

2007

E.U. Citizenship and Political Rights in an Evolving European Union

Jo Shaw

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Jo Shaw, *E.U. Citizenship and Political Rights in an Evolving European Union*, 75 Fordham L. Rev. 2549 (2007).

Available at: <https://ir.lawnet.fordham.edu/flr/vol75/iss5/13>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

E.U. Citizenship and Political Rights in an Evolving European Union

Cover Page Footnote

Salvesen Chair of European Institutions, School of Law, University of Edinburgh. This essay is a development of one section of Chapter Six of Jo Shaw, *The Transformation of Citizenship in the European Union* (Cambridge Univ. Press, forthcoming 2007).

E.U. CITIZENSHIP AND POLITICAL RIGHTS IN AN EVOLVING EUROPEAN UNION

*Jo Shaw**

INTRODUCTION

In 1975, responding to an emerging debate led by the Heads of State and Government of the Member States of what was then the European Communities about the development of special rights for “European citizens,” the European Commission articulated what at the time seemed a daring proposition for the development of E.U. law: “[C]omplete assimilation with nationals as regards political rights is desirable in the long term from the point of view of a *European Union*.”¹

By the mid-2000s, the European Communities had evolved into a “European Union” of sorts, but the “complete assimilation” of nationals of other Member States with the nationals of the host state in relation to political rights, as postulated by the Commission, had not been achieved. E.U. citizens continue to have rather limited rights to vote and stand in elections in the Member States where they are resident, if they lack the nationality of that state. In particular, citizens of the E.U. Member States have no rights under E.U. law to vote in national or regional² elections in the state in which they are resident. This stands in sharp contrast to the situation in the United States, where the Citizenship Clause of the Fourteenth Amendment grants U.S. citizens the citizenship of the state in which they reside. Through this guarantee flows the right to vote in state-

* Salvesen Chair of European Institutions, School of Law, University of Edinburgh. This essay is a development of one section of Chapter Six of Jo Shaw, *The Transformation of Citizenship in the European Union* (Cambridge Univ. Press, forthcoming 2007).

1. Commission of the European Communities, *Towards European Citizenship*, point 3.1, COM (75) 321 final (July 2, 1975) (emphasis added), available at http://aei.pitt.edu/5572/01/002205_2.pdf.

2. The term “regional elections” is used here to denote elections to representative bodies at the substate level. However, it is a problematic term, because the extent of powers held at the “regional” level varies substantially across the Member States. There are several federal or quasi-federal states in the European Union (including Austria, Belgium, Germany, Spain, and the United Kingdom). In all these cases, the regional authorities exercise some sovereign state powers, guaranteed by constitution, or by constitutional convention (United Kingdom). However, there are considerable variations across these five states, and indeed in some cases (Spain and the United Kingdom), within them. Other states have more limited devolution arrangements, especially for distinctive or peripheral regions (e.g., the Azores within Portugal). In other cases, “regional” elections effectively involve another tier of local or municipal government (e.g., counties or similar units of government), and the elected bodies have relatively few autonomous powers.

level elections. Though never stated explicitly in the European Union's founding treaties, E.U. law, like the U.S. Constitution, guarantees the right of "its" citizens to vote in "federal" elections—in this case, European Parliamentary elections held every five years.³

This essay examines the emergence of political rights for nonnationals in the context of the development of the European Union, with a particular focus upon the question of E.U. citizens voting in national and regional elections in the Member States in which they reside but of which they do not hold nationality. It reviews first the development of "European Union" and what that means in political and constitutional terms, and then moves on to review the different mechanisms which could be applied to enhance the political rights of E.U. citizens.

I. A EUROPEAN UNION WITHOUT POLITICAL INTEGRATION

The adoption and entry into force of the Treaty of Maastricht in 1993 inaugurated a European Union, based on the three "pillars" of E.U. policy: the European Communities; Common Foreign and Security Policy (CFSP); and Police and Judicial Co-operation in Criminal Matters (PJCC) (formerly Justice and Home Affairs). The original base of the European Communities in the field of economic integration and "market-building" was gradually deepened through innovations such as the Economic and Monetary Union and complemented through the continued development of flanking policies, such as those concerned with social affairs, the labor market, and environmental questions. It has also been extended into a much broader portfolio of activities covering many matters of foreign policy and internal security policy, historically central to the sovereign identity of the Member States as nation states.

The concept of "European citizens" has also become a legal reality since 1975. The Treaty of Maastricht instituted a formal notion of "citizenship of the Union."⁴ E.U. citizens are those persons holding the nationality of the Member States.⁵ Therefore, through their systems of nationality laws, the Member States serve as gatekeepers of access to E.U. citizenship by nonnationals. The package of "citizenship" rights introduced by the Treaty of Maastricht was largely limited to codifying the existing range of rights for nationals of the Member States, under the free movement rules contained in articles 39, 43, and 49 EC⁶ and the right to nondiscrimination on grounds of nationality, enshrined in article 12 EC.⁷

3. See Opinion of First Advocate Gen. Tizzano, Case C-145/04, Spain v. United Kingdom; Case C-300/04, Eman & Sevinger v. College van burgemeester en wethouders van Den Haag, Apr. 6, 2006, ¶¶ 67-68, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004C0145:EN:HTML>.

4. Consolidated Version of the Treaty Establishing the European Community art. 17, Dec. 29, 2006, 2006 O.J. (C 321) 37 [hereinafter EC Treaty].

5. *Id.*

6. *Id.* arts. 39, 43, 49.

7. *Id.* art. 12.

Since 1993, the Court of Justice has pushed the margins of E.U. citizenship gradually outwards, concluding that the right to reside in the Member States guaranteed by article 18 EC⁸ is directly effective and is therefore enforceable by individual citizens in the national courts against the public authorities of the Member States. Member States may place only proportionate restrictions upon E.U. citizens' right of residence, even with respect to those persons who are not economically active.⁹ The range of coverage provided the nondiscrimination principle—which was historically linked to the applicant carrying out some form of economic activity in another Member State,¹⁰ even if this only involved being a tourist¹¹—has been extended so that the applicant need no longer show an economic nexus.¹² Now, this range has been extended so that the applicant need no longer show an economic nexus. The equal treatment rights of students moving within the single market have been substantially increased.¹³ Professor Dora Kostakopoulou has argued that European citizenship has not been the purely symbolic institution which many initially expected it to be.¹⁴ Instead, it has evolved, in the hands of the Court of Justice in particular, in very significant ways beyond the confines of a concept of market citizenship to become both a more political and a more institutionalized figure.¹⁵

One element of the original citizenship package of 1993 already ventured into political territory. Article 19 EC grants electoral rights (the right to vote and the right to stand) to E.U. citizens in relation to local and European Parliamentary elections.¹⁶ E.U. citizens resident in a Member State other than the one in which they hold nationality may vote and stand in local and European Parliamentary elections in their Member State of residence, broadly under the same conditions as nationals.¹⁷ The equal treatment principle laid down in article 19 EC was elaborated and implemented in two directives adopted by the Council of Ministers in 1993 and 1994.¹⁸ These

8. *Id.* art. 18.

9. Case C-200/02, *Chen v. Sec'y of State for Home Dep't*, 2004 E.C.R. I-9925; Case C-413/99, *Baumbast & R v. Sec'y of State for Home Dep't*, 2002 E.C.R. I-7091, I-7125-33.

10. Case C-168/91, *Konstantinides v. Stadt Altensteig*, 1993 E.C.R. I-1191.

11. Case 186/87, *Cowan v. Le Trésor public*, 1989 E.C.R. 195.

12. Case C-148/02 *Garcia Avello v. État Belge*, 2003 E.C.R. I-11613; Case C-85/96, *Martínez Sala v. Freistaat Bayern*, 1998 E.C.R. I-2691.

13. Case C-209/03, *R, ex parte Bidar v. London Borough of Ealing*, 2005 E.C.R. I-2119; Case C-184/99, *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, 2001 E.C.R. I-6193. For commentary, see Michael Dougan, *Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education Within the EU?*, 42 *Common Market L. Rev.* 943 (2005).

14. Dora Kostakopoulou, *Ideas, Norms and European Citizenship: Explaining Institutional Change*, 68 *Mod. L. Rev.* 233 (2005).

15. *Id.*

16. EC Treaty art. 19.

17. *Id.*

18. Council Directive 94/80, 1994 O.J. (L 368) 38 (EC) ("laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not

electoral rights are somewhat restricted in nature, and also have been rather limited in their impact (e.g., in the rates of participation of voters and the visibility of nonnational candidates).¹⁹ Nonetheless, they are symbolically important, as they represent an encroachment by the European Union as a political union into traditionally protected areas of national sovereignty, which are concerned with the organization of the political system on a democratic basis. While the rights were granted on a top down basis, as a result of the collective will of the Member States expressed in amendments to the EC Treaty, they are dependent for their impact upon their implementation and practical application at a national, subnational, and often local level by the authorities of the Member States with responsibility for electoral matters.

These rights benefit the relatively small, but significant, number of citizens of the Member States resident in a state other than that in which they hold nationality. Prior to the 2004 European Parliament elections, and with an eye already to the impact of the 2004 enlargement,²⁰ the European Commission estimated that there were around 6.5 million "Community voters" in the European Union.²¹ This term refers to those who are eligible to vote, but are resident outside their Member State of nationality, and who are covered by the equal treatment guarantee in article 19 EC. The total population of the twenty-five E.U. Member States in 2006 was over 460 million,²² but this includes persons not eligible to vote for reasons such as age. A figure of around 1.5 percent of E.U. citizens resident in other Member States is frequently cited,²³ and this figure has been relatively stable for a number of years. To put these figures in context, it is worth noting that 6.5 million "Community voters" would outnumber the electorate in more than a third of those small and medium-sized European states which are E.U. Member States.²⁴ At the same time, the vast majority of

nationals"); Council Directive 93/109, 1993 O.J. (L 329) 34 (EC) ("laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals").

19. Shaw, *supra* note *, chs. 4, 5.

20. Inevitably, the figures do not anticipate the additional mobility which has occurred since May 2004, particularly from some new Member States, such as Poland, Latvia, and Lithuania, to Member States which have maintained an open labor market, such as Ireland and the United Kingdom.

21. Directorate-General Justice and Home Affairs (EC), Working Paper: EP Elections in 2004, Number of Community Voters under Directive 93/109/EC in the 2004 EP Elections, JAI.C.3/SAS/2004-1 (Mar. 23, 2004).

22. Giampaolo Lanzieri, *Population in Europe 2005: First Results*, in Statistics in Focus: Population and Social Conditions 3 tbl.1 (Eurostat, No. 16/2006, Nov. 2006).

23. Obviously some instabilities have arisen as a result of the substantial enlargements of the European Union in 2004 and 2007, especially since these are coupled with many restrictions on the free movement of labor from the new Member States. However, the figure of 1.5 percent has been remarkably enduring over thirty years.

24. Potential "Community voters" outnumber the electorate not only in the three micro-states (Luxembourg, Malta, and Cyprus), but also in Estonia, Latvia, Lithuania, Ireland, Denmark, Finland, Slovenia, and Slovakia.

those voters are excluded from those forms of democratic participation which are not covered by article 19 or by national law. This is because, with the exception of certain rights granted under national law in Ireland and the United Kingdom, E.U. citizens are not given rights to vote for representatives elected to parliaments or assemblies at the national, substate, or regional level (e.g., the *Länder* in Germany or the autonomous communities in Spain). It is ironic that while the European Union exists in part to encourage mobility between the Member States, it gives rise at the same time to a structural “citizenship deficit,” in that those persons who do exercise mobility rights are excluded from full democratic membership of the state of residence unless they take on the national citizenship of the host state. Indeed, the very essence of E.U. law on mobility since the Union’s inception has been to create a legal framework which blurs the distinction between intrastate and interstate mobility within the single market for the citizens of the Member States and to remove the need for mobile E.U. citizens to acquire the citizenship of the host state. This is not least because mobile E.U. citizens might well envisage multiple acts of mobility during their lifetime, perhaps moving successively for educational, employment, family, and lifestyle reasons. This “citizenship deficit” persists despite the fact that the European Union has recently instituted a form of *permanent residence* which Member States must guarantee under the 2004 Citizens’ Rights Directive to those nationals of other Member States who have been resident for more than five years in the host state.²⁵ However, this status of permanent residence does not give access to any additional political rights beyond those guaranteed in article 19 EC.

Discussions of E.U. electoral rights need to be nested within a variety of intellectual and political, legal, and constitutional contexts. One such context, which takes on the challenge of the European Commission’s bluesky thinking of 1975 in relation to the allocation of political rights across the Member States of the European Union in the context of a *political* union, is provided by the gradual evolution of the European Union’s constitutional framework.

This is not the forum to rehearse in full the arguments regarding the European Union’s constitutional past, present, and future. Suffice it to say at this stage that there exists a symbiotic relationship between two reference points for constitution building in the European Union.²⁶ On the one hand, there exists what one may term the European Union’s gradually evolving informal constitutional framework, which is a composite structure based on the existing treaties, as interpreted and applied by the Court of Justice and other political and legal actors. This composite constitutional structure enshrines both the rules according to which the European Union operates and the underlying political and ideological values and structures which

25. Council Directive 2004/38, art. 16, 2004 O.J. (L 158) 77, 106 (EC).

26. For more detail, see Jo Shaw, *Europe’s Constitutional Future*, Pub. L., Spring 2005, at 132.

infuse these rules.²⁷ On the other hand, the European Union has been engaged actively since 2000—thus far unsuccessfully—in the attempt to sponsor the drafting and adoption of a more encompassing and unitary documentary constitution for the European Union. This began with the Declaration on the Future of the Union appended to the Treaty of Nice, which recognized the unsatisfactory nature of the Intergovernmental Conference (IGC) which concluded in December 2000 and some of the future challenges facing an enlarging European Union. Eventually, after the work of the Convention on the Future of the Union and a further IGC had been concluded in 2004, that phase of the process concluded with the signature by the Member States of the Treaty Establishing a Constitution for the European Union (“Constitutional Treaty”) in October 2004.²⁸ However, signature merely signaled the beginning of the ratification process. It seems extremely unlikely under current conditions that the Constitutional Treaty will ever come into force, given that it was rejected in popular referendums in France and the Netherlands in mid-2005. With the ratification process stalled indefinitely, the Constitutional Treaty itself seems to exist in limbo.

The Constitutional Treaty was very much a hybrid document. It draws very heavily upon the resources offered by the existing informal constitutional framework, while at the same time innovating in a number of important areas, especially in relation to institutional design. Had the Constitutional Treaty come into force as originally scheduled on November 1, 2006, it would have been impossible to understand the future arrangements without frequent and detailed reference back to what had gone before because of the symbiotic relationship that would exist between the “new” and the “old” E.U. constitutionalism.²⁹

With the possibility of a documentary constitutional framework for the European Union now blocked for the foreseeable future, it is likely that Member States and the E.U. institutions will pursue other avenues of constitutional development.³⁰ On the other hand, some observers suggest that the entire constitution-building enterprise has been an unnecessary distraction for what remains in essence a limited exercise in international cooperation between sovereign states guaranteed already by a sufficiently

27. Neil Walker, *The White Paper in Constitutional Context* (N.Y.U. Sch. of Law, Jean Monnet Ctr., Working Paper No. 6/01, 2001), available at <http://www.jeanmonnetprogram.org/papers/01/011001.html>.

28. Consolidated Version of the Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 1 [hereinafter Constitutional Treaty].

29. Jo Shaw & Jean Monnet, *Legal and Political Sources of the Treaty Establishing a Constitution for Europe*, 55 N.I.L.Q. 214 (2004).

30. See, e.g., Nicolas Sarkozy, Speech to the Friends of Europe Foundation and the Robert Schuman Foundation (Sept. 8, 2006), available at <http://www.demyc.org/fruitbasket/index.php?download=658.pdf> (putting forth a proposal for a mini-treaty by French Interior Minister and presidential candidate of the right).

diverse and effective range of legitimation mechanisms.³¹ The constitutional promoters can, however, probably muster the larger number of voices speaking in favor of further developments on the constitutional and/or the treaty reform front. Some of that reforming energy has been diverted into consideration of the possibility of concluding a type of “Constitutional-Treaty-lite,” or a “Nice Treaty *bis*,” which might garner sufficient support at the national level and which would not necessarily need ratification via referendum. The focus in these proposals has been primarily upon minimal institutional reform to smooth the ongoing effects of both the 2004 and 2007 enlargements, and possible future enlargements.³² A limited number of observers call for the resurrection of the Constitutional Treaty itself,³³ albeit sometimes in a revised form.³⁴ The European Commission has tended to avoid too many shrill pronouncements on the Constitutional Treaty, for fear of alienating opinion in the national capitals. However, most individual commissioners who have expressed an opinion are supportive of the Constitutional Treaty³⁵ and concerned about the implications of potentially “watering it down” in order to achieve acceptance. Perhaps the best view is to take a longer-term perspective.³⁶ Some commentators have pointed out that over a period of years, or even decades, the most enduring and effective ideas put forward in documents such as the Constitutional Treaty or the earlier Draft Treaty of European Union elaborated by the first directly elected Parliament after 1979, tend to be incorporated into the European Union’s legal and constitutional structure.³⁷ To put it another way, if what is in the Constitutional Treaty would “work” in an E.U. context, then it will be picked up again in future reforms, probably piecemeal, over a period of years.

However, none of these proposals directly addresses the ongoing challenges faced by the Union as a political union of *citizens*, which is what the Commission was referring to back in 1975 with its “complete

31. See Andrew Moravcsik, *What Can We Learn from the Collapse of the European Constitutional Project?*, 47 *Politische Vierteljahresschrift* 219 (2006).

32. See, e.g., Janis A. Emmanouilidis & Almut Metz, *Renewing the European Answer*, EU-Reform 2006/2 (C.A.P., Bertelsmann Stiftung, Oct. 2006), available at http://www.cap.lmu.de/download/spotlight/Reformspotlight_02-06_en.pdf.

33. *European Socialists Set to Relaunch Constitution*, EurActiv, Oct. 24, 2006, <http://www.euractiv.com/en/constitution/european-socialists-set-relaunch-constitution/article-159040> (last visited Feb. 6, 2007).

34. Andrew Duff, *Plan B: How to Rescue the European Constitution* (Notre Europe, Studies and Research, No. 52, 2006).

35. See, e.g., Marc Beunderman, *Commissioners Reject Sarkozy Mini Treaty Plan*, EUObserver, Nov. 22, 2006, <http://euobserver.com/18/22932>; Margot Wallström, Vice President of the European Comm’n Responsible for Institutional Affairs and Commc’n Strategy, *The Consequences of the Lack of a European Constitution*, Presentation to the Constitutional Affairs Committee of the European Parliament (Nov. 22, 2006) (transcript available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/731&type=HTML&aged=0&language=EN&guiLanguage=fr>).

36. See also Shaw, *supra* note 26, at 150-51.

37. Philippe de Schoutheete, *Scenarios for Escaping the Constitutional Impasse*, *Europe’s World*, Summer 2006, at 74.

assimilation" call. Indeed, the Constitutional Treaty itself largely ignored the question of the structural citizenship deficit highlighted in this paper, although it did address some issues related to democracy. Part I of the Constitutional Treaty included a title on democracy, quaintly headed "the democratic life of the Union."³⁸ This included interesting innovations such as citizens' initiatives, whereby a million citizens from a significant number of Member States may sign a petition and submit it to the Commission to consider making a proposal in a field where citizens think there should be Union action.³⁹ However, the Constitutional Treaty's provisions were limited to addressing the role of the principles of participatory and representative democracy regarding the functioning of the Union's institutions, and the policy-making endeavors of the Union itself, not the Member States. Moreover, the Constitutional Treaty does not provide for the development of the concept of Union citizenship. Instead, it reproduces, by and large, the existing provisions of the EC Treaty.

The lack of attention to democracy in any respect other than in relation to the Union's own institutions is, at one level, hardly surprising. It is certainly not for the Union to tell the Member States how their democratic systems should be developed, even though being a functioning liberal democracy is undoubtedly a condition for accession to the Union.⁴⁰ Moreover, it should be recalled that back in 1993 the Treaty of Maastricht did partially reshape the democratic institutions of the Member States by adding several million "Community voters" to the rosters of the Member States for local elections, and by offering E.U. citizens the possibility of being elected to local councils in their place of residence. However, limitations upon those local electoral rights manifested themselves from the very beginning, in order to permit the Member States to resist too much encroachment upon their national sovereignty. Under article 5(3) of the Local Elections Directive, Member States were permitted to lay down that "only their own nationals may hold the office of elected head, deputy or member of the governing college of the executive of a basic local government unit if elected to hold office for the duration of his mandate."⁴¹ Furthermore, article 5(4) provides that "Member States may also stipulate that citizens of the Union elected as members of a representative council shall take part in neither the designation of delegates who can vote in a

38. Constitutional Treaty tit. VI.

39. *Id.* art. I-47(4). In an example of the peremptory application of the Constitutional Treaty, an online petition arguing for the relocation of the European Parliament's seat solely in Brussels, and away from Strasbourg and Luxembourg, garnered more than one million signatures, before it was presented to the E.U. institutions. *See* The European Parliament should be located in Brussels, <http://www.oneseat.eu/> (last visited Feb. 6, 2007). Its chances of success are minimal, however, because of the complex politics associated with the location of the E.U. institutions—a veritable Pandora's box which the Member States are reluctant to reopen, whatever the costs of the current complex and unwieldy arrangements.

40. *See, e.g.*, Treaty on European Union, art. 6(1), Dec. 24, 2002, 2002 O.J. (C 325) 5; *id.* art. 49.

41. *See* Council Directive 94/80, *supra* note 18, art. 5(3).

parliamentary assembly nor the election of the members of that assembly.”⁴²

However, the fact that the EU, at its present stage of integration, has not been vested with the relevant powers to develop a comprehensive *federal* vision of political citizenship does not completely frustrate other citizenship initiatives. Indeed, there is no reason why there should not be developments in relation to the constitutionalization of rights of E.U. citizens that are derived from *national* sources, rather than from sources within *European Union* law which rely upon the *Union* institutions. The sources of constitutional law necessary to sustain a multilevel polity such as the European Union have never in practice been confined to those rooted directly in the supranational entity itself, but also have stemmed in different ways from national law and national institutions.⁴³ To operate effectively, the European Union relies upon the administrative systems and procedural laws of the Member States, and there is no reason why constitutional development could not be seen as fostered by measures taken at the national level, whether autonomously or in response to a collective initiative which the Member States choose to take outside the confines of the current integration framework.

The reason for making this argument is that there is no foreseeable possibility that the Member States will change the E.U. treaties to include a provision akin to article 19 EC that covers elections for national and subnational parliaments and assemblies within the Member States, presidential elections (or similar), and referendums. However, there is already in place a patchwork of electoral rights for E.U. citizens, which does extend a little beyond that which is mandated by the treaties as they stand, notably in Ireland and the United Kingdom. Potentially, that patchwork could be developed in the future, and this essay explores some of the pathways that policy makers and legislators at a number of different levels could take to achieve the goal articulated by the Commission back in 1975.

II. ELECTORAL RIGHTS FOR E.U. CITIZENS IN REGIONAL AND NATIONAL ELECTIONS?

There is some popular support for the electoral rights of E.U. citizens to be extended within the Member States. In 2006, a Eurobarometer survey showed considerable support within many Member States for the premise that one of the best ways to strengthen European citizenship could be instituting the right for E.U. citizens to vote in all elections in the Member

42. *Id.* art. 5(4)

43. For a fully elaborated example of how this interplay can work in the context of the mandate given to national courts to act as “European courts” within the EU’s multilevel constitutional system, see Monica Claes, *The National Courts’ Mandate in the European Constitution* (2006).

State in which they are resident.⁴⁴ Reflecting these concerns, the question whether E.U. citizens should have voting rights in regional and national elections has been a consistent theme in written questions posed by Members of the European Parliament to European Commissioners. For example, in a reply to a question about U.K. citizens losing voting rights in national elections after fifteen years outside the United Kingdom, without acquiring them in the host state,⁴⁵ Commissioner Antonio Vitorino commented,

The right to vote of own nationals of a Member State in elections of that Member State belongs fully to the competence of the Member States, independent of whether those citizens reside in its territory or outside of its territory. This is explicitly confirmed in the relevant Directives 93/109/EC (1) and Directive 94/80/EC (2), which provide that nothing in those Directives affects each Member State's provisions concerning the right to vote or to stand as a candidate of its nationals who reside outside of its territory.

....

Because of the lack of the competence the Commission does not plan to take any actions relating to the right to vote of nationals of a Member State residing outside of its territory.⁴⁶

Notwithstanding this negative conclusion about the possibility of regulating expatriate voting, the Commission did devote some attention to the question of regulating the rights of mobile E.U. citizens in the host state in its Fourth Report on Citizenship of the Union in 2004, raising the matter initially for the Member States' attention. The Commission noted with regret,

Recurrent petitions, parliamentary questions and public correspondence reveal the concerns of many Union citizens regarding a gap in electoral rights at the present level of Community law: Union citizens may still be deprived of important civic rights as a result of the exercise of the right to free movement, namely the right to participate in national or regional elections. The Member States do not grant electoral rights at national or regional elections to nationals of other Member States residing in their territory.⁴⁷

44. Special Eurobarometer, No. 251, The Future of Europe 45-46 (May 2006), available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_251_en.pdf.

45. Voting by expatriates from the United Kingdom was originally introduced with a limit set at five years by the Representation of the People Act, 1985, c. 50, § 1. This was increased to twenty years in the Representation of the People Act, 1989, c. 28, § 2, and then reduced once more to fifteen years by § 141 of the Political Parties, Elections and Referendums Act, 2000, c. 41.

46. Written Question E-1301/02 by Michael Cashman (PSE) to the Commission Regarding *Voting Rights of EU Citizens*, 2003 O.J. (E 92) 44.

47. *Fourth Report on Citizenship of the Union (1 May 2001-30 April 2004)*, at 8-9, COM (2004) 695 final (Oct. 26, 2004) [hereinafter *Fourth Report on Citizenship*] (emphasis omitted); see also EUROPA, European Year of Workers' Mobility 2006,

This comment about recurrent complaints on this matter, it should be noted, is in stark contrast to the Commission's statement in other reports that it has received few complaints over the years about the workings of the right to vote in local elections.⁴⁸ The lack of complaints in the latter area could suggest that these work well; it could also provide a message about the comparative salience of local and national elections for voters, and specifically for voters who find themselves resident in a Member State other than the one of which they are a national. What "special rights"—to reapply the terminology of the early citizenship debates from the 1970s in the European Communities—need to be granted for there to be effective integration of mobile E.U. citizens into the host state? "Complete assimilation as regards political rights" was the solution according to the Commission, and it would seem that some of the feedback to the Commission from disgruntled E.U. citizens does indeed echo that point.

In its conclusion to the Fourth Report, the Commission returned to the same topic, commenting however that "decisions concerning possible measures to be adopted under Article 22(2) of the EC Treaty still require careful consideration."⁴⁹ Article 22 allows for amendments to be adopted to the EC Treaty's citizenship provisions using a truncated amendment procedure which avoids the need for a full intergovernmental conference, but still requires any amendments to be ratified by all the Member States following a unanimous agreement in the Council of Ministers, as with all amending treaties. The Commission has yet to make use of its power of proposal in article 22, and while it is conceivable that it might make such a proposal, it would be highly unlikely that any such proposal would garner the necessary unanimous support in the Council of Ministers at the present time, especially if it concerned the sensitive question of political rights. It is notable that since 1993 and the institution of E.U. citizenship, the provisions have already been amended in small ways twice—by the Treaties of Amsterdam and Nice.⁵⁰ However, in both cases the provisions

http://ec.europa.eu/employment_social/workersmobility_2006/index.cfm?id_page=140 (last visited Feb. 6, 2007) (listing personal, but wholly anonymous, "testimonies of people who have had first hand experience of living and working in another EU country").

48. *Commission Report on the Application of Directive 94/80/EC on the Right to Vote and Stand as a Candidate in Municipal Elections*, at 7, COM (2002) 260 final (May 30, 2005).

49. *Fourth Report on Citizenship*, *supra* note 47, at 11.

50. The Treaty of Amsterdam added a phrase to article 17(1): "Citizenship of the Union shall complement and not replace national citizenship." Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1, 27. This was part of a set of trade-offs between Denmark and the other Member States. In part it was retrospective in nature, as the phrase is drawn from the 1992 Conclusions of the Edinburgh European Council which followed the first (failed) Danish referendum on the Treaty of Maastricht, and was agreed to as part of a package to persuade the Danish government and political elite to try, once more, to "sell" the Treaty to the electorate. In terms of the Treaty of Amsterdam itself, it was also part of a complex trade-off related to the incorporation of Schengen within the framework of the E.U. Treaties, which included also an "opt-out" for Denmark in relation to the nature of

adopted formed part of a larger trade-off between the Member States, insofar as they were concluding a broader bargain on a new treaty ranging across a number of topics. In those circumstances, Member States may feel able to trade sensitivities about the concept of E.U. citizenship against success in securing agreement with their partners to amend other provisions of the E.U. Treaty framework. Article 22 provides, by its very nature, a focused amendment procedure which would deprive the Member States of the capacity to make such trade-offs across different political issues of varying degrees of sensitivity.⁵¹ It is therefore rather hard to see the circumstances in which it could ever be used in practice.

The Commission returned again to the question of national voting rights for E.U. citizens in its communication evaluating the effects of the Tampere Programme in the area of Justice and Home Affairs policy.⁵² In its communication, the Commission invited the Member States to open up a dialogue in this area. This is an invitation which they failed to take up when formulating the Hague Programme which followed on from the Tampere Programme. Instead, the European Council declared that it “encourages the Union’s institutions, within the framework of their competences, to maintain an open, transparent and regular dialogue with representative associations and civil society and to promote and facilitate citizens’ participation in public life.”⁵³ This vague statement hardly seems to presage a collective major initiative from the Member States in this area, and there is nothing in the practical program for action which refers to electoral rights for nonnationals, even though article 22 refers to the possibility of adopting an unspecified measure.⁵⁴ But, as we noted above, it is not likely that the Member States will demonstrate the collective will at present to adopt a measure under article 22.

Support for the proposal to extend electoral rights to national elections has come from within the European Parliament. In a somewhat confused and controversial report on the Commission’s Fourth Report on Citizenship, which was approved by the Committee on Civil Liberties, Justice and Home Affairs,⁵⁵ several references were made to this question:

Schengen law within the domestic legal order, and its continued development, in which Denmark has not participated.

51. EC Treaty art. 22.

52. *Commission Communication: Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations*, at 8, COM (2004) 401 final (June 2, 2004).

53. Presidency Conclusions, Brussels European Council, Annex 1, at 16 (Nov. 4/5, 2004).

54. *Council and Commission Action Plan Implementing the Hague Programme on Strengthening Freedom, Security and Justice in the European Union*, point 2.1(e), 2005 O.J. (C 198) 1, 4.

55. *Report of the Committee on Civil Liberties, Justice and Home Affairs on the Commission’s Fourth Report on Citizenship of the Union (1 May 2001 – 30 April 2004)*, A6-0411/2005 (Dec. 15, 2005), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2005-0411+0+DOC+PDF+V0/EN> (last visited Feb. 6, 2007).

16. [The Parliament] [c]alls upon the Member States to discuss forthwith the possibility of granting European citizens the right to vote and to stand for election in municipal, local and regional elections of the Member State in which they are resident, irrespective of nationality;

17. [And] [c]alls upon the Member States to discuss forthwith the possibility of granting EU citizens the choice of voting and standing for election in national elections either in the country in which they are resident or in their country of origin (though not in both), irrespective of nationality . . . [.]⁵⁶

Picking up a text contained in the earlier opinion given by the Committee on Constitutional Affairs, the report goes on to suggest that

the conferring on European citizens who are not nationals of their Member State of residence of the right to vote and to stand for election in national and regional elections would make a tangible contribution to the feeling of belonging to the European Union which is indispensable for genuine EU citizenship.⁵⁷

Of course, it is not necessarily obvious why a citizen of one Member State who is given additional rights of political participation in another Member State where she is resident should feel more *European* in these circumstances, as opposed to feeling more attached to the state (generously) conferring these rights upon her. Perhaps the latter is a necessary precondition for the former? In any event, the report as a whole was rejected by the European Parliament in plenary in January 2006, largely because it was opposed by the center-right majority party grouping of the European People's Party—European Democrats, and thus this text should be treated with caution as expressing at most the view of a particular committee.⁵⁸

A more sophisticated link between European citizenship and electoral rights for nonnationals in national elections is developed by Heather Lardy, who argues for voting rights in national elections in terms of the link between citizenship and self-government and democracy: "If citizens are denied full voting rights, they are deprived of one of the most effective mechanisms available to them for exerting political power."⁵⁹ Furthermore, she adds that "[t]he denial of full voting rights to European Union citizens effectively creates within each Member State two sub-groups of European citizens: those who happen to be national citizens of that state, and those who are not. Only the former group is granted the right to vote in national

56. *Id.*

57. *Id.*

58. In a vote held in plenary on January 17, 2006, the report was rejected by 276 votes in favor to 347 against with 22 abstentions. European Parliament, Strasbourg Plenary: 16-19 January 2006, http://www.europarl.europa.eu/news/expert/background_page/008-4356-019-01-03-901-20060113BKG04268-19-01-2006-2006-false/default_p001c018_en.htm (last visited Feb. 6, 2007).

59. Heather Lardy, *The Political Rights of Union Citizenship*, 2 Eur. Pub. L. 611, 625 (1996).

elections.”⁶⁰ Against those who would argue that ascribing wider electoral rights to E.U. citizens within the Member States would undermine national sovereignty, she argues trenchantly that “[i]t should be remembered also that the primary purpose of democratic principle is not to prescribe the conditions which will protect national sovereignty, but to set out precepts designed to further and sustain democratic government.”⁶¹ In other words, she invites us to look more critically at the relationship between the defense of national sovereignty and the development of European citizenship as a political and democratic project. Those seeking to defend national sovereignty as they see it by excluding certain groups of residents from the franchise should also have to justify the damage to democracy done by excluding those residents in terms of limiting the scope and compass of democratic *self-government*. Lardy’s argument is that having now breached the boundary, which a traditionally exclusive conception of national citizenship places around suffrage by introducing at least limited electoral rights in the form of article 19 EC, the Member States consequently must base any rejection of the argument for subsequently extending those rights on something more than the defense of national sovereignty.

As noted above, the normative issue here is how to prevent the E.U. free movement space from becoming a space of negative democratic impetus. To put it another way, if the impulse of the E.U. treaties is positively to encourage E.U. citizens to exercise their free movement rights, then how are they to be protected against the negative consequences of moving without acquiring the host state citizenship (such as the loss of the right to vote in regional and national elections unless they are protected by expatriate voting rights from their home state)? Furthermore, how are the European Union and its Member States as a whole to be protected from losing the democratic input of migrants into regional and national elections? While this number is not necessarily huge at the present time, at around 1.5 percent, it is nevertheless the case that if the exercise of free movement rights under E.U. law consistently coincides with the loss of democratic participation rights, then this must have negative consequences for the Member States as democratic polities. It is arguably wholly inconsistent for the European Union and the Member States to preserve those participation rights by means of nondiscrimination rights instituted at the E.U. level under article 19 EC in relation to *local* and *European* electoral rights, while ignoring the impact upon democratic participation in regional and national elections.

III. DEVELOPING MECHANISMS OF DEMOCRATIC PARTICIPATION IN THE EUROPEAN UNION: THE CASE OF REGIONAL AND NATIONAL ELECTIONS

In sum, it seems plausible to argue not only that this is a live issue—as demonstrated above—but also that so long as the European Union exists in

60. *Id.* at 626-27.

61. *Id.* at 632.

its current form the issue is likely to become an ever more acute challenge both to the European Union as an emergent polity and to the Member States as more established polities. Consequently, it is useful to consider the various mechanisms by which the Member States, separately or together, in conjunction with the E.U. institutions or alone, might address this challenge, even if the political omens regarding decisive action at the present time are poor. The objective here is not to make a plea for one particular outcome, such as a generalized extension of regional and national electoral rights to E.U. citizens, but rather to illustrate the richness of the legal instruments available to the Member States at the present time, and to indicate how they might be developed in the future.

Under E.U. law as it stands, the Member States enjoy full and unlimited discretion as to the groups upon which they confer the franchise in regional and national elections, subject only to the strictures of the European Convention on Human Rights and Fundamental Freedoms such as article 3 of Protocol No. 1. This means an unlimited power to restrict the franchise to national citizens alone, and an unfettered discretion as to whether, and under what conditions, to grant to expatriates the right to vote in regional and national elections and as to how to deal with issues of voter registration and absentee ballots and postal voting. This is the status quo.

Clearly, if each and every mobile E.U. citizen became a citizen of the Member State in which he or she resided, then there would be less difficulty, although this would still not deal with issues raised by differences of rules on expatriate and absentee voting. However, citizenship acquisition is unlikely to be the answer. As things stand, a resident nonnational E.U. citizen may be unable or unwilling to acquire the nationality of the host Member State for one or more of the following reasons:

- failure to satisfy a qualifying residence period;
- failure to satisfy probity or wealth tests (e.g., having minor criminal offenses on the record which prevent citizenship acquisition);
- failure to satisfy other country-specific citizenship acquisition conditions requiring applicants to pass language or cultural tests;
- unwillingness to state long-term future residence intentions because of a future intention to migrate to a third state or to return to the home state or to relinquish other nationalities (if dual nationality is not tolerated).

There is presently nothing like a system of automatic or ascriptive citizenship acquisition for resident nonnationals (without prejudice to home state citizenship) in the E.U. Member States. Thus each and every national of a Member State resident in another Member State would have to satisfy whatever conditions on nationality acquisition are imposed by the host. Professor Ruth Rubio-Marín argues in favor of a system of automatic or ascriptive citizenship acquisition by resident nonnationals, making the

argument precisely in order to find a normatively satisfactory method for promoting democratic inclusion in the context of migration: She sees “immigration as a *democratic* challenge.”⁶²

In terms of what such a shift in approach might mean for the development of a more intensive multilevel system of federal-type citizenship in the Union, it is useful to make the comparison with the United States. In combination with the gradual development and hardening of a concept of national citizenship over many years, a matter on which the original U.S. Constitution itself was remarkably silent,⁶³ the United States developed a form of state citizenship which linked to residence alone, rather than any other marker of belonging. However, this was imposed from above through the Fourteenth Amendment’s Citizenship Clause, which provides that U.S. citizens are citizens of the state “in which they reside.”⁶⁴ It did not result from the separate or even collective decision of the states. Such a decision would be required in the European Union at its present stage of development. In the European Union, article 16 of the Citizens’ Rights Directive does at least (and—some might say—“finally”) create a status of permanent resident, which removes any further conditions upon the right of residence of the Union citizen, thus potentially smoothing the pathway for a Union citizen who does in fact seek naturalization in the host state by providing a framework for establishing settled residence.⁶⁵ It also seeks to ensure that E.U. citizens are granted equal treatment with nationals so far as pertains to any matter falling within the scope of E.U. law. But it does not directly interfere with national citizenship status, or matters such as electoral rights at the regional or national level. However, it is perhaps arguable that the status of permanent residence should be regarded as a form of “citizenship-of-residence-lite” for resident nonnational E.U. citizens. In that case, could it be seen as a sufficient condition for the granting of electoral rights to vote in regional and national elections in the host state, as the next step towards integration?

Alternatively, we could shift the focus from looking at rights within the *host state*, to consider the case for Member States to facilitate *home state voting* for expatriates resident in other Member States. They could do this without changing the rules on the right to vote simply by relaxing registration arrangements to allow the loosest of connections with the home state to suffice as the basis for registration in the former district of residence. Alternatively, Member States could look more closely at expatriate voting arrangements. In the latter case, this could be either with specialist arrangements for direct representation of expatriates in the

62. Ruth Rubio-Marín, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (2000).

63. Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* 115-28 (1997).

64. Peter H. Schuck, *Citizenship in Federal Systems*, 48 *Am. J. Comp. L.* 195, 223 (2000).

65. See Council Directive 2004/38, *supra* note 25.

legislature (as in France and now, most recently and controversially, Italy, where expatriates effectively decided the outcome of the 2006 general election), or with participation of expatriate voters in the normal elections of home-based representatives, as in the case of the United Kingdom (where expatriate votes are reallocated back to the constituency where the expatriate most recently resided). This may be hard to sustain in the longer term, as indeed may the alternative of allowing flexible arrangements for voter registration in their former domicile, as the connections between the expatriate (and even potentially their children and grandchildren) and their state of origin become ever looser. In turn, of course, that very looseness of the connection undermines the case for arguing that expatriate voting is an adequate form of democratic representation, since it can easily be argued that the expatriate voter may always be a relatively disconnected and ill-informed voter, and thus hardly one who adds to the democratic quality of the electoral process.⁶⁶

In any event, wherever there is a possibility that an expatriate E.U. citizen resident in another Member State could have two votes (in the home and the host state), the question arises as to the desirability and acceptability of dual voting. Under the European Parliament Voting Rights Directive,⁶⁷ both dual voting and dual candidatures are emphatically ruled out. Article 4(1) provides that “[c]ommunity voters shall exercise their right to vote either in the Member State of residence or in their home Member State. No person may vote more than once at the same election.”⁶⁸ It is of course clearly wrong that any person should have two votes in a single election (i.e., the European Parliament elections), albeit one that is still conducted along essentially segmented national lines.⁶⁹ However, it is not so clearly problematic that a person should have two votes in separate regional or national elections. Obviously, persons with dual nationality may already be able to vote in general elections in two Member States, depending upon the national rules in place. Interestingly, Maarten Vink comments upon a case of trade-off within Dutch parliamentary politics, where the case for extending electoral rights in national elections to nonnationals (building upon the right to vote in local elections introduced in the 1980s) was traded off in Parliament between the two governing parties, the Christian Democrats (who were against) and the Social Democrats (who were in favor) to produce an outcome which supported greater toleration of dual nationality instead.⁷⁰ This emphasizes the intimate link between policies on expatriate voting and voting rights for nonnationals and citizenship policies.

66. See generally Claudio López-Guerra, *Should Expatriates Vote?*, 13 J. Pol. Phil. 216 (2005).

67. Council Directive 93/109, *supra* note 18.

68. *Id.*

69. Case C-145/04, *Spain v. United Kingdom*, 2006 ECJ CELEX LEXIS 444 (Sept. 12, 2006) (acknowledging this point).

70. Maarten Vink, *Limits of European Citizenship: European Integration and Domestic Immigration* 5 (2005).

Under the current state of E.U. law and with the current state of competences, any formal change to the rights and status of E.U. citizens within the Member States will need to be driven forward by national action. If this is to be the case, it does not necessarily mean that the European Union will have no future role, but it remains to be established precisely what that might be, and how the national action might impact upon the evolution of the E.U. constitutional framework.

It goes without saying, of course, that the Member States could choose to act together by changing the E.U. treaties to institute an equivalent to article 19 EC in the domain of regional and national elections and thus oblige themselves to secure national implementation of the E.U. citizen's right to equal treatment in relation to regional and national elections, just as they did with local and European Parliamentary electoral rights. This would require a formal extension of existing powers and competences either under article 22 EC by way of a freestanding addition to the citizenship provisions under this truncated amendment procedure (and initiating that process would require an initiative from the Commission), or as part of a generalized treaty amendment process. While I have already commented about the unlikelihood in practice of the Council and the Commission applying article 22, the latter proposal for generalized treaty amendment also seems unlikely. In the wake of the failure of the Constitutional Treaty to achieve ratification across the Member States in 2005 and 2006, questions must be asked about whether any further treaty amendments are conceivable in the short term. Moreover, even under more propitious political circumstances than those prevailing in the mid-2000s, the need to achieve unanimous agreement around a measure which would necessarily involve an intrusion into national sovereign choices on the boundaries of the suffrage would militate against such a major change in the scope of the E.U. treaties.

Marginally more conceivable is a treaty provision which merely encourages the Member States to adopt electoral rights in regional and national elections. This could be along the lines of article 41 EC, which states that "Member States shall, within the framework of a joint programme, encourage the exchange of young workers."⁷¹ Any such reference to voting in regional or national elections in the Treaty, even if it did not include a dispositive element such as that which can be found in article 19 EC, would already open the way for the Commission to propose various forms of action promoting convergence or benchmarking as between the Member States in relation to electoral rights practices, so long as such action fell short of proposing formal harmonization of national laws. Even without such a reference, in the interests of promoting E.U. citizenship, the Commission could doubtless already encourage forms of soft law action on the part of the Member States such as, for example, a Council Recommendation on electoral rights for E.U. citizens. These types

71. EC Treaty art. 41.

of measures have been much used in recent years in the field of policy making in relation to the integration of immigrants from third country nationals, where such policy action lies at the margins of the EU's formal competences.⁷² There have even been references in some, but not all, documents on integration to encouraging the Member States to institute local electoral rights for all immigrants.⁷³ However, such measures categorically do not impose enforceable obligations upon the Member States.

An alternative way forward could be to use a mechanism of international law outside the formal legal framework of the E.U. treaties, which would have the advantage of providing a flexible structure into which the Member States could opt, as politics and circumstances dictated. Using the mechanisms of international law to promote flexible policy making in the European Union is a form of "old-fashioned" flexibility, not least because this mechanism has always existed and makes use of the external resources of international law, and in particular the principle of reciprocity of obligations.⁷⁴ Thus, instead of just adopting recommendations or guidelines which the Member States take little notice of, and which it cannot formally enforce, the Commission could try to encourage the Member States to follow the line at least some of them took with the Schengen Agreements in the 1980s and 1990s. The Schengen Agreements were intended to lead to the gradual abolition on border checks on persons moving between the Member States, along with the installation of a common approach at the external frontiers (e.g., the Schengen Visa). It was a laboratory of integration, and it led in the longer term to a substantial extension of the scope of the E.U. treaties in 1999, with the incorporation of Schengen into the E.U. system through the Treaty of Amsterdam.

To put it another way, by analogy with the Schengen experiment, some or all of the Member States could explore the possibilities for further integration in the field of political rights for citizens offered by an international agreement developed outside the framework of the European Union, without prejudice to the possibilities of future Union action or Union competences in the field. Such a convention negotiated between the Member States could lay down a consensual framework for reciprocal recognition of voting rights in regional and national elections to nonnationals on a bilateral and possibly multilateral basis. It might also provide a roadmap to achieving mutual recognition in this field, and thus encourage the development of the requisite trust and common action

72. Shaw, *supra* note *, ch. 7.

73. See, e.g., Draft Conclusions of the Council and the Representatives of the Governments of the Member States on the establishment of Common Basic Principles for immigrant integration policy in the European Union, 14776/04 MIGR 105, Principle 9 (Nov. 18, 2004).

74. Bruno de Witte, *Old-fashioned Flexibility: International Agreements Between Member States of the European Union, in Constitutional Change in the EU: From Uniformity to Flexibility?* 31 (Gráinne de Búrca & Joanne Scott eds., 2000).

between the Member States needed for developments to occur in this area. The Convention could be developed such that it would come into force as soon as a minimum of two Member States had formally signed and ratified it, thus creating a framework which all of the states, if they so wished, could gradually opt into as they developed bilateral and multilateral arrangements with their partners within the Union. The level of detail in the convention should at the minimum cover the issues relating to registration and mutual recognition covered in the two electoral rights directives of 1993 and 1994.⁷⁵

It may be objected that there already exist many international instruments in the field of political rights, including ones which are much less far-reaching in nature, such as the Council of Europe Convention on the Political Participation of Foreigners in Public Life at Local Level.⁷⁶ Yet the majority of the Member States have declined to adopt and ratify such modest instruments. Why should they proceed with a more ambitious agreement along the lines suggested? The reply to this objection would presumably point to the incentives of the Member States resulting from an agreement which would be clearly reciprocal in nature, offering the possibility for Member States creating bilateral or possibly multilateral arrangements of reciprocity in the first instance with close neighbors or states with which they had an existing affiliation. It could reasonably be expected that there may be genuine pressure for such developments from their respective citizens (e.g., Portugal/Spain, Germany/France, Sweden/Finland/Denmark, Czech/Slovak Republics, Baltic states, Benelux and so on). Only after trust has been built up in the context of such relationships might Member States move on towards generalizing the ascription of voting rights in regional and national elections to all resident E.U. citizens. The downside of such alliances, of course, could be the increasing fragmentation of E.U. law, and the danger that some European citizens may find themselves excluded from access to what is regarded as the "gold standard" of political rights (i.e., the right to vote in national elections), just because the Member State where they reside and the one of which they hold the national citizenship do not belong to the same alliance.

IV. BUILDING ON THE STATUS QUO: THE NATIONAL *ACQUIS*

One clear advantage of this manner of proceeding, which stresses reciprocity, is that it could build in interesting ways upon the few examples of the ascription of voting rights to nonnationals in regional and national elections within the Member States of the European Union at the present time. The United Kingdom is the most substantial case, giving rights to Irish citizens, and to Cypriot and Maltese citizens as Commonwealth

75. See *supra* note 18.

76. Convention on the Participation of Foreigners in Public Life at Local Level, *opened for signature* Feb. 5, 1992, Europ. T.S. No. 144 (entered into force May 1, 1997).

citizens, to vote in all U.K. elections,⁷⁷ subject only to satisfactory immigration status.⁷⁸ They may also stand for election, but again subject to satisfactory immigration status.⁷⁹ The franchise for Irish citizens and Commonwealth citizens is a legacy of the British Empire and the slow emergence of a concept of “citizenship” as opposed to “subjecthood” (to the Crown) in the United Kingdom.⁸⁰ In that sense, neither Irish citizens nor Commonwealth citizens were treated as “aliens,” that is as persons whose influence on domestic politics should be prevented as a matter of principle because of the imputation of some potential malign influence.

From time to time the case for extending the suffrage is canvassed in the U.K. Parliament. The views of the various political parties presented in a 1998 Home Affairs Select Committee of the House of Commons Report on Electoral Law and Administration give a flavor of the range of views, and how these map onto the political landscape:

[I]t has been suggested that the right to vote in parliamentary elections could be extended to all EU citizens or, further still, that the right to vote in all elections could be given to all foreign residents after they had been in this country for a set period of time. The representatives of the political parties were not at one on this point, with Lord Parkinson for the Conservatives reluctant to extend the current exceptions, Mr Gardner for Labour recognising there might be a case—particularly on the basis of reciprocity—for some extension, and Mr Rennard for the Liberal Democrats suggesting that the present distinctions were artificial and that

77. The Representation of the People Act, 1918, 7 & 8 Geo. 5, c. 64 (U.K.), established the first truly modern franchise for the U.K. Westminster Parliament, abolishing property qualifications for men and introducing the franchise for (some) women for the first time. At the time it posited the franchise for “British subjects,” and when Ireland and what are now the countries of the Commonwealth became independent states, the franchise arrangements were preserved and updated, for example, in the Ireland Act, 1949, 12, 13, & 14 Geo. 6, c. 41 (U.K.). The relevant consolidating legislation laying down the general entitlement to vote is the Representation of the People Act, 1983, c. 2 (U.K.), as amended. For a review of the current scope of the franchise, see Chris Sear, *Electoral Franchise: Who Can Vote?* (House of Commons Library Standard Note SN/PC/2208, March 1, 2005).

78. Oonagh Gay, *The Franchise and Immigration Status* (House of Commons Library Standard Note SN/PC/419, Oct. 11, 2005). There is now a requirement that to be registered a person must have leave to enter and remain in the United Kingdom. Representation of the People Act, 1983, §§ 1, 2, 4 (U.K.), substituted by Representation of the People Act, 2000, c. 2, § 1 (U.K.). Such a person is a “Qualifying Commonwealth Citizen.”

79. The Act of Settlement, 1700, 12 & 13 Will. 3, c. 2, § 3 (Eng.), prescribes the basic contours of the right to stand for election in the United Kingdom, although its requirement that a person be born in England, Scotland, or Ireland or one of the dominions thereto in order to stand for election does not apply to Irish and Commonwealth citizens. See Isobel White, Oonagh Gay, Richard Kelly, & Ross Young, *The Electoral Administration Bill 2005-06*, at 74 (House of Commons Library Research Paper No. 05/65, Oct. 2005). However, until the adoption of the Electoral Administration Act, 2006, c. 22, § 18 (U.K.), the immigration status of the candidates had not been dealt with in like manner to the immigration status of nonnational voters.

80. In Case C-145/04, *Spain v. United Kingdom*, 2006 ECJ CELEX LEXIS 444, ¶ 79 (Sept. 12, 2006), the court recognized this position as one of the constitutional traditions of the United Kingdom, and, as such, as a position which deserved protection within the framework of Community law so far as possible.

prima facie those who were resident here and paying taxes should have some form of right to vote [W]e do not think the present voting entitlements for non-UK citizens need extension.⁸¹

From the U.K. perspective, the franchise for E.U. citizens is already wider than in other Member States, since the United Kingdom allows E.U. citizens to vote in the elections for the devolved Parliaments and Assemblies of the component nations of the United Kingdom, and in the elections for the Mayor of London and the London Assembly. Technically this is because such elections are governed within a framework analogous to local elections for the purposes of the franchise and so the right to vote flows naturally from that conclusion.⁸² The use of the local electoral register might seem anomalous in some respects since these bodies may have “legislative competence”⁸³ or the power to make acts of Parliament.⁸⁴ But the choice for the local electoral register may reflect both the need to simplify electoral administration by not creating a new register of electors just for these purposes, and/or the need to emphasize the local character of the devolved functions, in a manner which tends to conceal the emerging federal character of the United Kingdom’s territorial and governance settlement.

Moreover, E.U. citizens were able to vote in the regionally based referendums in Scotland and Wales held to ascertain whether the people of these “region-nations” wanted new forms of representation or political authority, and they have had the right to vote in every other referendum held since 1997 (e.g., the one held in London to decide whether to have a Mayor of London and a London Assembly) apart from the one held on the establishment of devolved institutions in Northern Ireland.⁸⁵ The degree of openness to this question in the United Kingdom is further illustrated by the fact that prior to the publication of the draft E.U. bill, which if passed would have provided for the United Kingdom’s referendum on the Constitutional Treaty, there was some speculation in political circles about whether the government would propose extending the franchise to E.U.

81. Home Affairs Select Committee of the House of Commons, Report on Electoral Law and Administration, 1997-8, H.C. 768-I, ¶ 118.

82. Local Government Elections (Changes to the Franchise and Qualification of Members) Regulations, 1995, S.I. 1995/1948, § 3(1) (U.K.), provides the basic amendments to the local electorate to incorporate the requirements of E.U. law. In relation to the inclusion of E.U. citizens in the “regional” franchise, see Greater London Authority Act, 1999, c. 29, § 17 (U.K.); Scotland Act, 1998, c. 46, § 11 (U.K.); Government of Wales Act, 2006, c. 32, § 12 (U.K.); Northern Ireland (Elections) Act, 1998, c. 12, § 2(2) (U.K.) (repealed Dec. 2, 1999).

83. Government of Wales Act, 2006, § 94.

84. Scotland Act, 1998, § 28.

85. Referendums (Scotland and Wales) Act, 1997, c. 61, §§ 1(2), 2(2) (U.K.). The parliamentary electoral register was used to determine the franchise in the Northern Ireland referendum, doubtless given the sensitivities of the issues attaching to this referendum, which followed on from the Belfast Agreement of Easter 1998. *See generally* Oonagh Gay, *The Franchise for Referendums* (House of Commons Library Standard Note SN/PC/2583, Aug. 18, 2003).

citizens resident in the United Kingdom.⁸⁶ However, in the event the bill proposed that the franchise should be based on that for general elections in the United Kingdom, and thus included only Irish, Cypriot, and Maltese citizens resident in the United Kingdom. Since Irish citizens would not have had an expatriate electoral right in relation to voting in any Irish referendum, they would not have enjoyed double representation.

Ireland is the only other E.U. Member State which gives rights to vote in national elections to nationals of another E.U. Member State.⁸⁷ It gives the right to vote, but not stand, in *Dáil* elections to U.K. citizens alone. It does not give U.K. citizens the right to vote in referendums or presidential elections.

The text of the ninth amendment to the *Bunreacht na hÉireann* (Irish Constitution), which was passed by referendum in 1984, gives a general power to the *Oireachtas* (Irish Parliament) to legislate to extend rights to vote in *Dáil* elections to noncitizens. These provisions were only introduced after a case had been brought before the Irish Supreme Court which contested a 1983 bill which would have originally extended the franchise to U.K. citizens not only to vote in *Dáil* elections, but also in elections for the President and in referendums.⁸⁸ This bill was intended to extend the existing legal position which already gave U.K. citizens the right to vote in local elections (along with all other resident nonnationals) and in European Parliament elections (in the latter case, of course, in advance of introduction of article 19 EC). A primary motivation for the 1983 bill was to introduce some element of reciprocity in relation to the electoral rights granted under U.K. law to Irish citizens.

In finding that the 1983 bill violated the constitution as it stood, the supreme court concluded that article 16 of the Irish constitution, in the form in which it then existed, provided a complete code limiting the electorate for the *Dáil* elections to Irish citizens, and Irish citizens alone. There could be no possibility of extending by ordinary legislation the franchise to other

86. Conspiracy theorists suggested that the Labour Government of Prime Minister Tony Blair might try to extend the franchise in this way to increase the chances of a "yes" vote in the referendum, on the (perhaps misplaced) assumption that E.U. citizens from other Member States resident in the United Kingdom might be more likely to vote "yes." The possible options for the franchise (local or national) are canvassed in Oonagh Gay, *Proposals for a Referendum on the New European Constitution* (House of Commons Library Standard Note SN/PC 3064, May 27, 2004).

87. Ireland also grants electoral rights to all nonnationals in local elections (voting and standing), and has done so since 1972. Electoral Act, 1992, § 10 (Act No. 23/1992) (Ir.) available at http://www.irishstatutebook.ie/1992_23.html (last visited Jan. 23, 2007).

88. *In re* Article 26 of the Constitution and in the Matter of The Electoral (Amendment) Bill, 1983 [SC No 373 of 1983] [1984] I.R. 268 (Ir.). U.K. citizens continue to be excluded from voting in presidential elections and referendums. These are powers reserved under the constitution to citizens alone, by interpretation of article 6 of the constitution. Ir. Const., 1937, art. 6, available at http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20IrelandNov2004.pdf (last visited Feb. 6, 2007).

groups of electors, as had been contended by the Attorney General,⁸⁹ who was tasked with arguing the case for a bill which had been piloted through Parliament by the *Fine Gael*/Labour coalition government before being challenged before the supreme court. The supreme court based its argument on a conception of the national suffrage oriented around a concept of national popular sovereignty. It found that this conception of sovereignty underpins the Irish constitution:

Article 6 [of the Constitution] proclaims that all powers of government derive under God from the people and, further, that it is the people's right to designate the rulers of the State and, in final appeal, to decide all questions of national policy. There can be little doubt that "the people" here referred to are the people of Ireland by, and for, whom the Constitution was enacted. In short, this Article proclaims that it is the Irish people who are the rulers of Ireland and that from them, under God, all powers of government derive and that by them the rulers are designated and national policy decided. It is not possible to regard this Article as contemplating the sharing of such powers with persons who do not come within the constitutional concept of the Irish people in Article 6.⁹⁰

The court went on to distinguish between a provision regarding the basic political organization of the state, such as article 16 on the suffrage, and provisions on fundamental rights such as freedom of association and expression, granted ostensibly under the constitution to citizens alone, but which the Irish courts had also interpreted in certain circumstances as protecting the rights of noncitizens. Consequently, article 16 was interpreted as providing an exhaustive definition of the suffrage, which meant that the introduction of electoral rights for U.K. citizens (and any other noncitizens) would require a constitutional amendment.

After the referendum passing the ninth amendment to the constitution, the Electoral (Amendment) Act, 1985, was passed amending the suffrage for *Dáil* elections to cover British citizens, and to create a power for a minister to extend this on the basis of reciprocity in the event that other E.U. Member States confer the right to vote in their parliamentary elections on Irish citizens. Thus,

(1B) Where the Minister is of opinion that—

(a) the law of a Member State relating to the election of members of, or deputies or other representatives in or to, the National Parliament of that Member State enables citizens of Ireland, by reason of their being such citizens and being resident in that Member State, to vote at such an election, and

89. It is interesting to note that the Attorney General of Ireland at the time was Peter Sutherland, later to become a member of the European Commission and, later still, Director General of the WTO. Throughout, Sutherland has been an important proponent of closer European integration.

90. *In re* Article 26, [1984] I.R. at 268.

(b) the provisions of that law enabling citizens of Ireland who are so resident so to vote are the same, or are substantially the same, as those enabling nationals of that Member State so to vote,

the Minister may by order declare that Member State to be a Member State [whose citizens may vote in *Dáil* elections].⁹¹

This is an interesting development on two counts. First, because while the political act of extending the suffrage to U.K. citizens can be regarded as recognizing the historical connection between, and the overlapping citizenships of, the two states of the United Kingdom and Ireland, as well as the rights granted by the United Kingdom to Irish citizens,⁹² only the condition of reciprocity is applied for the future to other E.U. Member States. The second curiosity is that it requires only a ministerial order to extend the suffrage beyond its current boundaries, the relevant parliamentary consent having already been given.

As it stands, with the reciprocity requirement in what is now section 8(3) of the Electoral Act, 1992, the trigger for action must in principle come from another Member State, or from common action amongst the Member States. As the Minister for the Public Service, Mr. Boland, stated, during debates in the Irish Parliament,

[I]t seems appropriate to look forward to the day when member states will be prepared to confer on each other's citizens the right to vote at parliamentary elections. [The Irish Government] would welcome this development and, in anticipation of it, this Bill proposes to enable the Minister by order to extend the *Dáil* vote on a reciprocal basis to nationals of other member states.⁹³

While the issue of extending electoral rights to E.U. citizens has not recently been actively debated in Irish politics, it is supported within a number of opposition parties, notably *Sinn Féin* and the Labour Party, even

91. Electoral (Amendment) Act, 1985, § 2(1B) (Act No. 12/1985) (Ir.) (inserting a new § 1B into §5 of the Electoral Act, 1963 (Act No. 19/1963) (Ir.)). These provisions are now encoded at Electoral Act, 1992, §§ 8(2)-(7) (Act No. 23/1992) (Ir.).

92. Introducing the original Electoral (Amendment) Bill 1983 into the *Dáil*, the Minister stated that

[t]he aim of this Bill is to give a further measure of practical expression to what has been referred to as the unique relationship which exists between this country and our nearest neighbour, and to acknowledge and reciprocate the voting rights enjoyed by Irish citizens in Britain. It is my hope that measures such as this, reflecting close ties between neighbouring peoples, will make their contribution to promoting peace and reconciliation throughout these islands.

345 *Dáil* Deb. col. 251 (Oct. 19, 1983). The case for excluding British citizens from the right to vote in presidential elections, *Seanad Éireann* (upper house) elections, and referendums was highlighted by the speaker from *Fianna Fáil*, Bobby Molloy TD, precisely because there cannot be reciprocity in the United Kingdom with a nonelected Head of State and Upper House, and (at that time) no tradition of referendums. 345 *Dáil* Deb. col. 253 (Oct. 19, 1983). As was noted in the text accompanying *supra* note 86, the franchise for the U.K. Referendum on the Constitutional Treaty would have included all those entitled to vote in general elections in the United Kingdom, including Irish citizens.

93. 108 *Seanad* Deb. col. 1193 (June 27, 1985).

as an issue which should be taken up unilaterally by Ireland, in the absence of common action amongst the Member States.⁹⁴

What the combined examples of the existing franchises in the United Kingdom and Ireland show is that there are many conceivable routes within political argument towards the extension of the franchise in national elections to resident nonnational E.U. citizens. In Ireland, a mechanism such as an international agreement between the Member States could be a trigger to developing the reciprocity necessary for extending the existing scope of the franchise within the confines of the existing legislation. However, Ireland, like all the Member States, could apply a “pick and choose” approach to its fellow Member States in relation to the electoral rights granted. It could be argued that such a “pick and choose” approach imports too great an element of flexibility into the system of integration which links the Member States. There may be some force in this objection given that the thrust of European integration for the most part has been towards identifying collective goals for the Member States and then finding the means by which these can be achieved, through as much collective action as possible. However, there are already substantial elements of flexibility built into the system of E.U. law as it stands. Opt-outs are available for states from monetary union and from the Schengen system governing the borders, and thus adding one more element to the system of flexible integration packages does not seem wholly problematic. This argument is particularly powerful if—in comparison to the situation as it stands at present—such a system would lead to an incremental accretion of rights accruing to E.U. citizens, albeit through the medium of national law but triggered by the reciprocity mechanisms of international law.

In the United Kingdom, it would represent a very few steps from acknowledging that the degree of integration of and trust in resident nonnational E.U. citizens, which makes them part of the electorate for elections to the devolved authorities of the non-English parts of the United Kingdom, to acknowledging that the same principles of integration and trust should also mandate the possibility that an E.U. citizen, perhaps having served a qualifying residence period, should be able to participate in Westminster elections as well as elections to institutions based in Edinburgh, Cardiff, or Belfast. This argument might particularly be made in respect of E.U. citizens resident in England (with the exception of those in London who can vote for the Mayor of London and the London Assembly), who do not currently enjoy the opportunities for democratic participation given to their E.U. citizen peers in Scotland, Wales, and Northern Ireland to vote for the authorities that hold powers in fields such

94. Interviews with TDs (Irish MPs) representing *Sinn Féin* and the Labour Party, at the Irish Parliament (Mar. 3, 2005). A TD representing the Green Party was broadly supportive of the suggestion in the light of wider Green Party policy, some of which is highly critical of developments within the European Union notably in the defense field, but a Senator from the Progressive Democrats, the junior coalition partner of the *Fianna Fáil* government was much more skeptical.

as education, agriculture, transport, and health, and in the case of the Scottish Parliament, at least, the power to make primary legislation. In any event, the existing anomalies in relation to the United Kingdom's asymmetric federal arrangements are enhanced by the differences in the franchise between these two types of elections, and any attempt to review the United Kingdom's current constitutional settlement should surely take that question into account.⁹⁵ As in Ireland, a convention mechanism could create the institutional structure in which the necessary trust and reciprocity between the Member States could gradually be seeded and develop.

One final note of caution needs to be sounded, however, and this concerns possible constitutional obstacles at the national level which may be faced by this type of innovation in the broad context of European integration. While the United Kingdom clearly sees no constitutional obstacle to including nonnationals within the franchise for the purposes of national elections—since it already allows Irish and Commonwealth citizens to vote and stand in Westminster elections, and since Ireland has already successfully amended its constitution to make it possible in practice to enfranchise nonnational E.U. citizens—it can be assumed that these two states would not encounter a significant difficulty with the type of proposal set out here. However, if Ireland were to go beyond what has already been established in order to enshrine, for example, a right to stand for election, or the right to vote in presidential elections or referendums, it would undoubtedly require a further amendment to the constitution. Equally, it can be assumed that constitutional changes would be required in most if not all of the other Member States. There is no doubt that the right to vote in regional and national elections cuts closer to the heart of national sovereignty than does the right to vote in local elections, and establishing the latter set of electoral rights at the national level already required constitutional adjustments to be made in many Member States consequent upon the Treaty of Maastricht.⁹⁶

There may in some cases be a further problem beyond the feasibility and political possibility of such a sensitive constitutional amendment, and that concerns its very possibility in constitutional terms, given that it would be proposed to include nonnationals within the group of persons tasked with electing the sovereign legislature. Notwithstanding the powerful normative arguments that can be made in favor of a more inclusionary conception of the *demos*,⁹⁷ or indeed the instrumental arguments about E.U. citizenship made earlier in this paper, it may simply be legally impossible for the national constitutions of some Member States to be amended to allow for

95. See Shaw, *supra* note *, ch. 8, for a further discussion of voting in regional elections.

96. Siofra O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* 218 (1996); Peter Oliver, *Electoral Rights under Article 8B of the Treaty of Rome*, 33 *Common Mkt. L. Rev.* 473, 476-78 (1996).

97. William A. Barbieri, Jr., *Ethics of Citizenship: Immigration and Group Rights in Germany* (1998); Heather Lardy, *Citizenship and the right to vote*, 17 *O.J.L.S.* 75 (1997); Lardy, *supra* note 59.

nonnational E.U. citizens to vote in regional and national elections. To do so would violate their fundamental self-conceptions as *nation* states, where power flows from the “people,” and the “people” are the national citizens, bound together in a community. In 1990 the German Federal Constitutional Court annulled *Land* level legislation put forward by Hamburg and Schleswig-Holstein to introduce electoral rights for nonnationals at the local level for nonnationals.⁹⁸ In ruling that the proposed legislative schemes breached the German Basic Law, the court relied upon a concept of popular sovereignty as the basis for political legitimacy, and linked this to a principle of a bounded *Staatsvolk* (or “state people”), limited by reference to the holding of national citizenship. It explicitly rejected the principle of affected interests as the basis for a claim to political equality and access to the franchise. The key phrase reads,

[The principle of popular sovereignty] in Article 20(2) of the Basic Law does not mean that the decisions engaging state authority must be legitimated by those who are affected by them; rather state authority must be based on a people understood as a group of persons bound together as a unity.⁹⁹

It extended its conclusion about “state” authority also to the level of local democracy, holding that municipalities, like the elected authorities at the state and federal level, wield state power. Not only did this rule out the Hamburg and Schleswig-Holstein initiatives, but it also meant that the implementation of article 19 EC subsequently required an amendment to article 28 of the Basic Law.

Extrapolating from those rulings to the question as to whether a constitutional amendment would be possible to give nonnational E.U. citizens the right to vote in German national or indeed *Länder* elections raises some obvious problems. The Federal Constitutional Court demonstrates a clear constitutional preference for a bounded concept of the *demos* calculated by reference to the limits of formal legal nationality, with some indications in the text that it has a preference for a concept of national legal community that involves strong societal bonds (of language, culture, and so on). This goes to the untouchable core of the German constitutional framework. The *Staat*, which is the basis for calculating the *Staatsvolk* is defined in the Basic Law as a democratic, federal, and social state based on

98. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 31, 1990, 83 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 37 (F.R.G.) (Schleswig-Holstein); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 31, 1990, 83 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 60 (F.R.G.) (Hamburg). For detailed commentary, see Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* 71-128 (2004); Christian Joppke, *Immigration and the Nation State: The United States, Germany, and Great Britain* 104-19 (1999); Rubio-Marín, *supra* note 62, at 186-234; Shaw, *supra* note *, ch. 9; Olivier Béaud, *Le droit de vote des étrangers: l'apport de la jurisprudence constitutionnelle allemande à une théorie du droit de suffrage*, 8 *Revue Française de Droit Administratif* 409 (1992); Gerald L. Neuman, “*We are the People*”: *Alien Suffrage in German and American Perspective*, 13 *Mich. J. Int'l L.* 259 (1992).

99. 83 BVerfGE 37 (50) (my translation).

the rule of law. In addition, the court seems to indicate its support for the principle that there can be no democracy without a *demos*, a legally defined group which in turn wields state power.¹⁰⁰ Even in the liberal and increasingly pluralistic society which Germany is today, one does not need to deploy an ethno-cultural reading of the concept of *Volk* in the German Basic Law for it to be possible to envisage difficulties with an attempt to amend the text to allow nonnationals to wield state power due to the tight conception of political responsibility which the court gave in the 1990 judgments. In its rulings, the court did explicitly recognize the possibility of E.U. citizens being given the right to vote in the future in local elections, as this was already under discussion at the time, in 1990. But this did require an amendment to article 28 of the Basic Law, which was introduced as part of the package of measures designed to give effect to the Treaty of Maastricht. It remains, however, a moot point in German constitutional law whether the Basic Law could be stretched to accommodate rights for nonnational E.U. citizens to vote in either regional or national elections.

CONCLUSIONS: ELECTORAL RIGHTS AND THE CONSTITUTIONALIZATION OF THE EUROPEAN UNION

This essay has used the issue of whether mobile E.U. citizens should be granted the right to vote in the regional and national elections of the Member State in which they reside as a case study showing how the constitutionalization processes of the European Union are not (and should not be) necessarily confined to the European Union level alone. The European Union is a complex system of multilevel governance, in which detailed interconnections with the legal and constitutional orders of the European Union and its Member States (and of the Member States inter se) are an integral component of the overall structure and are as important in their own way as the E.U. treaties themselves or the case law of the Court of Justice. These interconnections would have been sustained, and indeed in some ways developed, had the EU's Constitutional Treaty been ratified and entered into force, as scheduled, on November 1, 2006. However, the rejection of the Constitutional Treaty in two decisive referendums held in France and the Netherlands in mid-2005 effectively froze the ratification process, and it seems very unlikely that the Constitutional Treaty will enter into force in its current form. However, in the absence of decisive treaty-based reform, the EU's underlying composite constitutional framework will continue to develop incrementally, including in the sphere of citizenship.

This case study has illustrated both the possibilities for further development of the political dimension of E.U. citizenship through the type of semi-coordinated trust building advocated in Part II in the form of a convention providing a framework for the reciprocal allocation of electoral rights to resident E.U. citizens, and also—in the latter part of Part III—

100. See Rubio-Marin, *supra* note 62, at 205.

some of the limitations of such an approach. For, at a certain point, in every sphere, including that of the franchise, the constitution-building process of a limited polity such as the European Union will run up against the “rock” of national sovereignty. There may be, as the German case briefly demonstrates, some conceptions of national political sovereignty, which place a claim to exclusive ownership of the concept of *demos*, that even the most skilled and subtle constitutional drafting cannot get around. However, even limiting the discussion to that which is legally possible, and arguably politically desirable, there remains considerable space to develop the political dimension of E.U. citizenship further than it has hitherto been taken.