the Member State courts to protect third-country spouses from deportation by the Member State of the spouse who is an EU citizen. See Opinion of Advocate General Bot, O & S, Joined Cases C-356/11 & Case C-357/11, [2012], E.C.R. I___ ¶ 91 (delivered Sept. 27, 2012) (not yet reported). See also Yoshikazu Iida v. Stadt Ulm, Case C-4014 (delivered Nov. 8, 2012) (not yet reported). Eight Member States and the European Commission submitted observations.

108. Opinion of Advocate General Kokott, *McCarthy*, Case C-434/09, [2011] E.C.R. I___, ¶ 40 (delivered Nov. 25 2010) (judgment not yet issued).

has always lived and of which he or she is a national.”¹⁰⁹ Nevertheless, Advocate General Kokott recognized that it was possible for the Court “to derive a prohibition on discrimination against one’s own nationals from citizenship of the Union,” noting that Advocate General Sharpston had already taken such a reasonable position.¹¹⁰ The moment was lost due to the objection of several Member States to a perfectly logical position, as Advocate General Sharpston had showed, because third-country nationals married however legitimately to nationals in the home Member State would probably be the first to be laid off in a recession and become dependent on Member State social welfare benefits.

A few months later, in *Dereci*, the Grand Chamber of the CJEU suggested that the national court could at least theoretically see a way through this problem by the recognition of fundamental rights, specifically the enjoyment of family rights, subject to examination of the Convention.¹¹¹ For the McCarthy family, however, the stakes were much higher: they are denied a participation in the mutual government that is the EU. In actuality they have no stake in that venture. Mrs. McCarthy is, as other commentators have powerfully pointed out, painted as exactly that, someone who does not work and contribute to the society, her personhood virtually dismissed.¹¹²

Even her efforts at complying with CJEU categories, like dual nationality do not receive mention in the facts of the case, due in part as the commentators are careful to point out, to the failure of the national court to write the statement of facts in

109. *Id.* ¶ 58.

110. *Id.* ¶¶ 41, 42.

111. *Dereci*, [2011] E.C.R. I____ (delivered Nov. 15 2011) ¶¶ 68–72.

112. See Kochenov, *supra* note 1, at 389–90. Mrs. McCarthy is in fact a brave woman taking care of her own three children, one severely disabled, when families with greater monetary assets might have several home health aides or institutionalize the child. See Shirley McCarthy v. Sec’y of State for the Home Dep’t, Case C-434-09, [2011] E.C.R. I-03375 (“Mr. George McCarthy is a Jamaican citizen who lacks leave to enter or remain in the United Kingdom. The object of the application for a residence permit under the regulations is to enable her husband to obtain, as her husband, a residence permit under the regulations on the basis that his spouse, the appellant, has one. He also was refused a residence permit or residence card on December 6, 2004. In his case, the refusal was accompanied by a notice that he had no further basis of stay in the United Kingdom. Mr. McCarthy is not a party to the present appeal but, if it were to succeed, he would be likely to be granted the relevant permit.”).

Mrs. McCarthy's favor.¹¹³ The McCarthys are left with the hollow choices of "self-deporting" the other four members of the family to join the father and husband in a new country for those four or remaining in the country they know without George McCarthy, husband and father of the family. By staying in United Kingdom, Sheila loses both her husband and any income her husband might have had now or during future employment in United Kingdom, thus throwing herself completely on the welfare state, which did not provide enough before the deportation order for Mr. McCarthy.

The emphasis in the case that Mrs. McCarthy has not moved from one Member State to another is used as a gate-keeping function. She is not a traveling woman and therefore does not trigger one of the four freedoms, such as the right of a person to move from one Member State to another to receive services. That inexplicably absolves the CJEU from examining, or suggesting that the national court examine, the applicability of the convention, although Advocate General Kokott had done so in her Opinion.¹¹⁴ Surely the more relevant point about Mrs. McCarthy's lack of travel is that she does not wish to leave UK, so that the choice of self-deportation is in actuality no real choice. While it may be deemed choice because Sheila McCarthy did not lose her own citizenship, leaving the United Kingdom to stay with her husband or remaining in UK without him is in fact coercive. Her citizenship does not come with a right of continued residence in her own Member State with her family intact. This lack is a shortfall of her UK citizenship but because

113. See A. P. van der Mei, *Combatting Reverse Discrimination: Who Should Do the Job?*, 16 MAASTRICHT J. EUR. & COMP. L. 379, 382 (2009) [hereinafter van der Mei, *Combatting*] (taking the position that Union citizenship "is not a magic judicial tool that can be used to fix any legal problem of the nationals of the Member States"). Cutting down on the role of citizenship makes presenting the plaintiff Mrs. McCarthy extremely difficult because the equities of her case revolve around her citizenship as a vehicle for keeping her family together. Writers in the common law tradition have emphasized the equities of a party as a basis for decision. KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960); Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255 (1961); Aristotle, *Nicomachean Ethics*, 1137b, 12–29; Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 467 (1988); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology of Judging*, 36 J. LEGAL EDUC. 518 (1986); Patrick J. Rohan, *The Common Law Tradition: Situation Sense, Subjectivism or "Just Result" Jurisprudence*, 32 FORDHAM L. REV. 51 (1963).

114. Opinion of Advocate General Kokott, *McCarthy*, Case C-434/09, [2011] E.C.R. I____, ¶ 59–60 (delivered Nov. 25, 2010) (judgment not yet issued) .

of the line-drawing about what a wholly internally situation means, it appears that EU citizenship cannot provide a remedy because of the CJEU's limited competence to review violations of fundamental rights. The CJEU, of course, must not insult the Member State and seemingly ignores the situation. It also does not take the suggestion of Advocate General Kokott to examine the facts more closely than the present state of the record from the Member State court allows.

In *McCarthy*, what did it mean that the court quoted "Union citizenship is destined to be the fundamental status of nationals of the Member States?"¹¹⁵ The quotation should have required the Court to face Mrs. McCarthy's fundamental status as a citizen of the European Union and two Member States. "[E]very citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations."¹¹⁶ Advocate General Georgios Cosmas has noted in ¶ 81 that the drafters of the Maastricht Treaty used constitutional language by referring to rights and citizen of the Union.¹¹⁷ In fact, the CJEU distinguished the facts in *McCarthy*, reaffirming as in other cases this fundamental status with its implication of fundamental rights, both citizenship itself as a fundamental right and the implication of other fundamental rights, to emphasize that a citizen can get the same treatment under the treaty whatever the Member State, subject to exceptions.¹¹⁸

115. *Nathalie-Marie D'Hoop v. Office National de l'Emploi*, Case C-224/98, [2002] E.C.R. I-6191, ¶ 1 (quoting *Rudi Grzelczyk v. Centre Public d'Aide Sociale*, Case C-184/99, [2001] E.C.R. I-6193, ¶ 31). Advocate General Leendert Geelhoed observed that "By placing emphasis on the fundamental character of EU citizenship, the Court makes clear that this is not merely a hollow or symbolic concept, but that it constitutes the basic status of all nationals of EU Member States. . . ." *Regina ex parte Dany Bidar v. London Borough of Ealing*, Case C-209/03, [2005] E.C.R. I-2119, point 28. Other cases quoting *Grzelczyk* include *Baumbast and R*, Case C-413/99, [2002] E.C.R. I-7091, ¶ 82; *García Avello*, Case C-148/02, [2003] E.C.R. I-11613, ¶ 22; *Zhu & Chen*, Case C-200/02, [2004] E.C.R. I-9925, ¶ 25; *Janko Rotman v. Freistaat Bayern*, Case C-135, [2010] E.C.R. I-1449, ¶ 43.

116. *Boukhalfa v. Bundesrepublik Deutschland*, Case C-214/94, [1996] E.C.R. I-2253, ¶ 63 (Advocate General Philippe Léger emphasized the importance of equality of status for each citizen of the Union).

117. *Criminal Procedure v. Wijsenbeek*, Case C-378/97, [1999] E.C.R. I-6207.

118. After the Maastricht Treaty was signed but before it came into force, Advocate General Francis Jacobs expressed the coming changes in rights, duties and the concept itself of European citizenship in the powerful phrase *civis europeus sum*. See *Christos Konstantinidis v. Stadt Altensteig*, Case C-168/91, Opinion of Advocate General Jacobs, [1993] E.C.R. I-1191, ¶ 46. The EU citizen "is entitled to assume that, wherever he goes to earn his living in the European [Union], he will be treated in accordance with a common

What is the exception here? Mrs. McCarthy's case does not "provide the right context for detailed examination of the issue of discrimination against one's own nationals."¹¹⁹ The implication is that like Mary Carpenter, Sheila McCarthy did not move from one Member State to another and that for the CJEU, the complainant's staying in place may, ironically speaking, have been a step too far for the Court.¹²⁰ In Mary Carpenter's case it was clear that Mary committed no other offense than to fail to make a timely application to extend her original six months' visa. The anonymous critic ("the critic"), however, analogizes the status of deportees to jail birds: "[T]he effects on family life . . . are no different from a deportation order if a spouse has to go to jail."¹²¹ If the parent is jailed, however, there is some implication, at least, that the parent has broken a criminal law of the Member State in question. In Mary's case which the critic finds wrongly decided, there is no such situation. The analogy is misplaced not only because Mary did nothing wrong but also because the child can still visit the offending parent in jail whereas the non-offender Mary would not be accessible to the children.

code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say "*civis europeus sum*" and to invoke that status in order to oppose any violation of his fundamental rights." *Id.* See generally Francis G. Jacobs, *Citizenship of the European Union: A Legal Analysis*, 13 EUR. L.J. 591 (2007).

119. Opinion of Advocate General Kokott, *McCarthy*, Case C-434/09, [2011] E.C.R. I____, ¶ 43 (delivered Nov. 25 2010) (judgment not yet issued). The Advocate General describes Mrs. McCarthy as a "static" Union citizen rather than a "mobile" Union citizen. *Id.* While much has changed in the law of EU citizenship, the model of the internal market remains deeply imprinted. See *Uecker & Jacquet v. Land Nordrhein-Westfalen*, Joined Cases C-64/96 & 65/96, [1997] E.C.R. I-3171, ¶ 16 (citizenship rights do not arise in a wholly internal situation); see also Ferdinand Wollenschleger, *The Evolution of Union Citizenship between Judicial and Legislative Action*, EU Studies Ass'n Conference, Boston, Mar. 2-5, 2011 available at: euce.org/eusa/2011/papers/gd_wollenschleger.pdf.

120. See van der Mei, *Outer Limits*, *supra* note 28, at 77, n.66; Anonymous, *Editorial Comments: Freedoms Unlimited?*, 40 COMMON MKT. L. REV. 537 (2003). Note that anonymity presumably allows the author protection from retaliation but it also prevents transparency. It may conceivably strengthen the weight attached to the editorial, at least among the small number of people who know the editorialist's identity starting with the editors at the Review. The anonymous attacker uses quite strong language against the protection of family life (as in effect the anonymous but influential editorial operates) although this attack is said to be for other reasons, leaving the harm to the integration of family life as so much "collateral damage" from the exaltation of a "higher" preferred value than an integrated family life which simply get in the way, as children do when a bomb or drone strikes the civilian area where terrorists may hide out.

121. Anonymous, *Editorial Comments*, *supra* note 1120, at 541.

After rhetorically criminalizing the deportee's status, the critic opens the floodgates: "[A]ny jail sentence for a service-provider will have to be considered as a restriction of that freedom, as the service-provider will be prevented from exercising his or her right."¹²² The critic suggests "the answer the Court ought to give" in the following terms: "it is the function of the freedoms to control and set limits to regulations that hinder the integration of the markets of the Member States, and not to guarantee economic and non-economic due process as such."¹²³ Would the critic return to the time before *van Gend en Loos*, as the commentary quoted here suggests?

The critic of the *Carpenter* judgment suggests that while the argument from Article 8 of the ECHR is compelling, it is irrelevant in *Carpenter* because the ECHR was "not at the time incorporated into UK law."¹²⁴ The critic wrote in June 2003 that if the ECHR had been binding in UK, "the deportation order against Mrs. Carpenter would probably not have been issued."¹²⁵ Therefore the CJEU acted unnecessarily and incompetently (*ultra vires*).

What about the timeline in Mrs. McCarthy's situation? She and George McCarthy married in November 2002. Would the critic of *Carpenter* have imagined that the Secretary of State who issued the deportation order for Mr. McCarthy and the immigration Adjudicator who dismissed Mr. McCarthy's appeal would have acted differently because by that time the United Kingdom had incorporated the ECHR into UK law, therefore binding UK to comply with its articles? In any event, although the United Kingdom failed to comply with Article 8, the critic, if writing when the decisions were taken in Mrs. McCarthy's situation, these decisions would no doubt still have been

122. *Id.* at 541–42.

123. *Id.* at 542 (emphasis added); see also *supra* note 9 and accompanying text (giving the development of the preliminary reference procedure in individual persons' cases).

124. *Id.* at 540, n.17.

125. *Id.* at 540; see also Paul Craig, *The ECJ and Ultra Vires Action: A Conceptual Analysis*, 48 *COMMON MKT. L. REV.* 395 (2011) (explaining that the court must follow the competence given it in the treaties). Note that the UK has not changed its position on immigration despite the Charter. See Cassell Bryan-Low & Nicholas Winning, *U.K. Plans to Limit Immigrant Benefits*, *WALL ST. J.*, Mar. 26, 1913, at A9 (explaining that the anti-EU Independence Party (UKIP) even refuses to recognize other EU nationals such as Bulgarians and Romanians).

irrelevant because the CJEU in 2003 had not the competence to enforce the Charter of Rights in any circumstances.¹²⁶ The Charter of Rights was not then binding on the European Union or therefore on signatories to what later became part of the Treaty of Lisbon. In fact this same argument was made by later critics.

In her opinion in *McCarthy*, Advocate General Kokott wrote that “citizenship of the Union is not intended to extend the scope *ratione materiae* of EU law to internal situations which have no link to EU law.”¹²⁷ Peter Carpenter’s travel is duly noted in *Carpenter*, although in the context that Mary, who does not travel, is enabling Peter to travel by providing a stable home life for the children. That allows his third-country national wife to stay in the United Kingdom. Mary and Sheila were not traveling women but the new Maastricht citizenship of 1992 marks a time when, metaphorically speaking, the hunter-gatherers of the internal market can settle down like farmers of old.¹²⁸ The democratic deficits of cases that might have given better retail justice as well as clarified the proper scope of the law are not often invoked. The ensuing confusion about the nature of citizenship (and concomitantly Sheila McCarthy’s inability to claim her fundamental rights to respect for her family life), however, constitutes a large enough problem that it should not simply be treated as an inevitable cost of the system.

Carpenter and *Ruiz Zambrano* should have controlled *McCarthy*. What is different in *McCarthy*? The consequences of failures in government fall on citizens. The European Commission had worked on a Directive on family reunification.¹²⁹ In an early draft that Directive had a provision to cover people like Mrs. McCarthy who did not travel outside her own Member State and had married a third-country

126. See *infra* note 145 and accompanying text (giving a discussion of the present applicability of the Charter of Rights).

127. Opinion of Advocate General Kokott, *McCarthy*, Case C-434/09, [2011] E.C.R. I ___, ¶ 41 (delivered Nov. 25, 2010) (judgment not yet issued).

128. See Jo Shaw, *E.U. Citizenship and Political Rights in an Evolving European Union*, 75 *FORDHAM L. REV.* 2549, 2576–77 (2007).

129. Directive 2003/86 [2003] O.J. L251/12 deals with third-country nationals, but only if they have residence permits. That leaves out Mr. McCarthy who wanted to get a residence permit.

national.¹³⁰ Whether agreement was not possible or whether it was simply an administrative decision to leave non-traveling citizens and their third-country national spouses for the Citizenship Directive, no provision to cover Mrs. McCarthy's situation was ultimately included in the Directive on family reunification. Mrs. McCarthy suffered the consequences by being given only disturbing choices (to follow her husband to his home country which her husband had previously left or to break up her family and remain without her husband).¹³¹ Future Mrs. McCarthys will continue to pay the same price "so long as there is no further harmonisation of the rules on family reunification at EU level."¹³²

B. *The Role of the Member States and the Reaction of the CJEU*

Immigration and the solvency of immigrants have always concerned the Member States, often with prejudice to people having different traditions and cultures.¹³³ Financial self-sufficiency is particularly relevant to immigration departments because family reunification is the most frequently given reason

130. See Nathan Cambien, *The Impact of Union Citizenship on Member State Immigration Laws: Some Potentially Perverse Side-Effects Resulting from Recent ECJ Case Law* 28–29 (2012).

131. Directive 2004/38, *supra* note 76. See, e.g., *Metock and Others v. Minister for Justice, Equality and Law Reform*, Case C-127/08, [2008] E.C.R. I-6241 (construing article 3 of the directive and overruling *Sec'y of State for the Home Dep't v. Akrich*, Case C-109/01, [2001] E.C.R. I-9607 which required both spouses to accompany each other to a host Member State rather than to meet there and then marry). If the CJEU had not overruled *Akrich*, the usefulness (*effet utile*) of the directive would have been lost and affected Union citizens could not lead a normal family life in the host Member State. Nevertheless, Member States are politically displeased. See generally Cathryn Costello, *Metock: Free Movement and "Normal Family Life" in the Union*, 46 COMMON MKT. L. REV. 587 (2009).

132. Adam & van Elsuwege, *supra* note 73, at 190. Nevertheless, the CJEU "has played a central role in establishing a fundamental right to family reunification in Union law. The Court has also extended the net of protection to third[-]country national spouses of EU nationals, thereby lifting them out of the regulative confines of national, and often restrictive, migration regimes," not, however, including Mrs. McCarthy and others such as those in *Dereci*, among those fortunate few. Dora Kostakopoulou, *The European Court of Justice, Member State Autonomy and European Union Citizenship: Conjunctions and Disjunctions*, in *THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES* 175, 186 (Hans W. Micklitz & Bruno De Witte eds., 2012) [hereafter Kostakopoulou, *Autonomy*].

133. Cambien, *supra* note 130, at 15, n.51 (explaining that "there must be sufficient resources for the Union citizen and his family members not to become a burden on the social system of their Member State of residence. These resources could derive from the economic activity of the non-EU parent of the Union citizen or from his savings").

for immigrating to a Member State which always wishes to protect itself from extra budgetary burdens.¹³⁴ In George McCarthy's case, dissolution is at stake for the family. Thus, "a wide interpretation of the rights of Union citizens and their family members in ECJ case law may well lead the Member States to restrict their nationality rules and immigration rules."¹³⁵ It is well known that Member States are willing to treat their own citizens who have not traveled to another Member State less favorably than EU citizens from other Member States by limiting their rights in the area of family reunification.¹³⁶

"However, the unfortunate human consequences of these limits should not be overestimated in practice."¹³⁷ People in Mrs. McCarthy's situation in the future "may be stimulated to make use of their free movement rights in order to benefit from the right to family reunification under the conditions laid down in the Citizenship Directive, and, hence, to circumvent the often more restrictive requirements applicable under national law."¹³⁸ This would be "[m]ovement exclusively and artificially motivated by the attempt to circumvent the application of domestic norms,"¹³⁹ encouraged by the CJEU which cannot now do justice to the few (or more likely many) people in Mrs. McCarthy's situation. Traveling to another Member State may prove more feasible for others than it would have been for Mrs. McCarthy herself with a severely disabled child or for others with other disincentives to travel. "This situation, where movement within the territory of the Union almost becomes a practical

134. *Id.* at 21, n.76.

135. *Id.* at 24 (explaining that Member States resist a wide interpretation of the rights of Union citizens and their family members in ECJ case law "because they fear that the Court thereby opens the 'floodgates' and renders it impossible for them to control immigration, resulting in significant and uncontrollable financial burdens," citing *Metock*, Case C-127/08, [2008] E.C.R. I-6241, ¶ 70-71). *Id.* at 23-24, n.85; see also Bernard Ryan, *The Celtic Cubs: The Controversy over Birthright Citizenship in Ireland*, 6 EUR. J. MIGRATION & L. 173 (2004) (giving an example of a Member State taking measures to prevent its exposure to liability for the social services immigrants might need); Cambien, *supra* note 124, at 17-23 (providing an example in Belgium).

136. See Cambien, *supra* note 130, at 25.

137. Adam & van Elsuwege, *supra* note 73, at 182.

138. *Id.*

139. *Id.* at 183, nn.37-38 (citing Dautricourt, *supra* note 94).

obligation instead of *right*, inevitably raises the issue of a potential abuse of the rights attached to EU citizenship.”¹⁴⁰

Substantively speaking, the CJEU has stepped back from *Carpenter* where it said that “the separation of Mr. and Mrs. Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr. Carpenter exercises a fundamental freedom.”¹⁴¹ *Carpenter* had protected the complainant’s right to family life in an arguably purely internal situation: “the recent case law seems to follow a more cautious approach” and that caution would prevent *Carpenter* from controlling *McCarthy*.¹⁴² Mary Carpenter did not travel to other Member States but Peter did. “By introducing a high threshold for satisfying the requirement of a link with EU law in purely internal situations,” *McCarthy* limits *Carpenter* and *Ruiz Zambrano*.¹⁴³

What is the reason for the court’s retreat? According to Judge Lenaerts:

[The court] has opted for a restrictive interpretation of the expression ‘national measures which have the effect of depriving’ In my view, this is a positive development, since otherwise the CJEU would run the risk of excessively loosening the requirement of a connecting factor for the application of the Treaty provisions on EU citizenship, thus

140. *Id.* at 182–83.

141. See *Carpenter v. Sec’y of State for the Home Dep’t*, Case C-60/00, [2002] E.C.R. I-6279, ¶ 39; see also Silvia Aciermo, *The Carpenter Judgment: Fundamental Rights and the Limits of the Community Legal Order*, 28 EUR. L. REV. 398, 400, 402 (2003) (noting that the Immigration Adjudicator’s “decision to deport Mrs. Carpenter constitutes an interference with the exercise by Mr. Carpenter of his right to respect for his family life within the meaning of Article 8 of the ECHR”). The Court held that the decision to deport Mrs. Carpenter “does not strike a fair balance between the competing interests, that is, on the one hand, the right of Mr. Carpenter to respect for his family life, and on the other hand, the maintenance of public order and public safety.” *Carpenter*, [2002] E.C.R. I-6279, ¶ 43.

142. See von Danwitz, *supra* note 67, at 1407 (citing *J.McB. v. I.E.*, Case C-400/10, [2010] E.C.R. I____ (delivered Oct. 5, 2010) (not yet reported); Gueyc & Salmeron Sanchez, *Joined Cases C-483/09 & C-1/10*, [2011] E.C.R. I____ (delivered Sept. 15, 2011) (not yet reported); see also Claire Dekar, Comment, *J.McB. v. I.E.: The Intersection of European Union Law and Private International Law in Intra-European Union Child Abduction*, 34 *FORDHAM INT’L L.J.* 1430 (2011) (commenting further on the *J.McB.* case).

143. See Adam & van Elsuwege, *supra* note 73, at 189.

disturbing the vertical allocation of powers sought by the Treaties.¹⁴⁴

How best to characterize the *rationale* for this statement? Docket control is perhaps too cynical an answer and the role of fundamental rights, despite the invocation in the Charter of Rights, is still ambiguous in an environment long-dominated by the concept of an internal market.¹⁴⁵ Other possible reasons include competence¹⁴⁶ or separation of powers.¹⁴⁷

The substitution of lack of coercion for genuine justice does not absolve the administrative state whether in the form of national governments' immigration departments or the CJEU itself, from enhancing the democratic legitimacy of the justice provided to citizens. The trust in markets to arbitrate between the citizen and the administrative state does not deliver the legitimacy to which citizens are entitled in their justice system and in government generally. "Lottery rather than logic would seem to be governing the exercise of citizenship rights."¹⁴⁸ The notion that the bureaucrats have misappropriated "our" government is surely one of the factors that fuels the alienation of those disgruntled people who are leery of any governmental over-reaching. Therefore, it is appropriate to examine whether the AG and the Court could have done something else to

144. See Lenaerts, *Civis*, *supra* note 57, at 18. That connecting factor in addition to a fundamental right is necessary for the protection of the families of EU citizens who have not traveled to another Member State, just as Scalia thought two constitutional rights had to be at stake in order to protect religious freedom, even though it is included in its own right in the first amendment to the United States Constitution. See *supra* note 80 and accompanying text.

145. The US Supreme Court has the writ of *certiorari* to control the docket yet in *Smith*, Justice Scalia thought we needed two rights to trigger free exercise, despite the wording of the first amendment ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"). See *supra* note 80 and accompanying text (giving addition context to *Smith*).

146. See Cambien, *supra* note 130, at 32 (explaining that "an intervention by the Union legislator would bolster the effectiveness of Union citizenship and enhance its contribution to the European integration process. Such intervention would, however, come at a large cost for the division of powers as it would mean a direct intervention in some of the most fundamental competence areas of the Member States").

147. Commentators have alluded to "the complex balance of powers between the European Union and its Member States following the entry into force of the Lisbon Treaty and the Charter of Fundamental Rights." See Adam & van Elsuwege, *supra* note 73, at 176.

148. Opinion of Advocate General Sharpston, *Gerardo Ruiz Zambrano v. Office National de l'Emploi*, Case C-34/09, [2010] E.C.R. I-01177, ¶ 88.

prevent Sheila McCarthy, an EU citizen, a UK citizen and an Irish citizen, from having to face the brutal choices of leaving all she knew in her life or staying in UK and taking care of her children without the presence, help and support of her husband. “[I]s the jurisprudence of the Court with or against EU citizens? And this cannot just mean the transnationally mobile ones.”¹⁴⁹

IV. A PROBLEM THAT DEMANDS A SOLUTION: *QUO VADIS, O CIVIS EUROPAEUS, O CIVIS EUROPAEA?*

What is the real issue in Sheila McCarthy’s case? Is it that she is the citizen whose citizenship rights are not threatened in this situation because Sheila has the choice of splitting up her family and staying in Britain or going with her husband to Jamaica and keeping her family together? In that way the family and fundamental rights would be incidental. Mrs. McCarthy’s situation took place before the Treaty of Lisbon together with the Charter was in force. Would it be any different if similar facts occurred again after December 2009?¹⁵⁰

It is unlikely that the Charter of Rights could make a difference in the outcome of a case concerning a future Mrs. McCarthy. Three important scholarly contributions to the analysis of the usefulness of the EU Charter of Fundamental Rights in resolving issues for real people, individual citizens of the EU like Sheila McCarthy, are predictive of the outcomes in

149. Shuibhne, *supra* note 76, at 360, 362 (explaining that “[i]f securing the greatest degree of protection for citizenship rights is considered . . . the primary objective” then “institutional or process-oriented” interests must give way to substance).

150. *Carpenter* was similarly decided before Lisbon so that the Charter was merely hortatory but Peter Carpenter’s very occasional trips to other Member States to sell ad space in medical magazines served as a tenuous jurisdictional trigger and the ECtHR was invoked to emphasize that the citizen (Peter)’s family life would be interrupted if his third-country national wife (Mary) were not allowed to stay. See *Carpenter v. Sec’y of State for the Home Dep’t*, Case C-60/00, [2002] E.C.R. I-6279, ¶ 41 (“The decision to deport Mrs. Carpenter constitutes an interference with the exercise by Mr. Carpenter of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 . . . which is among the fundamental rights which, according to the Court’s settled case-law, restated by the Preamble to the Single European Act and By Article 6(2) EU, are protected in Community law”).

McCarthy and *Dereci*.¹⁵¹ The three articles emphasize that the interpretation of ambiguous wording in Article 51 should be designed to protect Member States from worrying that the EU is overreaching its powers.¹⁵² That leaves the rights that citizens of their own Member States might wish to exercise against those Member States' restrictive legislation on the short side of the stick. Legislative history shows that the Member States wanted "to avoid a competence creep via judicial action" and that therefore Title VII of the Charter of Rights encompassing Articles 51 to 54 narrows the situations under which the Charter of Rights may be invoked and even "determines how the provisions of the Charter [of Rights] may be interpreted," therefore tying the hands of the judges behind their backs.¹⁵³

Advocate General Kokott acknowledges that the Charter of Rights might be thought of as harmonizing "the fundamental rights for the entire European Union" but treats that interpretation as daring because in her opinion, "it is exactly this comprehensive application which is not intended."¹⁵⁴ As in the Treaty of Rome itself, private parties are not addressed the first sentence of Article 51(1) of the Charter of Rights, which is far from democratic, thus contributing to the much-lamented democratic deficit. That omission of a private right of action did not deter the CJEU in the early 1960s as the most famous cases,

151. See generally Kokott & Sobotta, *supra* note 77; von Danwitz, *supra* note 67; Lenaerts, *Civis*, *supra* note 57. But see *Exploring the Limits of the EU Charter of Fundamental Rights*, 8 EUR. CONST'L L. REV. 375 (2012) [hereafter Lenaerts, *Exploring*] (providing a less harsh stance toward individual citizens). Some scholars attempt to avoid the limitations in Article 51 of the Charter by seeking a different source for fundamental rights so that the court could avoid this limitation on competence or jurisdiction. See generally, Kochenov & Plender, *supra* note 1.

152. See Lenaerts, *Exploring*, *supra* note 151, at 376.

153. See *id.* at 376. Explanations Relating to the Charter of Fundamental Rights, 2007 O.J. C 303/02; see also generally Jason Coppel & Aidan O'Neill, *The European Court of Justice: Taking Rights Seriously*, 29 COMMON MKT. L. REV. 669 (1992) (explaining that protecting fundamental rights is not so simple as honoring the family integrity of the McCarthy family but may simply be an instrumental grab for the power of a different department of government).

154. See Kokott & Sobotta, *supra* note 77, at 6 (citing Ferdinand Kirchhof's article in STAATSRICH UND POLITIK: FESTSCHRIFT FÜR ROMAN HERZOG ZUM 75.GEBURTSTAG 155, 164–66 (Matias Herdegen ed., 2009) and rejecting his interpretation that all of the Charter of Rights "rights, freedoms and principles could benefit any citizen of the Union under any circumstance").

van Gend en Loos and *Costa v. ENEL*, ringingly demonstrate.¹⁵⁵ According to Advocate General Kokott, however, the Charter of Rights does not provide any scope of action for individual persons because “the provisions of the Charter [of Rights] are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.”¹⁵⁶ Although Kokott rejects the most undemocratic interpretations¹⁵⁷ of the scope of the Charter of Rights and recognizes the contentiousness of the positions, she is aware of being influenced by the “German version” of the Charter of Rights, which refers to the Member States’ “execution” (*Durchführung*) of EU law. That implies ministerial action with little discretion.¹⁵⁸ For Kokott, however, whatever discretion exists is designed only to “ensure a uniform application of other European law.”¹⁵⁹

Advocate General Kokott recognized the unfavorable position in which that leaves Mrs. McCarthy in her quest to keep her husband in the United Kingdom where they met and married and where she always lived. Kokott acknowledges the problem that someone who travels to the United Kingdom from another Member State would be treated more fairly than Mrs. McCarthy who was born in the United Kingdom (the problem of “reverse discrimination”).¹⁶⁰ The Advocate General, however, feels that EU law failed to cope with this situation of reverse discrimination. Because it falls through the cracks, reverse

155. See LINDSETH, *supra* note 9, at 137–38; Janek T. Nowak, *Case Note, Case C-34/09, Gerardo Ruiz Zambrano v. Office National de l’Emploi (ONEM) & Case C-434/09, Shirley McCarthy v. Secretary of State for the Home Department*, 17 *COLUM. J. EUR. L.* 673, 687 (2011) (“The Court’s judgment in *Ruiz Zambrano* has everything to become a classic of EU law along the lines of *Van Gend & Loos* and *Costa v. ENEL*: it is short, bold and lacks proper reasoning.” (citations omitted)).

156. See Kokott & Sobotta, *supra* note 77, at 6; see also de Burca, *supra* note 5, at 137.

157. See Kokott & Sobotta, *supra* note 77, at 7, n.41 (citing Huber as considering the wording of the first sentence of Article 51(1) of the Charter of Rights as a reduction of the application of the European Union’s fundamental rights).

158. See *id.* at 7, n.41. Other versions of the Charter of Rights in different Member States refer to application (*aplicar* (Spanish), *mise en oeuvre* (French) or implementation (English) of European law). *Id.*

159. See *id.* at 7, n.41. “Thus, the Charter would not alter the scope of application of fundamental rights protection under EU law, respecting the constitutional allocation of powers sought by the authors of the treaties.” Lenaerts, *Exploring, supra* note 151, at 376.

160. Tryfonidou, *supra* note 28, at 64.

discrimination is not addressable by EU law but simply leaves Mrs. McCarthy and those who find themselves in her circumstances in a catch-22 outside the scope of EU law with her family discriminated against.¹⁶¹ The CJEU can only deal with the substance of citizenship.

Article 5 of TEU, the constitutional principle of conferral of competence, “provides an explanation [for the CJEU’s decision] not to apply the Treaties to situations which are confined in all relevant respects to a single Member State.”¹⁶² The current view of the CJEU “is that it is first and foremost for the Member States, either acting on their own or in their capacity as members of the EU legislature, to address the problem of reverse discrimination.”¹⁶³ If the immigration laws of her home Member State disfavor the unity of the McCarthy family, what alternative does she have? She “may still rely on the judicial remedies provided . . . by national law.”¹⁶⁴

Lenaerts suggests that the “minority could try to enforce the constitutional principle of equality” but recognizes that “not all national courts are empowered to set aside national law conflicting with the constitution.”¹⁶⁵ Furthermore, even when “the EU legislator lacks the powers to intervene,” fundamental freedoms and EU citizenship still apply at least theoretically, even if they remain practically unenforceable.¹⁶⁶ Morally, narrow conferral of powers on the European Union with respect to citizenship must not be allowed to prevent justice for Mrs.

161. *Contra* Opinion of Advocate General Sharpston, *Ruiz Zambrano* [2010] E.C.R. I-01177 (explaining the opposite position from Advocate General Kokott’s opinion in *McCarthy*).

162. Lenaerts, *Civis*, *supra* note 57, at 8. Article 6 of TEU similarly states that “the Charter shall not extend in any way the competences of the Union as defined in the Treaties.” TEU post-Lisbon, *supra* note 5, art. 6, 2010 O.J. C 83/13. Furthermore, to ensure this outcome, unlike the treaties, “the Charter lays down binding instructions as to the way in which it must be interpreted. Article 5(1) TEU—which refers to Title VII of the Charter and to the explanations relating to it—stresses the importance of those instructions.” Lenaerts, *Exploring*, *supra* note 151, at 376.

163. van der Mei, *Combating* *supra* note 113, at 382. Nevertheless, “[a]s far as the restriction of a Member State’s nationality legislation is concerned the Union legislator can, in principle, not intervene.” Cambien, *supra* note 130, at 30.

164. Lenaerts, *Civis*, *supra* note 57, at 9.

165. *Id.* In other words, the CJUE requires that the deprivation in the Member State legislation be more than “serious inconvenience” to Mrs. McCarthy. “That effect requires a *de facto* loss of one of the rights attaching to the status of citizen of the Union.” *Id.* at 17.

166. *Id.* at 10.

McCarthy's family and those in the same circumstances in the future simply because Member States disagree that "an individual should be able to rely on the Treaty provisions on EU citizenship in order to combat reverse discrimination, regardless of whether his or her situation is confined in all relevant respects to a single Member State."¹⁶⁷

Nevertheless, "the question of who is entitled to be a member of the European citizenry" has not been subjected to a process of "critical reflection" characterized by "incremental, principled and transformative institutional change."¹⁶⁸ The transposition and implementation of the Citizenship Directive has been difficult.¹⁶⁹ National political pushback against the Directive includes such complaints as less national control over passports, a broader conception of the EU citizen's family, increased welfare budgets and less control over expulsions.¹⁷⁰ These complaints, considered achievements from the legal perspective of those promoting the rights of individual human beings against the modern bureaucratic State, are offset by "the practice of exclusion of long-term resident third[-]country nationals from the personal scope of Union citizenship."¹⁷¹

Natural judicial conservatism shields the desire of the Member States that "an ever closer union" continue to remain as much an aspiration as a reality. Thus the recent [Nov. 30, 2012] full-court judgment on a two-tier project for ever closer union gives the legislature an opportunity to participate in rendering the European Union more democratic.¹⁷² Ferdinand Wollenschlager has explored the relationship between the court and the legislature in contributing to a fuller legal definition of the meaning of EU citizenship.¹⁷³

167. *Id.*

168. Kostakopoulou, *Autonomy*, *supra* note 132, at 176.

169. *Id.* at 179, n.21.

170. *Id.* at 179.

171. *Id.* at 178, n.16.

172. View of Advocate General Kokott, *Thomas Pringle v. Government of Ireland*, Case C-370/12, (delivered Oct. 26, 2012) (on the Stability Mechanism for Member States whose currency is the euro).

173. Ferdinand Wollenschlager, *The Judiciary, the Legislature and the Evolution of Union Citizenship*, in *THE JUDICIARY, THE LEGISLATURE AND THE EU INTERNAL MARKET* 302 (Phil Syrpis ed., 2012).

In *McCarthy* and *Dereci*,¹⁷⁴ the CJUE has, broadly speaking, rejected the stance it had taken in *Carpenter*. As Wollenschlager observes, the court uses formalistic reasoning with regard to the citizenship directive.¹⁷⁵ Is the presence of a father deemed legally less important to a family when the Member State is still willing after *Carpenter* to discriminate against its own citizens, given the blessing of lack of EU competence? Mrs. McCarthy, advised to follow *Carpenter*'s artificial jurisdiction, filled out the citizenship papers for the Republic of Ireland where her mother was born to get her equivalent of Peter Carpenter's infrequent travel to other Member States.

Similarly, Mrs. McCarthy's advisors would have known that without traveling to the Republic of Ireland, Catherine Zhu, an Irish citizen, saved her mother (a third-country national) from having to worry about deportation.¹⁷⁶ The baby was born in Belfast with Irish citizenship in September 2000, at a time when the Irish constitution provided citizenship for anyone born on the island of Ireland, including Northern Ireland. Had Catherine been born in England, she would not have received UK citizenship because the doctrine of *ius soli* is not followed there. Mrs. Chen's right is derivative based on her child's need for care. If Mrs. Chen had had to leave the United Kingdom, so would Catherine have had to accompany her. Thus she was protected under Article 21 TFEU, unlike Mrs. McCarthy.¹⁷⁷

The accommodating and expansive approach to family unity or unification in the European Union in cases from *Carpenter* to *Zhu and Chen* and *Ruiz Zambrano* would have led

174. "[T]he compatibility of national measures which are not a means for a member state to fulfill its obligations under EU law, with fundamental rights cannot be examined by the ECJ [CJEU]. Recently, the ruling of the ECJ in *Dereci* confirmed this point." Lenaerts, *Exploring*, *supra* note 151, at 386.

175. This court uses formalistic language in both *McCarthy* and *Foerster* which "demonstrates the court's intention to accept the Community legislator's choices: [i]ts superficial proportionality test and its dubious reference to the said directive as the confirmation of the court's findings . . . underline the court's acceptance of the [Union] legislator's choices and its reluctance to challenge" the legislator. *Sheila McCarthy v. Sec'y of State for the Home Dep't*, Case C-434/09, [2011] E.C.R. I-03375; *Jacqueline Foerster v. Hoofddirectie van de Informatie Beheer Groep*, Case C-158/07, [2008] E.C.R. I-8507.

176. *Zhu & Chen v. Sec'y of State for the Home Dep't*, Case C-200/02, [2004] E.C.R. I-9925. Admittedly, unlike the *McCarthy*s, Mrs. Chen is well to do and is unlikely ever to need social welfare benefits or public health care from the UK. *Id.* ¶ 28.

177. TFEU, *supra* note 2, art. 21. See Catherine Barnard, *Of Students and Babies*, 64 CAMBRIDGE L.J. 560 (2005).

Mrs. McCarthy's advisors to expect a favorable outcome from the facts of her case, a father being torn away from his children with his wife left to raise them alone or a wrenching departure for the family of five from UK. The CJUE surprised not only Mrs. McCarthy's advisers but also many scholars.¹⁷⁸ True, EU citizenship no longer needs a connection with two Member States unless a citizen has not traveled to another Member State.

Nevertheless, the formulation in *McCarthy* is not a sufficient status on its own to protect the McCarthy family. Her family is allowed to fall through the cracks in *Ruiz Zambrano*, rendering the reality of the protective doctrine powerless in many cases to come.¹⁷⁹ The element of surprise in such an important area of the law can cause a boomerang effect, which the Member States actually do not wish to suffer from. Besides the obvious lesson to non-traveling citizens to borrow money to travel to another Member State temporarily in order to seek services or employment and thereby trigger EU citizenship rights, citizens married to third-country nationals but too poor to borrow travel funds may choose to go underground with their family

Since the McCarthy children would lose "only" the family presence of their father and Mrs. McCarthy her husband, they were not legally deprived of the "genuine" enjoyment of the "substance" of their citizenship. In this case, the elasticized scope of citizenship is pulled tightly like a tourniquet. Use of the value-laden words "genuine" and "substance" allows the CJUE in defining the meaning of EU citizenship to demean, rather than respect, the family life of the McCarthys.

The language implies that Mrs. McCarthy's family unity is only an illegitimate, rather than a "genuine," consideration and a peripheral value since she still enjoys the "substance" of her citizenship even if she must sacrifice her residence in the United Kingdom to keep her family together. At the same time the court proclaims that it moved the legal meaning of citizenship toward the reality of becoming the fundamental status for

178. "This is where the problem lies. We have no idea of what the exact purview of Union law is. It is in constant flux and it is very difficult to fix it at a certain point in time. There is no clear benchmark against which Court judgments can be tested." Nowak, *supra* note 155, at 697.

179. The CJEU's judgment was thinly explained. See Niamh Nic Shuibhne, *Seven Questions for Seven Paragraphs*, 36 *EUR. L. REV.* 162 (2011).

residents of the Union. Enough families face difficulties keeping their families together without the untoward interference of the State or the complicity of the CJEU. It is hard to see the modern administrative State willing to breach fundamental rights, including family integrity, to save the payment of prospective social welfare benefits. The damage the State does in this penny-wise but pound-foolish approach may have many larger costs repairing the psychological fallout and inherent instability from a State-induced broken family than merely the greater economic cost of the additional services a broken family will need from the State.

Due to the division of competences under the treaties, the court has exercised judicial restraint vis-à-vis national legislatures, especially in regard to the “wide margin of appreciation” for Member States’ stands on access to social benefits.¹⁸⁰ The Member States will only accede to a treaty that safeguards their powers not to recognize their own nationals’ fundamental rights in many instances. Accordingly, “national ways of doing things” and “statal autonomy” have, in the cogent phraseology of Dora Kostakopoulou, “often disempowered citizens [like Mrs. McCarthy trying to keep her family including her husband and disabled child in her home Member State] and helped to justify the raw force of restrictive and coercive practices [Mrs. McCarthy had the coercive “choice” of following her husband to his home country which he had left or depriving her children and herself of their father and husband].”¹⁸¹

CONCLUSION

While *civis Europaea* Sheila McCarthy is left in the wilderness, deemed to be without a “genuine,” substantive case regarding the meaning of her EU citizenship, many other *cives Europaei* are waiting in the wings, taking their chances for keeping their families together into their national courts which may refer cases with variations on those same EU citizenship issues. Many EU citizens in Mrs. McCarthy’s situation are now learning that even dual citizenship without travel to another Member State will not keep their families intact. They are well

180. Wollenschlager, *supra* note 173, at 304.

181. Kostakopoulou, *Autonomy*, *supra* note 132, at 202.

advised to borrow the money, if they can get the credit to do so, to go to another Member State in search of temporary work, however much they might not wish to face that journey.

For citizenship the next step of the CJEU is theoretically either to integrate the Charter or reject the application of fundamental rights in the treaties as expressed in the Charter or Rights out of deference for a narrow construction of Article 51 as offering no new competence for the CJEU. Similarly Article 21 TFEU, which on its face grants a right of residence to an EU citizen, is constrained. Article 21 is subjected to the limitations and qualifications to be set forth into such secondary legislation as directives. The difference in this case from the conditions that obtained when *van Gend en Loos* was decided is that the Member States have seen the CJEU in operation and have in the treaty itself limited the jurisdiction of the CJEU. They wish to pre-empt several choices the Court might otherwise have had in applying Article 21. To “prevent Member States from depreciating the concept of Union citizenship” and European integration as a whole, the Court should apply the principle of *effet utile* (effectiveness), as in *van Gend en Loos*, by declining to recognize the doctrine of the wholly internal situation.¹⁸²

One may well ask why was Article 21 written and incorporated into the Treaty of Lisbon? It looks as though citizens’ rights are being recognized but in fact as it stands now the CJEU is constrained in its application of Article 21. The Court may nevertheless be quite conservative and it in any event might prefer this limitation on the doctrine of *Ruiz Zambrano* in *McCarthy*. Or it may have embraced the step back from *Ruiz Zambrano* so that the CJEU does not become a focus of discontent for the Member States. We do not know because their hands are tied. If all members of the Court actually agreed with the Member States, it would still be good to know that is the unfettered position of the Court. As it is, we only know that the Member States have hedged about what would appear to be in the court’s competence with restrictions and, from the citizens’

182. Nowak, *supra* note 155, at 696 (citing Koen Lenaerts & Kathleen Gutman, “Federal Common Law” in the European Union: A Comparative Perspective, 54 *AM. J. COMP. L.* 1, 18–19 (2006)). “Why accept the application of the principle of effectiveness in one situation while rejecting it elsewhere? Good reasons should be advanced to justify a distinction.” *Id.* at 697.

point of view, unpalatable or distressing conditions and unattractive limitations to their EU citizenship rights.

Advocates General setting forth both the restrictive and expansive approaches have contributed to the ongoing development of the jurisprudence of the CJEU regarding EU citizenship. The legal theories are already available for the next step in the cycles of retrenchment and expansion as the times allow. Part of the advantage for the system from having opinions by Advocates General is the consistency each Advocate General brings to his or her work over time in signed opinions, even if different panels delivering judgments do not have this consistency. Eventually, as the inconsistencies and injustices in cases like *McCarthy* and *Dereci* are illustrated in clearer and bolder relief, the CJEU may again be able to loosen its constrictive language assessing the “genuine” enjoyment of the “substance” of one’s citizenship. This will not benefit Mrs. McCarthy, but would provide relief in the future for citizens in the same circumstances. A return to the spirit of *Ruiz Zambrano* would be more in line with the Court’s tradition of a rights-based approach to Union citizenship. It would also give the EU citizen, the person in society for whose service government is established, more of the substance (s)he seeks from the courts of the Member States and the CJUE alike.

Advocate General Sharpston expressed that spirit in her opinion in *Ruiz Zambrano*:

The Member States have conferred competences upon the European Union that empower it to adopt measures that will take precedence over national law and that may be directly effective. As a corollary, once those powers have been granted the European Union should have both the competence and the responsibility to guarantee fundamental rights, independently of whether those powers have in fact been exercised. The EU “is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.” That Treaty guarantee ought not to be made conditional upon the actual exercise of legislative competence. In a European Union founded on fundamental rights and the rule of law, protection should not depend on the legislative initiative of the institutions and the political process. Such contingent protection of rights is the antithesis of the way in which

contemporary democracies legitimize the authority of the State.¹⁸³

183. Opinion of Advocate General Sharpston, *Gerardo Ruiz Zambrano v. Office National de l'Emploi*, Case C-34/09, [2010] E.C.R. I-01177, ¶ 165.