

FREEDOM OF MOVEMENT FOR INDIGENTS: A COMPARATIVE ANALYSIS OF AMERICAN CONSTITUTIONAL LAW AND EUROPEAN COMMUNITY LAW

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I. INTRODUCTION

Generally, persons in need of welfare, social assistance, or other types of minimum subsistence benefits¹ do not have the right to establish residence in other countries. One of the most important criteria immigration authorities apply when evaluating residence permit applications is whether applicants are, and will continue to be, able to provide for themselves and their families. Non-nationals² who are likely to become a burden on minimum subsistence benefit systems have no right to obtain the required residence permit. Those who have obtained such a permit but later need public assistance may lose their lawful residence status and become subject to deportation measures.

States are entitled to use the financial status of non-nationals as a criterion for immigration purposes. International law imposes only a few limitations on the power of states to decide the conditions under which non-nationals will be admitted to their territories.³ However, the same is not

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1. This contribution deals with social benefits intended to offer indigents minimum means of subsistence. It concerns benefits that serve as a financial safety net for those who have no other source of income and that are funded out of tax revenues. In the United States such benefits are usually referred to as “welfare benefits,” whilst the term “social assistance benefits” is more commonly used in the Member States of the European Community (EC). When discussing United States law and EC law, I will refer to “welfare benefits” and “social assistance benefits” respectively. All benefits under consideration, however, are funded out of the public purse, aimed at offering beneficiaries minimum means of subsistence and may therefore be labeled “minimum subsistence benefits.”

2. Instead of the somewhat disrespectful notions of “aliens” and “foreigners,” I will use the term “non-nationals” to label persons lacking citizenship or nationality of a given State.

3. “It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.” *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

International law provides for only two limitations on the states’ sovereign power to refuse non-nationals residence in their territory. First, the right to family life can found a claim to reside in a State of which individuals do not hold the nationality and, second,

necessarily true for states joined together in federations and states that have joined international organizations run by multi-tiered systems of government.⁴ The constitutions or treaties on which such entities are based often confer upon individuals the rights to travel and move freely among the Member States. For example, the Constitution of the United States guarantees a right to travel, which entitles citizens “to enter any State of the Union either for temporary sojourn or for the establishment of permanent residence therein.”⁵ Comparably, the Treaty establishing the European Community (EC) provides that citizens of the European Union⁶ “shall have the right to move and reside freely within the territory of the Member States.”⁷ Both in the United States and the EC, these internal free movement rights are recognized as incidents of union citizenship.⁸ Because citizenship is awarded irrespective of economic status, one might expect that both the rich and poor can enjoy the rights to freedom of movement. However, historically, many of the American states and the EC Member States have objected to a right to freedom of movement, which would enable indigents to move to and establish residence in other states. Particularly, economically better developed states have always feared that their comparatively high level of social benefits would attract citizens of the less developed states. The wealthier states usually argue that a large influx of citizens, moving for the sole purpose of

individuals are entitled to remain in the territory of another State if the only alternative is to return to a place or State where they fear inhuman treatment. *See* ELSPETH GUILD, EUROPEAN COMMUNITY LAW FROM A MIGRANT’S PERSPECTIVE 1 (2000).

4. Since the entry into force of the Treaty on European Union on November 1, 1993, and the expiration of the European Coal and Steel Community Treaty (ECSC) in July 2002, the European (Economic) Community (E(E)C) and the European Atomic Energy Community (EAEC or Euratom) together constitute the first pillar of the European Union. In this Article, I will refer to the European Community (EC), EC Member States and European Community law (EC Law) only, since all legal issues involved in the subject under consideration are governed by the Treaty establishing the European Community and legislation adopted thereunder. *See* CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, O.J. (C 340) 3 (1997) [hereinafter EC TREATY]. Consequently, the Euratom Treaty and the remaining parts of the Treaty on European Union are of no direct relevance to the subject of this Article.

5. *Edwards v. California*, 314 U.S. 160, 183 (1941) (Jackson, J., concurring).

6. Perhaps somewhat confusingly, the provisions on Union citizenship are not contained in the Treaty on European Union but in Articles 17-22 of the Treaty establishing the European Community. *See infra* note 4.

7. Article 18(1) EC, which provides that this right is subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect. *See infra* notes 183-86 and accompanying text.

8. *See*, for example, *Smith v. Turner*, 48 U.S. 283, 492 (1849) (commonly referred to as the Passenger Cases) in regard to the United States. “For all the great purposes for which the Federal Government was formed, we are one people with one common country. We are all citizens of the United States; and as members of the same community, must have the right to pass and repass every part of it without interruption as freely as in our own states.” *Id.* at 492 (Taney, J., dissenting). *See also* EC TREATY art. 17(2), 18(1).

collecting higher benefits, could affect the funding of welfare or social assistance systems. In order to protect themselves against “welfare migration” or “social tourism,” both the American and the European states have argued that they need legal powers to restrict the ability of indigent nationals of other states to establish residency in their territories.

Political entities based on a federal or multi-tiered system of government, such as the United States and the EC, face a conflict between the constitutional value of guaranteeing freedom of movement and the need to safeguard the funding of minimum subsistence benefit systems enacted by individual states. This article⁹ establishes how American constitutional law and EC law have addressed this conflict by analyzing the degree to which union citizens¹⁰ are able to establish residence and claim minimum subsistence benefits in other states.¹¹

Part II discusses American law. After a brief description of the American welfare system, Part II analyzes to what extent states are constitutionally permitted to impose limitations on the free movement and welfare rights of indigents. The discussion will be based on the United States Supreme Court decisions in *Edwards v. California*,¹² *Shapiro v. Thompson*¹³ and *Saenz v. Roe*.¹⁴

9. This Article builds on two previous publications. See A.P. van der Mei, FREE MOVEMENT OF PERSONS WITHIN THE EUROPEAN COMMUNITY – CROSS-BORDER ACCESS TO PUBLIC BENEFITS (forthcoming 2002) [hereinafter VAN DER MEI, FREE MOVEMENT]; A.P. van der Mei, *European Union Citizenship, Freedom of Movement and Social Assistance, in SOCIAL SECURITY IN TRANSITION* (J. Berghman et al. eds., forthcoming 2002).

10. This contribution is limited to individuals who possess United States and European Union citizenship respectively. The free movement rights of non-citizens (“aliens,” or, as they are commonly referred to in the European Community, “third country nationals”) residing in the United States and the EC will not be discussed.

11. Of course, one must be careful in comparing American constitutional law and EC law, and this particularly holds true for issues relating to freedom of movement for persons. See, e.g., G.M. Rosberg, *Free Movement of Persons in the United States, in COURTS AND FREE MARKETS – PERSPECTIVES FROM THE UNITED STATES AND EUROPE* 275, 276 (Terrence Sandalow & Eric Stein eds., 1982); Jonathan Varat, *Economic Integration and Interregional Migration in the United States Federal System, in 21 COMPARATIVE CONSTITUTIONAL FEDERALISM – EUROPE AND AMERICA* 49 (Mark Tushnet ed., 1990). Arguably, however, the subject of cross-border access to minimum subsistence benefit systems allows for a meaningful comparison. The core questions and issues raised by the subject are similar. In brief, both the United States and the European Community may be regarded as multi-tiered governmental entities in which (i) the public task of developing minimum subsistence benefit systems is mainly carried out at State or local level and (ii) a right to freedom of movement is constitutionally protected. Both the individual American states and the Member States of the EC have been faced with problems concerning “welfare migration” or “social tourism,” and both American constitutional law and EC law have to settle the potential conflict between the constitutional value of freedom of movement, on the one hand, and the need for safeguarding social benefit systems, on the other hand.

12. 314 U.S. 160 (1941).

13. 394 U.S. 618 (1969).

Part III deals with EC law. It explores the degree to which the various categories of beneficiaries of free movement of persons enjoy the right to reside in other Member States and whether they can possibly claim social assistance allowances there. Part III comprises a detailed analysis of the rulings of the European Court of Justice (ECJ) in *Levin*,¹⁵ *Lebon*,¹⁶ *Martínez Sala*¹⁷ and *Grzelczyk*.¹⁸ Part IV will demonstrate that the aforementioned conflict has been settled differently on both sides of the Atlantic. In the United States, indigents enjoy a virtually unqualified right to establish residence in the state of their choice; states lack powers to protect themselves against “welfare migration.” EC law governing the legal status of the “migrating poor” has not yet equally evolved. Member States still retain powers to restrict the free movement of indigent citizens of the European Union. Section V addresses the question whether the EC could move closer to, or ideally even realize, a general right of residence for all Union citizens, including indigents. Section VI summarizes the findings and concludes that, in spite of the absence of compelling substantive objections, a general right to freedom of movement which would enable the “European poor” to choose the member state in which they wish to live and enjoy minimum subsistence benefits is unlikely to be realized in the near future.

14. 526 U.S. 489 (1999). Both in *Shapiro* and *Saenz* the Court concluded that so-called durational residence requirements, which impose a waiting period before new state residents may enjoy welfare benefits, are unconstitutional. The decisions have triggered extensive debates about their implications for durational residence requirement in fields other than welfare such as voting rights, admission to the bar, medical care and in-state tuition. In regard to *Shapiro* see, for example, T.R. McCoy, *Recent Equal Protection Decisions – Fundamental Right to Travel or “Newcomers” as a Suspect Class*, 28 VAND. L. REV. 987 (1975); Todd Zubler, *The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take a Hike* 31 VAL. U. L. REV. 893, 895-911 (1997). In regard to *Saenz* see, for example, E.K. Nelson, *Unanswered Questions: The Implications of Saenz v. Roe for Durational Residency Requirements* 49 KAN. L. REV. 193 (2000).

15. Case 53/81, *Levin v. Staatssecretaris van Justitie*, 1982 E.C.R. 1035.

16. Case 316/85, *Centre Public d’Aide Social de Courcelles v. Lebon*, 1987 E.C.R. 2811.

17. Case C-85/96, *Martínez Sala v. Freistaat Bayern*, 1998 E.C.R. I-2691.

18. Case C-184/99, *Grzelczyk v. Centre Public d’Aide Sociale d’Ottignies-Louvain-la-Neuve*, 2001 E.C.R. I-6193. The rulings in *Martínez Sala* and *Grzelczyk* have implications that far exceed the field of social assistance. In particular, the rulings give substance to the concept of European Union citizenship. See, e.g., Sybilla Fries & Jo Shaw, *Citizenship of the Union: First Steps in the European Court of Justice*, 4 EUR. PUB. L. 533 (1998). This contribution does not address the broader implications of *Martínez Sala* and *Grzelczyk*.

II. THE UNITED STATES

A. The American Welfare System

American constitutional law governing freedom of movement for indigents must be evaluated in the historical and structural context of the American welfare system. The roots of this system can be traced back to the English Poor Laws adopted in medieval England.¹⁹ Among the features of the English laws, which the colonialists incorporated into their public assistance laws, two are particularly relevant for indigents' right to freedom of movement. The first concerns the local structure of the welfare system. State and local governments, not the federal government, bore the responsibility for addressing the problem of poverty. A single welfare system did not exist; rather, the overall welfare system consisted of a large number of separate and independent welfare systems.

The second feature involved the aim of offering public aid to indigents. Like the English systems, the original American welfare systems were not social systems in the sense that they reflected solidarity of the rich with the poor. Indigents were regarded as a "moral pestilence."²⁰ Welfare was merely offered in order to protect the elite from beggary, crime, and other problems indigents were associated with.

The Great Depression of the 1930's revealed the inadequacies of the welfare system. Tax revenues decreased while the number of people in need of public assistance increased. About four million people, most of them indigents,²¹ migrated to more affluent states. This enormous flow of indigents across interstate borders constituted visible proof that poverty was no longer a problem that state and local governments could solve on their own. Instead, poverty had become a national problem that required a national solution. Furthermore, the public perception of indigents changed. Indigents were no longer perceived as a "moral pestilence." Rather, as victims of the economic recession, they were regarded as persons who lacked financial means due to circumstances beyond their control. Federal participation was required to guarantee that every person had an income sufficient for the essential needs of life.

19. On the English origins of the American welfare system see, for example, ANNE MARIE CAMMISA, *FROM RHETORIC TO REFORM?: WELFARE POLICY IN AMERICAN POLITICS*, ch. 2 (1998); WALTER TRATTNER, *FROM POOR LAW TO WELFARE STATE: HISTORY OF SOCIAL WELFARE LAW IN AMERICA* (1989); Larry Cata Backer, *Medieval Poor Law in Twentieth Century America: Looking Back Towards a General Theory of Modern American Poor Relief*, 44 *CASE W. RES. L. REV.* (1995); William P. Quigley, *Backwards into the Future: How Welfare Changes in the Millennium Resemble English Poor Law of the Middle Ages*, 9 *STAN. L. & POL'Y REV.* 101 (1998).

20. *Mayor of New York v. Miln*, 36 U.S. 102, 142-43 (1837).

21. Edward Adams, Note, *State Control of Interstate Migration of Indigents*, 40 *MICH. L. REV.* 711, 713 (1942).

These new perceptions of poverty and welfare were incorporated into the New Deal politics and ultimately the Social Security Act (SSA) of 1935.²² The Act's title on Public Assistance introduced welfare programs for four categories of indigents: the aged, blind, disabled, and dependent children. Indigents who were not covered by any of these categorical assistance programs, could only receive benefits under the traditional general welfare programs, which remained entirely within the responsibility of the state or local governments. The SSA did not federalize welfare in the sense that the programs were organized, administered and financed by federal authorities. The states remained the central governmental entities in the field. Furthermore, the Act did not oblige states to develop or to improve welfare programs. Its main purpose was to encourage the states to provide new and enhanced welfare programs by making available federal financial aid for states participating in the program. Federal funding, which was financed by a tax introduced by the SSA and offered in the form of matching grants,²³ was made conditional upon satisfaction of detailed requirements. The federal authorities had the power to determine which categories of people were eligible to apply for public assistance; the states had the authority to set the level of the benefits.²⁴

The complex system of cooperative federalism,²⁵ introduced by the Social Security Act, was partially simplified by the Supplemental Security Income Program (SSI) adopted by Congress in 1973.²⁶ SSI federalized the programs for the aged, the blind, and the disabled. The most important, category, however, Aid for Families with Dependent Children (AFDC), was excluded. The administration and funding of the three federalized programs were brought under the sole responsibility of the federal authorities. The SSI program introduced a nationwide uniform benefit level for the aged, blind, and disabled. States no longer played a role in the administration or financing of these programs.

In response to the growing concerns about the welfare system's funding and general functioning, the system was significantly altered in 1996 by the Personal Responsibility and Work Opportunity Act (PRWORA).²⁷ The PRWORA replaced the AFDC program with the Temporary Assistance for Needy Families (TANF) program, which eliminated the federal entitlement to welfare benefits, replaced the original matching grants to states with block grants,²⁸ and

22. Social Security Act, 49 Stat. 620 (1935).

23. Matching grants are subsidies that are contingent upon the amount states have decided to spend on welfare.

24. *Dandridge v. Williams*, 397 U.S. 471 (1970).

25. The Social Security's Act welfare programs were "major experiments in 'cooperative federalism' . . . combining state and federal participation to solve the problems of the depression." *Shapiro v. Thompson*, 394 U.S. 618, 645 (1969) (Warren, J., dissenting).

26. 42 U.S.C. § 1381.

27. Pub. L. No. 104-193, § 110 Stat. 2105 (1996).

28. Block grants are lump sum payments.

limited the receipt of benefits to a maximum duration of five years. TANF resulted in a decentralization of the welfare system. States are now able to determine whether, and under which conditions, benefits are made available.²⁹

The current American welfare system provides for three different types of welfare programs. The first, SSI, is administered and financed by the federal authorities. It guarantees the aged, the blind, and the disabled a universal annual income. The second type of welfare, TANF, is partly financed by the federal government but falls under the responsibility of the states. The third concerns general assistance programs or "Home Relief." These welfare programs serve as a safety net for all indigents not eligible for benefits under one of the other programs. They are purely local in character. The federal authorities neither administer nor fund these programs. This section examines constitutional law with regard to cross-border access to TANF and AFDC benefit systems, as well as the general welfare benefit systems.³⁰ SSI benefits are not included in the discussion because the conflict between the constitutional values of freedom of movement and the safeguarding of welfare systems does not arise under this program.

B. Edwards: The Recognition of a Freedom of Movement for Indigents

From the Union's inception, American states have undertaken measures to restrict the immigration of indigents from other states. Among the first of these restrictive measures were removal and exclusion laws,³¹ as well as laws which

29. See CAMMISA, *supra* note 19, at 117-22; Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATLANTIC MONTHLY, March 1997, at 43, 49 (claiming that PRWORA allows states to "do almost anything they want."). *But see* Candice Hoke, *State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism Based Constitutional Challenge*, 9 STAN. L. & POL'Y REV. 115, 116 (challenging the view that states have the ability to do "almost anything they want").

30. In comparison with many of the European systems, the level of American welfare benefits is relatively low. For example, in 1988 the average AFDC benefit for a family with three children was \$501. This amounted to 63% of the poverty line. See PAUL E. PETERSON & MARK C. ROM, WELFARE MAGNETS – A NEW CASE FOR A NATIONAL STANDARD, 166-67 (1990). The variation between benefit levels in the different states, however, has historically been wide. Taking into consideration the differences in living costs, the benefit level in the most generous states was in 1988 approximately five times as high as in the least generous states. See CENTER OF SOCIAL POLICY AND LAW, LIVING AT THE BOTTOM: AN ANALYSIS OF AFDC BENEFIT LEVELS 25 (1993); PETERSON & ROM, *infra* at 610. The inter-state variation in welfare benefits is somewhat exaggerated in that entitlement to food stamps may reduce the differences. See, e.g., Clark Allen Peterson, *The Resurgence of Durational Residence Requirements for the Receipt of Welfare Funds*, 27 LOY. L.A. L. REV. 305, 329 (1993); Zubler, *supra* note 14, at 927.

31. These removal and exclusion policies trace their origin to the English Poor Laws, which "sought to restrain the mobility of free laborers . . . by providing that those without

imposed civil or criminal sanctions upon anyone who assisted indigents from other states to enter the jurisdiction.³² Although these laws can hardly be compared with the constitutional right to travel,³³ they initially did not raise constitutional objections. These glowing descriptions demonstrate that the right to travel has a national, as well as a personal value. This right is an important instrument of national unity that strengthens the notion of United States citizens as one people. It has played an important role in the transformation of the several states into a single Nation³⁴ and it now prevents “the Balkanization of the Nation.”³⁵ At the same time, the right to travel is a highly valued personal right that enables individuals to explore new horizons and to pursue interests in the State of their choice. The right is

property could be forcibly ejected from a locality and removed to their place of birth.” Stephen Loffredo, “*If You Ain’t Got the Do, Re, Mi*”: *The Commerce Clause and State Residence Restrictions on Welfare*, 11 *YALE L. & POL’Y REV.* 147, 151 (1993). On these policies see also, for example, D.R. Mandelker, *Exclusion and Removal Legislation*, 1956 *WIS. L. REV.* 57; Note, *Depression Migrants and the States*, 53 *HARV. L. REV.* 1031 (1940).

32. Note, *supra* note 31, at 1034.

33. The United States Constitution does not mention the right to travel, a right to freedom of movement, or a comparable notion. The omission of a reference to the right to travel, which encompasses both the right to cross inter-state borders and the right to migrate, has never been seen as a denial of the right. On the contrary, the framers of the Constitution probably took the right to travel so much for granted that they considered any reference to the right superfluous. See ZECHARIAH CHAFEE, *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787* 185 (1956); Rosberg, *supra* note 11, at 281. Article IV of the Articles of Confederation, the predecessor to the Constitution, provided that “to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states . . . shall have free ingress and egress to and from any other State” The framers of the Constitution, however, dropped the phrase “free ingress and regress.” The 1787 Constitution converted the confederation into a federation. *Id.* The right to travel was so elementary that it “was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.” *United States v. Guest*, 383 U.S. 745, 757-58 (1966). No one has ever questioned the constitutional status of the right to travel. The right simply exists and the absence of an explicit reference to it may, if anything, symbolize how deeply the notion of freedom of movement is rooted in American thinking.

Throughout constitutional history, the Supreme Court and several Justices have stressed the fundamental importance attached to the right to travel. In *Edwards v. California*, Justice Jackson stated that it “is a privilege of citizenship of the United States protected from State abridgement, to enter any State of the Union either for temporary sojourn or for the establishment of permanent residence therein. . . . If national citizenship means less than this it means nothing.” 314 U.S. 160, 183 (1941) (Jackson, J., concurring). In *Shapiro v. Thompson* Justice Brennan stated: “The nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.” 394 U.S. 618, 629 (1969).

34. *New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986).

35. *New York v. O’Neill*, 359 U.S. 1, 7-8 (1959).

incidental to United States citizenship and valued as a personal liberty “as close to the heart of the individual as the choice of what he eats, or wears, or reads.”³⁶ Unlike the right to freedom of movement within the EC,³⁷ the American right to travel has never been perceived as functional or subordinate to the process of economic integration. The Constitution aims at integration of the economies of the various states and, obviously, the right to travel serves this process by enabling persons to do business or work in other states. Economic integration, however, is only of secondary importance. Above all, the Constitution provides, the legal framework for a political union. The personal right to move freely from state to state is a product of this political Union³⁸ and it occupies within the constitutional system “a more protected position . . . than does the movement of cattle, fruit, steel, and coal across state lines.”³⁹

In the eighteenth and nineteenth centuries, indigents did not enjoy the right to travel.⁴⁰ Illustrative of this point is the 1837 U.S. Supreme Court decision in *Mayor of New York v. Miln*.⁴¹ The case involved a New York statute that required the master of any ship to report to the mayor the names and origins of all passengers aboard. A person who was deemed “liable to become chargeable on the City” could be removed “to the place of his last settlement.” The Supreme Court affirmed the validity of the statute. The Court also spoke of the “danger” that a State’s citizens would be subjected to the heavy charge of supporting indigents. Furthermore, the Court stated that it is “as competent and as necessary for a State to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts.” The Court even held that it is the duty of the state to protect its citizens from this “evil.”⁴² The power to exclude indigents, which “undeniably existed at the formation of the Constitution,” remains vested in the states.

36. *Kent v. Dulles*, 357 U.S. 116, 126 (1958).

37. See sources cited *supra* note 126.

38. See Varat, *supra* note 11, at 31-34.

39. *Edwards v. California*, 314 U.S. 160, 177 (1941).

40. Article IV of the Articles of Confederation stated that “the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and egress to and from any State” ARTS. OF CONFEDERATION art. IV. When the clause was incorporated in Article IV of the Constitution, the explicit exclusion of paupers and vagabonds was, like the terms “free ingress and egress,” dropped. See discussion *infra* note 33. Article IV, however, was based on the same principles of the fourth article of the Articles of Confederation and it was therefore generally assumed that paupers or indigents were not entitled to the privileges and immunities of citizenship, including the right to travel. Rosberg, *supra* note 11, at 288.

41. *Mayor of New York v. Miln*, 36 U.S. 102 (1837); see also *Railroad Co. v. Husen*, 95 U.S. 465 (1877) (holding a State may use its police power to exclude people such as convicts, paupers, idiots, and lunatics, and persons likely to become a public charge from its limits).

42. *Miln*, 36 U.S. at 142-43.

However, in 1941, six years after the SSA came into force, the U.S. Supreme Court moved away from its reasoning in *Miln*. In *Edwards v. California*⁴³ the Court was faced with a California statute that made it a misdemeanor to bring or assist “in bringing into the State any indigent person who is not a resident of the State knowing him to be an indigent person.” A California resident had brought an unemployed relative to California and was subsequently sentenced to six months’ imprisonment. California attempted to justify the statute by referring to the large influx of immigrants into California, which would result in problems in the areas of health, morals, and especially finance. The Supreme Court recognized the seriousness of California’s concerns, but held the statute to be unconstitutional:

None is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders. It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world. But in the words of Mr. Justice Cardozo: “The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and in the long run prosperity and salvation are in union and not division.”⁴⁴

The Court further explained that:

Recent years, and in particular the past decade, have been marked by a growing recognition that in an industrial society the task of providing assistance to the needy has ceased to be local in character. The duty to share the burden, if not wholly to assume it, has been recognized not only by State governments, but by the Federal government as well. The changed attitude is reflected in the Social Security laws under which the Federal and State governments cooperate for the care of the aged, the blind and dependent children.⁴⁵

Prior to reaching its conclusion, the Court considered the validity of the contention that a limitation of the states’ power to restrict freedom of movement would be subject to an exception for “paupers.” The Court admitted that support

43. 314 U.S. 160 (1941).

44. *Id.* at 173-74.

45. *Id.* at 175.

for this contention could be found in *New York v. Miln*, but found itself no longer bound by those observations:

New York v. Miln was decided in 1837. Whatever may have been the notion then prevailing, we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a “moral pestilence.” Poverty and immorality are not synonymous.⁴⁶

The Court reasoned that states are no longer vested with the power to interfere with the cross-border movement of persons, including indigents.⁴⁷ Implicitly, the Court recognized that indigents enjoy the right to travel, including the right to both cross inter-state boundaries and choose the state of residence.

In *Edwards*, the Supreme Court responded to the transformation of the welfare system. The SSA of 1935 had established a single welfare union in which not only the states but also the federal authorities hold a responsibility for guaranteeing to every individual a “minimum income” sufficient for at least the “essential needs of life.” This newly created welfare union no longer allowed a “State to isolate itself from difficulties common to all” states by “shutting its gates” to indigents.⁴⁸ Indigents were no longer seen as second-class citizens, but rather as United States citizens who have the same right to move to and to pursue their interests in the state of their choice as other citizens of the Union.⁴⁹ A “man’s mere property status,” as the concurring Justice Jackson stated, could no longer, “be used by a state to test, qualify, or limit his rights as a citizen of the United States.”⁵⁰ The right to travel may have always been inherent in the nature of the Union, but the right was only granted to indigents after the establishment of the “Welfare Union.”

46. *Id.* at 177.

47. *Id.*

48. *Id.* at 173-74.

49. It is a “privilege of citizenship of the United States, protected from State abridgement, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing.” *Id.* at 183-84 (Jackson, J., concurring). Justice Douglas held that to deny indigents freedom of movement would:

[I]ntroduce a caste system utterly incompatible with the spirit of our system of government. It would permit those who were stigmatized by a State as indigents, paupers, or vagabonds to be relegated to an inferior class of citizenship. It would prevent a citizen, because he was poor, from seeking new horizons in other states. It might thus withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity. The result would be a substantial dilution of the right of national citizenship, a serious impairment of the principles of equality.

Id. at 181 (Douglas, J., concurring).

50. *Id.* at 183-84 (Jackson, J., concurring).

C. The Constitutionality of Welfare Waiting Periods

1. The Post-Edwards Debates

Edwards did not guarantee that indigents would actually enjoy greater freedom of movement. Virtually all states⁵¹ made eligibility for welfare benefits conditional upon fulfillment of durational residence requirements.⁵² States had always imposed such requirements⁵³ and continued to do so after 1935.⁵⁴ The SSA had neither established a uniform welfare benefit level nor provided a system under which states were reimbursed for the costs of the benefits offered to recently arrived indigents. The states argued that they still needed to protect themselves against “welfare migration.” The states found support for their view in the SSA, which explicitly allowed them to impose, within certain limits,⁵⁵

51. In 1969, approximately 40 states imposed welfare waiting period requirements. See James A. Kristy, *A Showdown Between Shapiro and the Personal Responsibility and Work Opportunity Reconciliation Act: Infringement on the Right to Travel*, 20 WHITTIER L. REV. 449, 457 (1998); see also *Shapiro v. Thompson*, 394 U.S. 618, 677 (1969) (Harlan, J. dissenting).

52. State rules that make entitlement to welfare benefits conditional upon mere residence in the state territory are constitutional. See *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 255 (1973) (holding that *Shapiro's* penalty analysis only applies to the right to migrate and thus only to durational residence requirements); *Shapiro*, 394 U.S. at 636 (involving discrimination among state citizens, not discrimination between state citizens and citizens of other states).

53. Durational residence requirements trace their origin to the settlement requirements of the English Poor Laws. Under these laws “settlement” implied an established residence of some duration accompanied by landholding and tax payment. In the United States these requirements took the form of statutes or ordinances that denied aid to persons who had not resided in the State for a prescribed period ranging, in the 20th century, from one to five years. Note, *Interstate Migration and Personal Liberty*, 40 COLUM. L. REV. 1033 (1940). The most common period was one year. D.R. Mandelker, *The Settlement Requirement in General Assistance*, WASH. U. L.Q. 355, 367 (1955).

54. Many states even increased the duration of residence required for eligibility for general assistance programs. Arthur J. Altmeyer, *People on the Move: Effect of Residence Requirements for Public Assistance*, 1 SOC. SECURITY BULL. 4 (1946). During the 1940’s and 1950’s, however, a number of states concluded compacts with other states in which the parties agreed to waive durational residence requirements for their mutual citizens and some states reduced the duration of the residence required for welfare eligibility even unilaterally. See *Shapiro*, 394 U.S. at 635-36, nn.15, 16.

55. During the debates on the Social Security Act in Congress in the 1930’s, durational residence requirements for welfare eligibility had been the subject of heated discussions. Advocates of lengthy waiting period requirements had emphasized the danger of a high influx of persons seeking higher welfare benefits, while opponents of such requirements had stressed the unfairness of the requirements to those who were forced by the Depression to seek work in other states. Advocates and opponents reached a compromise implying that federal funding would be made subject to durational residence

waiting period requirements. The practical significance of the decision in *Edwards*, granting the right to travel, was still minimal. Indigents who moved to another state risked a temporary loss of their "basic income."

In the years after *Edwards*, however, welfare waiting periods became the subject of heated debates.⁵⁶ Legal commentators argued that the temporary denial of welfare to migrating indigents was contrary to the spirit of the decision in *Edwards* and the basic philosophy of the SSA that every person should have a "basic income" sufficient for the "essential needs of life."⁵⁷ Justifications offered by the states to impose waiting periods had no basis in fact. The administrative costs of enforcing the requirements exceeded the potential costs of granting welfare to migrating indigents. Statistics presented indicated that indigents did not move to other states for the purpose of obtaining welfare benefits.⁵⁸ In the absence of a genuine need for the requirements, waiting periods would have to be held unconstitutional as unnecessary burdens on the right to travel or arbitrary denials of the equal protection of the laws.⁵⁹

2. *Shapiro v. Thompson*

It was not until 1969 that the issue of the constitutionality of welfare waiting period requirements was brought before the U.S. Supreme Court. In *Shapiro v. Thompson*⁶⁰ the Court was asked to rule upon the constitutionality of several state statutes which all made eligibility for AFDC-benefits conditional upon one year of residence. Each of the applicants met all other requirements for

requirements not exceeding a maximum of one year for AFDC. See *Shapiro*, 394 U.S. at 646 (Warren, J., dissenting); see also M.K. Rosenheim, *Shapiro v. Thompson "The Beggars are Coming to Town,"* 1969 SUP. CT. REV. 303, 313.

56. See, e.g., B.A. Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, in THE LAW OF THE POOR 243 (Jacobus Ten Broek ed., 1966); LoGatto, *Residence Laws – A Step Forward or Backward?*, 7 CATH. U. L. REV. 101 (1961); Note, *Residence Requirement for Public Relief: An Arbitrary Prerequisite*, 1 COLUM. J.L. & SOC. PROBS. 133 (1966); Note, *Residence Requirements in State Public Welfare Statutes-I*, 51 IOWA L. REV. 1080 (1966).

57. The unconstitutionality of welfare waiting periods was also implied in *Edwards*. This conclusion was not only based on the "sink-or-swim-together" rationale of the decision but also on dictum in which the Court had said that the nature and extent of a State's obligation "to afford relief to newcomers is not here involved. We do, however, suggest that the theory of the Elizabethan poor laws no longer fits the facts." *Edwards v. California*, 314 U.S. 160, 174 (1941).

58. For an overview of research and literature on welfare migration before 1969 see, for example, PETERSON & ROM, *supra* note 30, at 151-52; see also L.H. Long, *Poverty Status and Receipt of Welfare Among Migrants and Nonmigrants in Large Cities*, 39 AM. SOC. R. 46 (1974).

59. See Harvith, *supra* note 56, at 47.

60. 394 U.S. 618 (1969).

the benefits except the durational residence requirement. The main question the Court addressed was whether such discrimination⁶¹ against “new” indigent residents could be justified. The primary justification offered by the states concerned the preservation of the fiscal integrity of welfare programs. The states contended that, if indigents could be deterred from entering their territory by denying them welfare benefits during the first year, programs to assist long-term residents would not be impaired by substantial influxes of newcomers.⁶² Although the Court did not question that a one-year waiting period “was well suited to discourage the influx” of indigents, it held that the purpose of deterring immigration could not serve as justification for the waiting period requirement. The Court confirmed the constitutional status of the right to travel and stated that if a law has “no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who chose to exercise them, then it is patently unconstitutional.”⁶³

Furthermore, the states argued that even if they were forbidden to deter the entry of all indigents, waiting periods could be justified as an attempt to discourage those indigents from entering the state for the sole purpose of obtaining higher welfare benefits. The Court responded negatively to this free-rider argument. The requirements were all-inclusive. They did not only result in a denial of welfare to persons who came to the states for the sole purpose of collecting higher welfare benefits. These requirements also withheld benefits from the great majority of indigents who came to the state for other purposes.⁶⁴ More fundamentally, the Court held that:

A state may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a state with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for

61. The Court opened the decision by defining the constitutional problems raised by the waiting periods as problems of equal protection:

There is no dispute that the effect of the waiting period requirement . . . is to create two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year in the jurisdiction. On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist--food, shelter and other necessities of life.

Id. at 627.

62. *Id.* at 630-31.

63. *Id.* at 631.

64. *Id.*

herself and her children should be regarded as less deserving because she considers, among others, the level of a state's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular state in order to take advantage of its better educational opportunities.⁶⁵

The states had also presented a past-contributions argument, which suggested that welfare waiting periods could be sustained as an attempt to distinguish between new and old residents on the basis of the contributions made to the community through the payment of taxes. The Court rejected this argument as well. A state may legitimately attempt to limit its expenditure, but it may not seek to achieve such a purpose by invidious distinctions between classes of its citizens.⁶⁶ Accepting the past-contributions argument would permit states to bar new residents from schools, parks, and libraries or deprive them from police and fire protection.⁶⁷ It would even permit states to apportion all benefits and services according to the citizens' past contributions. The Equal Protection Clause prohibits such an apportionment of state services.⁶⁸

In rejecting the "free rider" and the "past contributions" arguments, the Court did not have to decide which of the equal protection tests had to be applied. Both arguments were held to be constitutionally impermissible; they simply could not justify the welfare waiting periods. The states, however, had offered a number of additional justifications that were accepted by the Court as legitimate. The Court decided that the strict scrutiny standard has to be applied since, "in moving from state to state . . . appellees were exercising a constitutional right to travel, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling state interest, is unconstitutional."⁶⁹

The fundamental right that triggered the strict scrutiny standard was the right to travel, not a right to welfare.⁷⁰ In *Shapiro*, the states could not meet the burden to show that the requirements were necessary to further a compelling state interest. The states had claimed that durational residence requirements could be sustained as objective tests of bona fide residence and as a safeguard against fraudulent receipt of welfare payments. One year of residence would ensure that an applicant was actually a resident of the state and not a non-resident faking residence for the purpose of obtaining welfare in another state in addition to the benefits received in the state where the indigent actually resides. The Court did

65. *Id.* at 631-32.

66. *Id.* at 633.

67. *Id.*

68. *Id.*

69. *Id.* at 634.

70. The Constitution does not guarantee a right to welfare payments. *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970) (explaining that the administration of welfare raises economic, social, and philosophical problems that are not the Court's business).

not consider a one-year waiting period a necessary means to determine bona fide residence and to avoid double payments. Less drastic means were found to be available for determining bona fide residency.⁷¹ The Court concluded the states did not use, and had no need to use, one-year waiting periods for the purposes suggested. Even under the rational relation test of the Equal Protection Clause, the residence requirements would have been unconstitutional.⁷²

Before the Court could reach a final conclusion, it had to deal with what may have seemed to be the strongest argument on behalf of the defending states. *Shapiro* involved categorical assistance programs (AFDC) for which Congress had authorized states to impose durational residency requirements, not exceeding a maximum of one year. The states argued that they had not exceeded this maximum and that they were therefore justified in imposing the requirements. In the view of the states, the real issue was not whether they were permitted to impose durational residence requirements, but whether Congress could authorize states to impose such requirements.⁷³

The Court rejected this argument stating that, regardless of the possible approval by Congress, it was the state legislation that infringed upon the constitutional rights of freedom of travel and equal protection of the laws.⁷⁴ In the view of the Court, the constitutional questions were posed by state legislation, not by federal legislation. Moreover, the Court provided that even if it could be argued that *Shapiro* involved the constitutionality of a federal statute, the waiting periods at issue would be unconstitutional.⁷⁵ Congress is prohibited from denying public assistance to otherwise eligible indigents solely on the ground that they have not been residents of a state for one year prior to their application for welfare. “Congress,” the Court stated, “may not authorize the states to violate the Equal Protection Clause.”⁷⁶

From a welfare perspective, *Shapiro* was not surprising.⁷⁷ Prior to the

71. The Court reasoned that before granting welfare, the responsible authorities investigate the applicants' employment, housing, and family situation, and in the course of the inquiry, learn whether applicants are residents. In the view of the Court, the hazard of double payments could simply be prevented by a call or letter from the authorities to the welfare authorities of the State from which the applicants came. *Shapiro v. Thompson*, 394 U.S. at 636-37. The Court did not accept the argument that a one-year waiting period could be justified as a means of encouraging “newcomers” to join the labor market promptly. The Court simply held that this logic would also require a similar waiting period for long-term residents of the state. *Id.* at 637-38.

72. *Id.* at 638.

73. *Id.* at 647-48 (Warren, J., dissenting).

74. *Id.* at 640-41.

75. *Id.*

76. *Id.* at 641.

77. To be sure, *Shapiro* did cause a stir in the legal doctrine. Most of the confusion and criticism, however, concerned the implications of the Court's penalty-on-the-right-to-travel analysis for waiting period requirements in areas other than welfare. See, e.g., Note, *Durational Residence Requirements from Shapiro to Sosna: The Right to Travel Takes a*

decision, legal commentators had already questioned the constitutionality of welfare waiting periods.⁷⁸ By rejecting the free-rider and the past-contributions arguments and holding that the requirements must be reviewed under the strict scrutiny test, the Court made it clear that there was no longer room for welfare waiting periods.⁷⁹ *Shapiro* largely built on the sink-or-swim-together rationale of *Edwards*. States were no longer permitted to shift the burden of supporting indigents to other states. In a single welfare union, in which the task of caring for the needy is shared by the states and the federal authorities, states were not only prohibited from isolating themselves from the poverty problem by closing their borders, but also by refusing access to their welfare systems. *Shapiro* made the right to freedom of movement recognized in *Edwards* a practical reality for indigents. In the single welfare union indigents can, as equally deserving United States citizens, move to the state where they think they can best pursue their interests without being discouraged by a temporary potential loss of their basic income, even if the sole motive for moving to another state is to collect higher welfare benefits. As soon as indigents establish residence in a state, they can apply for welfare.

Shapiro, however, was more than just the logical follow-up to *Edwards*. In *Shapiro* the Court was confronted with the “welfare magnet problem” for the first time. Unlike Congress and the dissenting Chief Justice Warren,⁸⁰ the majority of the Justices in *Shapiro* did not consider this problem serious enough to uphold the waiting period requirements. The reason for this is not that the SSA has made federal funds available for the states. Four years after *Shapiro*, the U.S. Supreme Court in *Maricopa County v. Memorial Hospital* held that whether a

New Turn, 50 N.Y.U. L. REV. 622 (1975); see also McCoy, *supra* note 14.

78. See *infra* notes 57-59 and accompanying text.

79. *Shapiro* did not imply that all welfare waiting periods were unconstitutional. In particular, the decision left room for the suggestion that the requirements could possibly be sustained if they serve as tests of bona fide residency. In *Shapiro*, the Court merely held that a one-year waiting period could not be upheld on this ground, but the decision did not exclude the possibility that shorter waiting periods of one or two months might be constitutional where they function as tests of bona fide residence. *Shapiro v. Thompson*, 394 U.S. 618 (1969). In the field of voting, the Court had similarly shot down one-year waiting periods but it had accepted durational residence requirements of up to 50 days in as far as they serve as reasonable tests of bona fide residence. See *Dunn v. Blumstein*, 405 U.S. 330 (1972) (shooting down one-year waiting periods); see also *Martson v. Lewis*, 410 U.S. 679 (1973); *Burns v. Fortson*, 410 U.S. 686 (1973) (accepting durational residence requirements).

80. Chief Justice Warren was of the view that, “Congress quite clearly believed that total elimination of durational requirements would be self-defeating because the prospect of a sudden influx of new residents might deter the states from significantly increasing categorical assistance benefits,” and that these “legislative realities could not be ignored in assessing the validity of the congressional decisions to authorize” durational residence requirements for welfare benefits. BERNARD SCHWARTZ, *SUPER CHIEF—EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIBLIOGRAPHY* 726 (1983).

program is federally funded is irrelevant to the applicability of *Shapiro*'s penalty analysis.⁸¹ It is uncertain whether, or to what extent, the welfare magnet problem played a role in the deliberations of the Court,⁸² but the reasoning provided by the Court in *Shapiro* suggests that the justices did not see a need for the challenged requirements. It is unlikely that the Court would have rejected the free-rider and past-contributions arguments as strongly had it expected that the abolition of welfare waiting periods would cause large numbers of indigents to move to other states.

Further, although the Court subjected welfare waiting periods to strict scrutiny under the equal protection test, it explicitly stated that even under the traditional equal protection tests a classification of welfare applicants in accordance with the one-year residence requirement would seem "irrational"⁸³ and unconstitutional. However, it is difficult to conceive why waiting periods are irrational or arbitrary, where their invalidation could possibly result in a large influx of indigents and an increase in welfare costs. As undesirable and objectionable as a limitation of indigents' right to travel and equal protection may be, waiting periods do not seem to be "without any reasonable basis." Thus, *Shapiro* suggested that the Court did not refrain from invalidating durational residence requirements for welfare benefits, because it did not expect that welfare-induced migration would actually occur.

3. From *Shapiro* to *Saenz*

a. The Resurgence of Welfare Waiting periods

In *Shapiro*, the Supreme Court ordered states to abolish welfare waiting period requirements. States indeed cancelled the requirements in subsequent years. *Shapiro*, apparently, had settled the earlier controversies regarding the need for, and the validity of, welfare waiting period requirements.⁸⁴ Since the late 1980's, however, waiting periods have returned to the agendas of the states and the federal government. Budget crises, general dissatisfaction with the

81. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 261 (1973).

82. On the discussions within the Court in *Shapiro*, see SCHWARTZ, *supra* note 80, at 725-32.

83. *Shapiro*, 394 U.S. at 638.

84. A number of states and localities attempted, however, to circumvent *Shapiro*. New York, for example, re-enacted a durational residence requirement arguing that this requirement was aimed only at those migrating for the purpose of New York's public assistance and that applicants could defeat the residency requirement if they could establish "by clear and convincing proof that the purpose" of their entry "was not for the purpose of securing public assistance and care in this state." The federal district court held that *Shapiro* prohibits such durational residency requirements. *Gaddis v. Wyman*, 304 F.Supp. 717 (N.D.N.Y. 1969), *aff'd*, *Wyman v. Bowens*, 397 U.S. 49 (1970).

functioning of the welfare system, and claimed in-migration of welfare recipients incited many states to reintroduce welfare waiting period requirements.⁸⁵ In order to avoid conflicts with *Shapiro*, most of these states⁸⁶ introduced durational residence requirements that differed in one or more respects from those ruled unconstitutional by the Supreme Court.

Wisconsin, for example, imposed a durational residence requirement of merely sixty days, instead of one year, and exempted persons who were born in the state, had previously lived there for one year, came to Wisconsin to join family members, or to accept a job offer from the denial of welfare benefits during the first sixty days of residence.⁸⁷ The purpose of Wisconsin's law was, therefore, to deter the in-migration of free-riding indigents only.⁸⁸ Minnesota decided to introduce a two-tiered benefit scheme.⁸⁹ Newcomers were only granted sixty percent of the basic welfare benefits during the first six months.⁹⁰ California chose a multi-tiered⁹¹ benefit system under which newcomers were only to receive welfare up to the level of the state they used to reside in, provided that this benefit level was lower than the level in California.⁹² The federal authorities supported the re-introduction of waiting periods. Before the PRWORA entered into force in 1996, federal authorities allowed⁹³ a number of states to experiment with various types of relatively short waiting periods,⁹⁴ and PRWORA itself explicitly allowed the states to apply "the rules (including benefit amounts) of the program . . . of another state if the family has moved to the state from the other state and has resided in the state for less than twelve months."⁹⁵

85. See, e.g., Peterson, *supra* note 30.

86. Indiana re-introduced waiting periods mirroring those reviewed in *Shapiro* by wholly denying welfare benefits to new residents for one year. Not surprisingly, the Indiana waiting period requirement was declared unconstitutional. Eddleman v. Center Township, 723 F. Supp 85 (S.D. Ind. 1989); see also *infra* note 101.

87. WIS. STAT. § 49.19(11m) (1992).

88. Jones v. Milwaukee County, 485 N.W.2d 21 (Wis. 1992) (upholding the waiting period); see also *infra* note 105.

89. MINN. STAT. § 256D.065 (1991).

90. *Id.*

91. Durational residence requirements that calculate newcomers' benefit on the basis of the benefit level applicable in the state from which they moved can be labeled "multi-tiered." Assuming that every State sets a different benefit level, and "groups of residents from every other state migrate to State X, State X could conceivably have 50 distinct 'tiers' of welfare beneficiaries." David A. Donahue, *Penalizing the Poor: Durational Residency Requirements for Welfare Benefits*, 72 ST. JOHN'S L. REV. 451, 484 n.8 (1998).

92. CAL. WELF. & INST. CODE § 11450.03 (West 1994).

93. Allowed by not refusing federal funding.

94. See, e.g., Susan Bennet & Kathleen A. Sullivan, *Disentitling the Poor: Waivers and Welfare "Reform"*, 26 U. MICH. J.L. REFORM 741 (1993); Stanford Schram & Gary Krueger, *"Welfare Magnets" and Benefit Decline: Symbolic Problems and Substantive Consequences*, 24 PUBLIUS: J. FEDERALISM 61, 80 (1994).

95. 42 U.S.C.A. § 604(c) (West Supp. 1997). Since 1996 the number of states which

b. The Welfare Magnet Debate

The re-introduction of welfare waiting period requirements fully rekindled the debate on the topic. Two separate, but closely intertwined, issues dominated the discussions. The first issue concerned whether there was really a need for the newly introduced requirements. Was the fear of welfare migration justified? Views differed. Various empirical studies conducted on the mobility of welfare recipients reached different and conflicting conclusions. In many of the earlier studies,⁹⁶ evidence of welfare migration was found. States like Wisconsin, Minnesota and California faced an influx of indigents moving for the sole purpose of collecting benefits. The scholars who conducted these studies did not claim that large numbers of poor people rush from one state to another with every modest adjustment in state benefit levels. Yet, they suggested that as people make major decisions about whether they should move or remain where they are, they take into account the level of welfare a state provides and the extent to which that level is increasing. Indigents would do this roughly to the same extent that they respond to differences in wage opportunities from state to state.⁹⁷

More recent studies have questioned the findings of these earlier studies.⁹⁸ Very little welfare migration occurs and fears of a “welfare race to the bottom”⁹⁹ are largely exaggerated, if not wholly unfounded. These studies did not

decided to re-introduce durational residence requirements increased to fifteen. Scott W. Allard, *Revisiting Shapiro: Welfare Magnets and State Residency Requirements in the 1990s*, 28 PUBLIUS: J. FEDERALISM 45, 55 (1998).

96. See e.g., PETERSON & ROM, *supra* note 30; Brian J. Crusling, *The Effect of Social Welfare Systems on Metropolitan Migration in the U.S., by Income, Group, Gender & Family Structure*, 30 URB. STUD. 325 (1993); Gordon F. DeJong & William L. Donnelly, *Public Welfare and Migration*, 54 SOC. SCI. Q. 329 (1973); Edward M. Gramlich & Deborah S. Laren, *Migration and Income Redistribution Responsibilities*, 19 J. HUM. RESOURCES 489 (1984); Paul E. Peterson & Mark Rom, *American Federalism, Welfare Policy, and Residential Choices*, 83 AM. POL. SCI. REV. 711 (1989).

97. PETERSON & ROM, *supra* note 30, at 83.

98. See e.g., Thomas R. Dye, *The Policy Consequences of Intergovernmental Competition*, 10 CATO J. 59 (1990); R.J. Hanson & J.T. Hartman, *Do Welfare Magnets Attract?*, 1994 UNIV. OF WIS., INST. FOR RESEARCH ON POVERTY DISCRIMINATION, PAPER NO.1028-94, 24-27; Robert Moffitt, *Welfare Reform: An Economist's Perspective*, 11 YALE L. & POL'Y REV. 126 (1993); Schram & Krueger, *supra* note 94, at 74-79.

99. The following, oversimplified, model may help to clarify the race to the bottom hypothesis. State *A* is grouped together with several other states in federal entity *X*. State *A* has to decide on the level of its benefits. If it opts for comparatively high benefits, and thus for comparatively high taxes, state *A* will encounter the problem that it may attract persons from other states who are in need of such benefits. The higher the level at which benefits are set, the greater the magnetic effect on needy individuals from other states. The more free-riding benefit recipients that come from other states, the greater the pressure on the funding of the benefit scheme. As the inflow of non-contributing benefit recipients becomes quite considerable, state *A* might have to choose either to lower benefit levels or to raise tax-rates. If state *A* were to choose the latter option, the danger exists that tax-

doubt that some states may have faced a larger number of indigents from other states, but they did deny that indigents would move to other states for the sole purpose of obtaining higher welfare benefits. Indigents primarily moved to the states where jobs are available. If there was any welfare migration, it was a secondary factor, and it did not result in forcing states either to raise taxes or to lower welfare benefit levels. The welfare magnet issue is a myth. States would use the notion of welfare magnet in order to justify refusals to raise welfare benefits.¹⁰⁰

c. The Constitutional Debate

The second issue addressed in the aforementioned debates concerned the constitutionality of the re-introduced waiting period requirements. As noted earlier in this article, many states¹⁰¹ tried to circumvent *Shapiro* by shortening durational residence requirements or reducing the amount of welfare benefits available to indigents who moved from other states. *Shapiro*, however, did not seem to leave much room for such alternative waiting periods. The main

paying citizens would move to other states, which might again lead to a reduction in tax revenues. In the end, state *A* might be forced to lower its benefits anyway. At the outset, state *A* might therefore decide to set the level of its benefits lower than the benefit level in neighbouring state *B*, in the hope that free-riders from other states would move to *B*. If state *A* were indeed to make that choice, it would indirectly increase the magnetic effect of state *B*'s benefit scheme. This state would be faced with the same problems that state *A* had initially encountered, and state *B* would therefore decide to decrease its benefits to a level lower than state *C* in the hope that free-riders would go to that state. State *C* might respond similarly and try to shift the burden to state *D*. A domino effect could occur. The fear of becoming a welfare magnet might trigger competition between states each lowering their benefits in the hope that other states would take their indigents. This competition might result in a race to the bottom, which could lead to a reduction in welfare benefit levels throughout the entire federal entity *X*.

100. See Schram & Krueger, *supra* note 94, at 82; see also, Scott W. Allard, *Revisiting Shapiro: Welfare Magnets and State Residency Requirements in the 1990s*, 28 *PUBLIUS: J. FEDERALISM* 45, 50 n.8 (1998); Nan S. Ellis & Cheryl M. Miller, *Welfare Waiting Periods: A Public Policy Analysis of Saenz v. Roe*, 11 *STAN. L. & POL'Y REV.* 343, 351 (2000).

101. Indiana had decided to re-introduce durational residence requirement, which wholly denied newcomers welfare for the first 12 months, and thus mirrored the waiting periods that had been held unconstitutional in *Shapiro*. See *infra* note 86. In *Eddleman v. Center Township of Marion County*, the District Court concluded that a statute that conditioned receipt of relief on three years of continued residence within the State of Indiana and one year of continued residence in the county facially violated the Equal Protection Clause. The statute under challenge classified poor relief applicants according to length of residency and penalized the right to travel. The statute failed the strict scrutiny test. The state admitted that there simply was "no compelling governmental interest furthered by the statute." 723 F. Supp. 85 (S.D. Ind. 1989).

motive¹⁰² behind welfare waiting periods was to deter the in-migration of poor people. The Court in *Shapiro* held, however, that if a state law has the purpose of chilling the exercise of constitutional rights, such as the right to travel, then it is patently unconstitutional.¹⁰³ Further, the Court concluded that waiting period requirements for welfare benefits constituted a penalty on the right to travel. Nothing in its decision suggested that shorter waiting periods or requirements that merely lower the amount of welfare payable to recipients could escape strict scrutiny.¹⁰⁴

Most courts¹⁰⁵ asked to examine the constitutionality of welfare waiting periods declared them unconstitutional. For example, in *Mitchell v. Steffen*, the Minnesota Court of Appeals concluded that the Minnesota statute that limited welfare benefits for persons that had not yet resided in the state for a period of six months, to sixty percent of the benefits payable to other residents of longer duration, discriminated between residents and penalized the right to travel. Following *Shapiro*, the court rejected the suggested free-rider and public fiscal arguments and held that the statute being challenged could not pass the compelling State interest test.¹⁰⁶ In *Green v. Anderson*¹⁰⁷ and *Roe v. Anderson*¹⁰⁸ a federal district court held California's statute, providing that families residing in the state for less than twelve months shall receive benefits no greater than the "maximum aid payment that would have been received by that family from the State of prior residence," to be unconstitutional. In both cases the courts concluded that *Shapiro* outlawed distinctions among state residents on the basis of their length of residency in the state.¹⁰⁹ The statute penalized the right to travel

102. Some government officials were quite open about their motives. For example, former Governor of California Pete Wilson stated:

We will have to minimize the magnetic effect of the generosity of this state I happen to think the *Shapiro* line of cases is wrong It seems to me that at the very least there should be a period in which new residents do not receive benefits that the state provides . . . [o]therwise . . . you are risking the health of your economic base.

Daniel M. Weintraub, *Wilson Favors Wait for Welfare*, L.A. TIMES, Nov. 10, 1991, at A3.

103. *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969).

104. Peterson, *supra* note 30, at 340, 344.

105. There was one exception. In *Jones v. Milwaukee County*, the Supreme Court of Wisconsin upheld a 60-day waiting period for public relief under the lenient rational relation test. The court did not apply strict scrutiny because the 60-day waiting period was "so substantially less onerous than the one-year waiting period of *Shapiro*," that it did not "penalize an individual's right to travel." 485 N.W.2d 21, 26 (Wis. 1992). *Jones*, however, was incompatible with *Shapiro* and wrongly decided. See, e.g., Donahue, *supra* note 91, at 476-77; Loffredo, *supra* note 31, at 167; Peterson, *supra* note 30, at 343-44; Zubler, *supra* note 14, at 907.

106. *Mitchell v. Steffen*, 487 N.W.2d 896, 903 (Minn. Ct. App. 1992).

107. 811 F. Supp. 516 (E.D. Cal. 1993), *aff'd, mem.* 26 F.3d 95 (9th Cir. 1994).

108. 966 F. Supp. 977 (E.D. Cal. 1997), *aff'd*, 134 F.3d 1400 (9th Cir. 1998).

109. Unlike *Green*, *Roe* was decided after the enactment of PROWRA, which allows

and failed strict scrutiny analysis.¹¹⁰

Legal commentators increasingly argued that the Supreme Court should step back from *Shapiro*'s penalty on the right to travel analysis¹¹¹ and develop an alternative framework for reviewing welfare waiting periods.¹¹² Constitutional law should allow for welfare waiting period requirements. The fear of welfare migration would be justified. *Shapiro* would have acted as the starter's gun in a

for the application of durational residency requirements. See *supra* note 91 and accompanying text. Citing *Shapiro*, however, the *Roe* court concluded that PRWORA could not save the requirement being challenged since Congress has no power to "authorize the State to violate the Equal Protection Clause." *Roe*, 966 F. Supp. at 984.

110. Waiting periods introduced by other states met with the same fate. See, e.g., *Maldonado v. Houstoun*, 157 F.3d 179 (3d Cir. 1998) (striking down a Pennsylvania statute capping welfare benefits at the level that recipients received in their former State by relying on *Shapiro*); *Westenfelder v. Ferguson*, 998 F.Supp. 146 (D.R.I. 1998) (holding that a residency requirement created by a Rhode Island public assistance statute, reducing benefits to new residents by thirty percent until they had resided in Rhode Island for twelve months, implied a denial of basic necessities of life; this constituted a penalty on the right to travel. The court rejected that the statute was narrowly tailored to the state interest of encouraging welfare recipients to obtain work and to end their dependence on governmental aid); *Warrick v. Snider*, 2 F. Supp. 2d 720 (W.D. Pa. 1997) (concluding that a Pennsylvania statute imposing a sixty-day waiting period for newcomers for cash benefits penalized the right to travel and that waiting periods designed to encourage employment could only be justified when applied to long term residents too); see also *Brown v. Wing*, 649 N.Y.S.2d 988 (N.Y. Sup. Ct. 1996); *Aumick v. Bane*, 612 N.Y.S.2d 766 (N.Y. Sup. Ct. 1994) (both finding a penalty in a New York statute that limited newcomers for six months to the greater of eighty percent of the otherwise available aid, or the level in their prior states, because the actual purpose was "to penalize the exercise of the right to travel by creating a class of short-term residents, who would receive lower benefits than all others who also have met the same eligibility requirements . . .").

111. But see Brenna Binns, *Fencing Out the Poor: The Constitutionality of Residency Requirements in Welfare Reform*, 1996 Wis. L. REV. 1255 (1996) (arguing that the Court should find that welfare waiting period requirements do not penalize the right to travel).

112. Most commentators called upon the Court to move away from *Shapiro* because of the "doctrinal mess" that penalty on the right to travel analysis had created and the uncertain implications of this analysis for durational residence requirements applied in fields other than welfare. See, e.g., William Cohen, *Equal Treatment for Newcomers: The Core Meaning of National and State Citizenship*, 1 CONST. COMMENT. 9 (1984); McCoy, *supra* note 14; Zubler, *supra* note 14. Zubler and Cohen argued that the Court should ground the right to travel or migrate in, and review welfare waiting period requirements under the citizenship clause of the Fourteenth Amendment, which provides that United States citizens are citizens of the state wherein they reside. On the face of it, this clause does not seem to leave any room for durational residence requirements, but it was argued that the Clause does allow the Federal Government to authorize states to treat "new" state citizens differently than other residents. Under the Citizenship Clause "any state discrimination against newcomers would be per se unconstitutional unless Congress specifically authorized it." Zubler, *supra* note 14, at 946.

race to the bottom,¹¹³ which could be accelerated by PRWORA's decentralization of the welfare system.

4. Saenz v. Roe

In light of the post-*Shapiro* developments and debates, it was inevitable that the question of the constitutionality of welfare waiting period requirements would be brought before the Supreme Court once again. The Supreme Court took this opportunity in *Saenz v. Roe*.¹¹⁴ In this case, three women who had all recently moved from other states to California to live with relatives in order to escape abusive family circumstances, challenged the California statute. Since the welfare benefit levels in California were higher, California reduced the amount payable to the women to the maximum they would have received in the state of their prior residence. California advanced only fiscal justifications for its waiting period requirements. The statute would save 10.9 million dollars in annual welfare costs. Under the compelling state interest test of the Equal Protection Clause, this argument could not stand. However, California claimed that the requirements would merely have to satisfy the more lenient rational relation test. Since the California statute did not deprive recently arrived residents from welfare payments entirely, it did not constitute a penalty on the right to travel.¹¹⁵

Responding to debates about the appropriate standard of review to be applied to durational residency requirements,¹¹⁶ the Court in *Saenz* reconsidered the rules and provisions governing the right to travel. The Court abandoned

113. Zubler, *supra* note 14, at 935.

114. 526 U.S. 489 (1999). See, e.g., April Dawn Lashbrook, *Back from a Long Vacation: The Privileges and Immunities Clause of the Fourteenth Amendment in Saenz v. Roe*, 29 CAP. U. L. REV. 481 (2001); R. Martinez, *Saenz v. Roe: The Court Breathes New Life into the Privileges or Immunities Clause More than a Century After its "Slaughter"*, 10 CIV. RTS. J. 439 (2000); Donna Reitz, *Traveling Down the Constitutional Highway: Saenz v. Roe*, 26 OHIO N.U. L. REV. 161 (2000); Dan Wolff, *Right Road, Wrong Vehicle?: Rethinking Thirty Years of Right to Travel Doctrine: Saenz v. Roe*, 119 S.Ct. 1518, 25 U. DAYTON L. REV. 307 (2000).

115. In 1994 the Supreme Court granted certiorari and heard oral arguments in *Green v. Anderson*, 513 U.S. 922 (1994). The Court, however, was unable to reach a decision on the merits. Because the requirement in question was different than that prescribed by AFDC, a waiver from the Secretary of Health and Human Services was needed. Such a waiver was initially granted, but later vacated by the Court of Appeals. In the absence of a waiver, California simply granted welfare to new residents upon arrival in the State under the same conditions as "old" residents and the case was no longer ripe for review. *Anderson v. Green*, 513 U.S. 557, 559 (1995). Since PRWORA took effect in 1996, no specific approval of waiting periods was required and California announced that enforcement of the waiting period would commence on April 1, 1997. See Wolff, *supra* note 114, at 313.

116. See sources cited *supra* note 14.

Shapiro's penalty-on-the-right-to-travel analysis. It decided that state statutes discriminating against state citizens on the ground that they have not lived long enough in the state must be reviewed under the Privileges and Immunities Clause of the Fourteenth Amendment.¹¹⁷ However, this change in the Court's approach toward durational residency requirements did not affect its view on the constitutionality of waiting periods for welfare benefits.

First, even though California had disavowed that the waiting period requirements were introduced to deter indigent residents of other states from coming to California, the Court expressly rejected the free-rider argument. The Court recognized that it may be reasonable to assume that some persons may be motivated to move for the purpose of obtaining higher benefits. However, the empirical evidence indicates that the number of such persons is quite small, and certainly not large enough to justify a burden on those who had no such motive. The Court, citing *Shapiro*, stated that the purpose of discouraging indigents from moving is "unequivocally impermissible."¹¹⁸

Second, the Court did not accept the fiscal justification raised by California. The Court calculated that the state could save the mentioned 10.9 million dollars by decreasing the benefits of all welfare recipients by a mere seventy-two cents per month. However, the Court explicitly held that its rejection of the fiscal argument did not rest on the weakness of California's claim. Rather, the rejection rested on the fact that the Citizenship Clause of the Fourteenth Amendment, which expressly equates citizenship with residence, does not allow for degrees of citizenship based on length of residence.¹¹⁹ The length of residency in California and the identity of the prior states of residence are not relevant to the need of applicants for welfare benefits. Further, these factors do not bear any relationship to the state's interest in making an equitable allocation of funds to needy state citizens. The Court, citing *Shapiro*, held that states are not entitled to apportion all benefits and services according to the past contributions of its citizens. The state's legitimate purpose in saving money provides no justification for its decision to discriminate among equally eligible citizens.¹²⁰

Third, the fact that the Privileges and Immunities Clause, rather than the Equal Protection Clause, must be applied did not imply a relaxation of the level of judicial scrutiny. Neither mere rationality nor some intermediate standard of review should be used in order to judge the validity of rules, such as durational residence requirements, which discriminate against a state's own citizens. The appropriate standard, the Court held, may be more categorical than that articulated in *Shapiro*, but it surely is no less strict.¹²¹

117. The Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV.

118. *Saenz v. Roe*, 526 U.S. 489, 506-07 (1999).

119. *Id.*

120. *Id.*

121. *Id.* at 504.

Finally, the Court rejected the view that the durational residency requirements might be upheld because Congress had given its approval to the requirements when it adopted PRWORA. Because the TANF program gives states broader discretion in setting benefit levels and eligibility criteria than the AFDC program did, California argued that the TANF program would provide new incentives for welfare recipients to change their residences and trigger a “race to the bottom.” The Court, however, was not persuaded. It did not understand why the disparities among the states’ benefit systems would be any greater under TANF than under AFDC. The potential savings under the discriminatory California statute could be achieved by nondiscriminatory means, which would have only a minuscule impact on benefit levels. While the Court in *Shapiro* concluded that Congress is not empowered to authorize states to violate the Equal Protection Clause, the Court in *Saenz* held that the same is true for all Clauses of the Fourteenth Amendment.¹²² The protection afforded by the Citizenship Clause implies a limitation on the powers of the federal government as well as on state governments.

In *Saenz v. Roe*, the Supreme Court may have altered the legal framework for reviewing durational residency requirements, but this does not imply that the Court has also altered its view on the legality of welfare waiting periods. Such requirements remain unconstitutional.¹²³ In fact, viewed from a welfare perspective, *Saenz* is quite similar to *Shapiro*. Under the Privileges and Immunities Clause, welfare waiting periods are subject to a standard of review that is at least as equally strict as the compelling state interest test of the Equal Protection Clause. Both Clauses of the Fourteenth Amendment prohibit Congress to authorize discriminatory state measures in the field of welfare. Furthermore, the Court affirmed that the free-rider and past contribution arguments are constitutionally impermissible. Thus, regardless of their economic status, all United States citizens enjoy the constitutional privilege of acquiring citizenship of the state of their choice and of being treated as citizens from the moment they establish residence in that state. From a welfare perspective, the main difference between *Shapiro* and *Saenz* is that the latter decision specifically rejects the financial arguments offered by the states. The Court did not see a practical need for durational residence requirements because it did not expect that applicants for welfare benefits would move in such great numbers to other states as to seriously affect the funding of states’ welfare systems.

122. *Id.* at 508.

123. To be sure, *Saenz* still leaves room for the conclusion that (relatively short) welfare waiting period requirements might survive judicial scrutiny when they are applied in order to establish bona fide residence. In *Saenz*, it was undisputed that respondents were bona fide residents, and the Court saw no need to consider what weight must be given to a citizen’s length of residence in cases where State citizenship is questioned. *Id.* at 504.

D. Conclusions

American constitutional law regarding the rights to freedom of movement of indigents has undergone drastic changes over the years. Prior to the transformation of the welfare system in the 1930's, it was virtually impossible for indigents to establish residence and obtain welfare benefits in other states. The states' responsibility for the poverty problem was limited to their territory and the indigents living therein. The in-migration of indigents from other states was perceived as a threat to public order and the states' ability to maintain adequate welfare programs. The local structure of the welfare system limited indigents geographical mobility. States were permitted to refuse residency to migrating indigents and to deny them welfare during the first months or years of residence in the state. The SSA of 1935 opened the door for strengthening indigents' legal status. The Act embraced the notion that every person should have the right to an income sufficient for at least the "essential needs of life" and recognized that poverty and welfare had become matters of common concern requiring cooperation between the states and the federal government. The U.S. Supreme Court held that this welfare union no longer permitted states to restrict indigents right to travel (*Edwards*) and to deny welfare benefits to new, recently arrived, indigent residents (*Shapiro, Saenz*). Therefore, all indigents lawfully residing in the United States now enjoy the freedom to choose the state in which they wish to live and claim welfare.

III. THE EUROPEAN COMMUNITY

Similar to the United States, EC Member States have always objected to a right to freedom of movement that would enable indigents to establish residence in other Member States.¹²⁴ Specifically, the Member States located in the geographical "heart" of the European Union¹²⁵ have always feared that the comparatively high level of their social assistance benefits would attract nationals

124. For an adequate comprehension of EC law governing freedom of movement and cross-border access to social assistance, there is no need to give an overview of the "European social assistance system." The reason is simple: such a system does not exist. Within the Community, it is wholly up to the Member States to organize, administer, and finance benefit systems that aim to guarantee persons who have no other source of income or work, social security or other sources. Crudely simplified, a distinction can be made between the northern Member States, which award comparatively generous social assistance benefits that actually enable indigents to obtain basic necessities of life, and the southern Member States, which merely provide for charitable systems and a few systems offering benefits to specific categories of needy persons, such as the blind and the disabled. See, e.g., Tony Eardley et al., *Social Assistance in OECD Countries: Synthesis Report*, DEP'T OF SOC. SECURITY RESEARCH REPORT, No. 46, HMSO: London (1996).

125. In particular, Belgium, the Netherlands, Luxembourg, France, and Germany.

from the poorer southern Member States. The wealthier states argue that a large influx of indigents moving for the sole purpose of collecting higher benefits would affect their ability to keep up social assistance systems. Initially, the objections to social tourism remained largely hidden. The original EEC Treaty of 1957 merely prescribed freedom of movement for employed and self-employed persons¹²⁶ and presumed that such persons would be able to provide for themselves and their family members. From the early 1970's, however, the ECJ started to interpret the rules on the free movement of workers broadly and proposals were launched to realize a general right of residence for all European citizens.¹²⁷ As a result, the conflict between the goal to realize a free movement of persons and the need to ensure the funding of Member States' benefit systems surfaced. While analyzing how Community law has approached this conflict, a distinction must be made among three categories of beneficiaries of the free movement of persons: workers, family members of workers¹²⁸ and economically inactive citizens of the European Union.

B. Workers

The free movement of workers is guaranteed by the Treaty Establishing the European Community (EC), Article 39.¹²⁹ This Article was implemented by

126. The fact that the 1957 Treaty merely provided for freedom of movement for employed and self-employed persons has been explained by the fact that the Treaty primarily sought to achieve economic objectives. More concretely, it is generally claimed that Article 39 EC on the free movement of workers was included in order to realize a freedom of movement for the production factor labor. *See, e.g.,* Andrew Evans, *Union Citizenship and the Constitutionalization of Equality in EU Law*, in *EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE* 270-71 (M. La Torre ed., 1998); Richard Plender, *An Incipient form of European Citizenship*, in *EUROPEAN LAW AND THE INDIVIDUAL* 39 (F.G. Jacobs ed., 1976). *But see* VAN DER MEI, *FREE MOVEMENT*, *supra* note 9 (arguing that Article 39 was not much more than a political compromise lacking any theoretical objective).

127. Fries & Shaw, *supra* note 169; *see also supra* text accompanying note 169.

128. The self-employed and their family members will not be discussed separately. However, it may safely be assumed that the legal status of the self-employed and their families regarding the rights to freedom of movement and minimum subsistence benefits is similar to the status of workers and their families. *See* VAN DER MEI, *FREE MOVEMENT*, *supra* note 9, manuscript ch. 2, § 2.4.

129. Article 39 reads:

1. Freedom of movement for workers shall be secured within the Community.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment. Remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

the Community legislator¹³⁰ in the late 1960's through the adoption of Regulation No. 1612/68¹³¹ and Directive No. 68/360.¹³² The Regulation specifies the details regarding workers' right to equal treatment; the directive contains the formalities and procedures regarding the exercise of workers' migration rights. At the time of implementation, the Community legislator had not considered granting workers a right to claim social assistance benefits in the state of employment.¹³³ Workers were expected to provide for themselves with the income earned from full-time employment. National laws and regulations governing minimum wages would guarantee that workers did not fall below the minimum subsistence level in the host state. If workers were unable to work due to illness, incapacity, or retirement, the Community's rules on the coordination of social security regimes contained in Regulations No. 3 and No. 4, as later replaced by the currently still applicable Regulations No. 1408/71¹³⁴ and No. 574/72,¹³⁵ would make them eligible for a wage-replacing social security benefit. Special rights pertaining to social assistance benefits were not mentioned in the legislation. Regulation No. 1612/68 does not contain any provision specifically dealing with social assistance and Regulation No. 1408/71 explicitly excludes social assistance from the scope of its application.¹³⁶ From the early 1970's, however, the ECJ broadly interpreted the provisions on the free movement of workers. The Court extended the scope of the right to equal treatment and recognized that Article 39 EC also applies to

(a) to accept offers of employment actually made;

(b) to move freely within the territory of the Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative decision;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

EC TREATY art. 39.

130. Generally, EC legislation is developed by the Commission, the European Parliament and the Council of Ministers acting in close collaboration in accordance with various procedures set out in the EC Treaty. Not one of the three institutions can actually be classified as the Community legislator. The term Community legislator will be used in this Article as referring to the three institutions acting together in the various legislative processes. See PAUL CRAIG & GRAINNE DE BURCA, *EU LAW – TEXT, CASES & MATERIALS*, 139-77 (2002).

131. 1968 O.J. SPEC. ED. (L 257) 2.

132. 1968 O.J. SPEC. ED. (L 257) 3.

133. See VAN DER MEI, *FREE MOVEMENT*, *supra* note 9, manuscript ch. 3, § 3.1.

134. 1997 O.J. (L 28) 1.

135. 1972 O.J. (L 74) 1.

136. Council Regulation 1408/71 on The Application of Social Security Schemes to Employed Persons and Their Families Moving Within the Community, art. 4(4), 1971 O.J. (L149) 2. For the most recent consolidated version see 1997 O.J. (L29).

work-seekers,¹³⁷ part-time workers¹³⁸ and other workers whose income may fall below the minimum subsistence level.¹³⁹ Are such workers entitled to claim social assistance in the member state where they work?

1. *Levin* and *Kempf*: The Right to Reside of Workers in Need of Social Assistance

*Levin*¹⁴⁰ involved a British national who wished to reside in the Netherlands. The application for a residence permit was rejected on the ground that Mrs. Levin was not engaged in gainful occupation in the Netherlands. While she appealed the decision, Mrs. Levin accepted a twenty hours-per-week job as a cleaning lady. The income she derived from this job fell below the minimum subsistence level. Mrs. Levin claimed that this did not justify the withholding of the residence card because she and her husband together had sufficient means to support themselves. The Dutch government argued that persons who only work for a limited number of hours, earn less than the host state's minimum subsistence level and move to other states lacking the primary intent of working, cannot obtain the status of worker and the right to reside.

The Court rejected the Dutch arguments. First, in order to prevent Member States from denying nationals of other Member States the right to freedom of movement, the Court held that the concept of worker should not be determined by reference to national rules on minimum working hours, wages, or subsistence levels. The concept should be clarified within the EC legal order.¹⁴¹ Second, the Court held that part-time work can constitute an effective means to improve a person's living conditions. Therefore, the concept of worker may also apply to persons who pursue or wish to pursue an activity as an employed person on a part-time basis only and who, by virtue of that fact, obtain or would obtain only remuneration lower than the minimum wage guaranteed in the sector under consideration.¹⁴²

Levin was not as controversial, from a social assistance perspective. Apparently, the Levins had sufficient financial means; they did not ask for, and

137. See e.g., Case C-292/89, *The Queen v. Immigration Appeal Tribunal ex parte Antonissen*, 1991 E.C.R. I-745 at 21.

138. Case 53/81, *Levin v. Staatssecretaris van Justitie*, 1982 E.C.R. 1035.

139. See e.g., Case C-357/89, *Raulin v. Minister van Onderwijs en Wetenschappen*, 1992 E.C.R. I-1027 (discussing persons working on the basis of so-called "on-call contracts").

140. Case 53/81, *Levin*, 1982 E.C.R. 1035.

141. *Id.* at 11.

142. *Id.* at 16. Workers income can be supplemented by private resources or by the earnings of an accompanying family member. *Id.* The motives that have prompted workers to move to other Member States, the Court held, are of no relevance and must not be taken into consideration. *Id.* at 22.

were unlikely to ever be in need of, social assistance. However, the judgment raised the question whether the right to reside as a worker could be obtained by part-time workers who have no other sources of income and are in need of social assistance. The question was answered by the Court in *Kempf*.¹⁴³ The case involved a German music teacher who taught guitar lessons for twelve hours a week in the Netherlands. Mr. Kempf's application for a residence card was rejected because he had obtained a supplementary social assistance-like benefit. The issue was whether the refusal to grant him the residence card was compatible with Article 39 EC. The Court concluded that merely because a worker enjoys a social assistance benefit, he cannot be denied the status of worker under Article 39 EC. It is irrelevant whether supplementary means of subsistence are derived from property or from the employment of a member of his family, or whether they are obtained from financial assistance drawn from public funds of the host State.¹⁴⁴

2. Hoeckx: The Right to Claim Social Assistance

Levin and *Kempf* represent the view that the need for social assistance cannot affect a worker's right to establish residence in the member state of employment. Does this imply that workers, when in financial need, can claim social assistance in that state? That question was addressed by the Court in *Hoeckx*. Mrs. Hoeckx was a Dutch national who claimed a social assistance allowance in Belgium. The Belgian authorities refused to grant the allowance because Mrs. Hoeckx had not lived in Belgium for five years prior to her application. The Court found that the durational residence requirement imposed by Belgium was incompatible with Article 7(2) of Regulation No. 1612/68.¹⁴⁵ This provision guarantees the right to equal treatment regarding "social advantages," which, according to settled case law, cover all those advantages or benefits "which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory . . ."¹⁴⁶ In *Hoeckx* the Court held that benefits guaranteeing minimum means of subsistence "in a general manner" constitute social advantages for the purposes of Article 7(2) of Regulation No. 1612/68.¹⁴⁷

The ability of workers in need of social assistance to invoke Article 7(2) of Regulation No. 1612/68 does not automatically imply that they can actually receive social assistance. Article 7(2) provides for a right to equal treatment,

143. Case 139/85, *Kempf v. Staatssecretaris van Justitie*, 1986 E.C.R. 1741.

144. *Id.* at 14.

145. Case 249/83, *Hoeckx v. Openbaar Centrum voor Maatschappelijk Welzijn Kalmthout*, 1985 E.C.R. 973.

146. *See, e.g.*, Case 207/78, *Ministere Public v. Even*, 1979 E.C.R. 2019 at 22.

147. *See* Case 249/83, *Hoeckx*, 1985 E.C.R. 973 at 20-22; *see also* Case 122/84, *Scrivner v. Centre Public d'Aide Sociale de Chastre*, 1985 E.C.R. 1027 at 26.

which implies that workers must meet the same eligibility requirements as nationals of the host state. Thus, to receive benefits workers must actively look for work, lack other sources of income, etc. Generally, such eligibility criteria do not violate the nondiscrimination principle. However, the same does not hold true for national rules that make enjoyment of benefits conditional upon a minimum period of residency in the state of employment. *Kempf* and *Hoeckx* have increased the magnetic effect of the benefit systems of the richer and more generous Member States. Some legal commentators, therefore, argued that Member States should have the right to apply durational residence requirements to protect themselves against social tourism.¹⁴⁸ The ECJ has not accepted the validity of such requirements. As noted earlier, the ECJ in *Hoeckx* addressed the issue of whether a five-year residence requirement for the Belgian minimex, which only applied to non-nationals, was compatible with Article 7(2) of Regulation No. 1612/68. The Court held that such a requirement implies an additional condition imposed on workers who are nationals of a member state, which constitutes direct discrimination on the basis of the nationality.¹⁴⁹ Thus, Member States are not entitled to make eligibility for social assistance benefits conditional upon the fulfillment of durational residency or employment requirements.¹⁵⁰

148. See, e.g., Josephine Steiner, *The Right to Welfare: Equality and Equity Under Community Law*, 10 EUR. L. REV. 21 (1985).

149. Case 249/83, *Hoeckx*, 1985 E.C.R. 973 at 23-24. In response to the judgment in *Hoeckx*, the Belgian legislature decided to delete the nationality requirement and to impose the rule that all persons regardless of their nationality had to meet the five-year residency requirement. See Stefaan Van den Bogaert, *The Consequences of the Gaygusuz Judgement for Belgian Social Security*, in SOCIAL SECURITY, NON-DISCRIMINATION AND PROPERTY 123, 141 (Stefaan Van den Bogaert ed., 1997). In the view of the European Commission, however, the Belgian rules were still contrary to Article 7(2) and the Commission subsequently started an infringement procedure. See EC TREATY art. 226. In *Commission v. Belgium*, the Court concluded that the waiting period requirement worked to the disadvantage of nationals from other Member States. The requirement constituted an indirect discrimination on grounds of nationality and was held to be at odds with Article 7(2) of Regulation No. 1612/68. Case C-326/90, *Commission v. Kingdom of Belgium*, 1992 E.C.R. I-5517 at 2-3.

150. This is not to say that the length of residence in the State is in all circumstances an irrelevant factor. In *Swaddling*, the Court condemned a United Kingdom rule that made eligibility for income support benefits conditional upon "habitual residence" in the national territory, implying that beneficiaries had to have a settled purpose of establishing residence in the country and had to have resided there for an "appreciable period." The Court concluded that the length of a person's residence can only be taken into consideration as one of the factors determining whether a person has actually established residence, but that it could not be regarded as an "intrinsic element" of the concept of residence. Case C-90/97, *Swaddling v. Adjudication Officer*, 1999 E.C.R. I-1075 at 30.

3. The Requirement of Effective and Genuine Work

Workers who earn less than the minimum subsistence level in the state of employment are entitled to establish residence there and can immediately supplement their income with social assistance under the same conditions as nationals of the host state. However, the ECJ has not neglected Member States' concerns regarding social tourism. On the contrary, the ECJ showed due regard to these concerns. The Court has not accepted the legality of durational residence requirements for entitlement to social assistance, by entitling Member States to refuse needy workers residence on public policy grounds,¹⁵¹ or by allowing the states to deny benefits to workers whose primary intent for moving is to obtain comparatively high benefits.¹⁵² Rather, the Court has incorporated the host states' interests in its interpretation of the concept of worker. In *Levin and Kempf*, the Court provided a broad interpretation of the concept by accepting that part-time workers who might be in need of social assistance can also obtain the status of worker. However, not all part-time workers can do so. The work must be "effective and genuine." Activities that are on such a small scale that they are to be regarded as purely "marginal and ancillary" do not suffice.¹⁵³ The Court has never indicated how many hours constitute "effective and genuine work," but case law suggests that European citizens must work approximately half of the number of normal working hours in a given sector in order to obtain the status of worker.¹⁵⁴ Although the Court's true motives are uncertain,¹⁵⁵ by introducing the

151. Article 39(3) EC allows Member States to impose restrictions on the rights accorded by Article 39 when, and to the extent necessary, to protect "public policy, public security or public health." The conditions for exercising this public policy proviso are set out in Directive (64/221/EEC). 1964 O.J. SPEC. ED., 850. In Case 36/85, *Bonincontro*, the Court was asked whether being in need of social assistance could possibly be regarded as a threat to public policy and thus be a reason to refuse residence to, or to expel, nationals of other Member States. The case, however, was withdrawn. Most probably, the Court would have answered the question in the negative. As an exception to the fundamental right to freedom of movement, the exception must be interpreted restrictively and this implies *inter alia* that it cannot be relied upon by states to further economic aims, such as the safeguarding of the employment opportunities of their own nationals. See Council Directive 64/221, art. 2, 1964 O.J. SPEC. ED. 850; see also CRAIG & DE BURCA, *supra* note 124, at 826 (securing the financing of public advertising funds); Case 352/85, *Bond van Adverteerders v. Netherlands*, 1988 E.C.R. 2124 at 24 (safeguarding the funding of social assistance systems).

152. See *infra* note 140.

153. Case 53/81, *D. M. Levin v. Staatssecretaris van Justitie*, 1982 E.C.R. 1035 at 17.

154. See, e.g., Ellen Brinch Jorgensen, UNION CITIZENS – FREE MOVEMENT AND NONDISCRIMINATION 31 (1996).

155. It would seem that the Court has indeed deliberately chosen to give regard to the Member States' welfare interests through the interpretation of the notion of worker. The concept of worker may not be defined by reference to national law (Case 53/81, *Levin*, 1982 E.C.R. 1035 at 11), but the three requirements of work, remuneration and

criterion of “effective and genuine work,” the Court creates a barrier for Union citizens who only work a small number of hours in order to obtain the status of worker, as well as the right to reside, and the right to claim social assistance under Article 7(2) of Regulation No. 1612/68.

C. Family Members of Workers

The drafters of Regulation No. 1612/68 recognized that free movement of workers could not be realized unless family members of workers are also able to reside in the host state. Article 10 of the Regulation entitles the workers’ spouse, their children and grandchildren, under the age of 21 years or financially dependent, and the dependent parents and grandparents to reside with the worker in the host state. The question of whether these family members would be entitled to claim social assistance in the host state did not arise. Workers were expected to be full-time workers who would provide for themselves and their families. Family members were assumed to be dependent on the worker, not on the host state. However, over the years the ECJ strengthened the legal status of family members of workers. The goal, as stated in the preamble to Regulation No. 1612/68,¹⁵⁶ was the integration of the worker’s family into the host state’s society. Does this imply that family members who are in need of social assistance benefits have the right to claim such benefits in that State?

1. Dependent Family Members

The ECJ addressed this question in the *Lebon* case.¹⁵⁷ Ms. Lebon was a

subordination which the Court has laid down (Case 66/85, *Lawrie Blum v. Baden-Württemberg*, 1986 E.C.R. 2121 at 17), do indicate that the Court has been inspired by national definitions of the concept of worker. The requirement that the work must be “effective and genuine,” cannot be found in the labor laws of any of the Member States. The work performed by European citizens whose jobs are according to the Court to be considered as “marginal and ancillary” may often very well be classed as economic activities. Indeed, as a rule, part-time workers are seen and treated as workers under national labor laws. The requirement that work must be “effective and genuine” for the purposes of Article 39 EC is new and unique, and it is hard to find any explanation other than the Court introduced this requirement in defense of the welfare state interests of the Member States.

156. The fifth indent of the preamble provides that the right to freedom of movement requires that “obstacles to the mobility of workers shall be eliminated, in particular as regards the worker’s right to be joined by his family and the conditions for the integration of that family into the host country.” Council Regulation 1612/68 on Freedom of Movement for Workers Within the Community, pmbl. 1968 O.J. (L 257) 2-12.

157. Case 316/85, *Centre Public d’Aide Sociale de Courcelles v. Lebon*, 1987 E.C.R. 2811.

twenty-four year-old French woman who lived almost her entire life in Belgium and claimed a social assistance benefit in her capacity of a worker's family member. Her application was rejected and Ms. Lebon subsequently appealed the decision. Ms. Lebon seemed to have a strong case. In earlier judgments, the ECJ had already held that minimum subsistence benefits constitute "social advantages" for the purposes of Article 7(2) of Regulation No. 1612/68,¹⁵⁸ and that family members may also rely on this provision.¹⁵⁹ For example, the Court in *Castelli* had stated that the mother of an Italian worker in Belgium could rely on Article 7(2) in order to claim a non-contributory income benefit that was intended to provide the elderly with minimum means for subsistence.¹⁶⁰ However, in *Lebon* the Dutch government argued that workers' family members over the age of twenty-one who are not dependent on the worker, do not have the right to reside in the state of employment under Article 10 of Regulation No. 1612/68. Consequently, they would not be entitled to claim benefits under Article 7(2). The ECJ disagreed. If the ECJ were to accept the Dutch argument, family members in need of social assistance could lose their family member status and their right to reside. It would be impossible for such family members to claim social assistance benefits; this would seriously undermine the right to equal treatment granted to workers. The ECJ reasoned that the status of dependent family member must be considered independently of the claim for, or the grant of, benefits.¹⁶¹

The idea that the need for minimum subsistence benefits cannot affect the right to reside does not necessarily imply that family members can claim such benefits in the host state. The Dutch government's argument in *Lebon* was financially motivated. If all family members who have acquired the right to reside in the state of employment could rely on Article 7(2) of Regulation No. 1612/68, the pressure on the social assistance budget could increase. The German government even warned of situations in which workers, by temporarily giving financial support to family members, would enable these family members to

158. Case 249/83, *Hoeckx*, 1985 E.C.R. 973 at 20-22.

159. *See, e.g.*, Case 261/83, *Castelli v. Office National des Pensions pour Travailleurs Salariés*, 1984 E.C.R. 3199 at 9-10; *see also*, Case 94/84, *Office National de L'emploi v. Deak*, 1985 E.C.R. 1873 at 26.

160. Case 261/83, *Castelli*, 1984 E.C.R. 3199 at 9-10.

161. Case 316/85, *Lebon*, 1987 E.C.R. 2811 at 20. The status of dependent family member, the Court stated, is held by family members who are actually supported by the worker. The Court rejected the view that family members can only be regarded as dependants in cases where national law confers upon family members a right to maintenance on the part of the worker. If that were the case "the composition of the family would depend on national legislation, which varies from one State to another," and that "would lead to the application of Community law in a manner that is not uniform." The status of dependent family member is the result of a factual situation and applies to family members who are supported by the worker. There is not a need to determine the reasons for recourse to the worker's support or to raise the question whether the person concerned is able to support himself by taking up employment. *Id.* at 21-22.

obtain the right to reside in the host state and to claim social assistance under Article 7(2) upon arrival.

If family members could rely on both Article 10 and Article 7(2) of the Regulation, the status of family member could be abused. The ECJ was sensitive to these concerns about abuse. Although the ECJ confirmed in *Lebon* that family members may rely on Article 7(2), it specified that family members can only indirectly benefit from this provision. Benefits only qualify as “social advantages” if they may be regarded as social advantages for the worker himself. Therefore, family members who are twenty-one years older and are no longer dependent on the worker cannot claim equal treatment regarding social assistance benefits under Article 7(2). In the case of such family members, the benefits do not constitute for the worker a social advantage within the meaning of Article 7(2).¹⁶²

The judgment in *Lebon* was a compromise. On the one hand, the Court promoted freedom of movement by holding that dependence on social assistance in itself cannot affect the right of family members to reside in the host state. On the other hand, the Court was sensitive to the financial interests of the host states by stipulating that reliance on Article 7(2) is preserved for family members who are dependent on the worker. Consequently, dependent family members do not seem to have a right to claim social assistance in their own right. They can rely on Article 7(2), but as members of the workers’ family they often will be unable to claim benefits in their own right under national law. The Court implicitly stated that family members can reside in the state of employment, but they either have to provide for themselves or must be taken care of by the workers.

2. Independent Family Members

The exclusion of independent family members from Article 7(2) of Regulation No. 1612/68 was problematic. Safeguarding the financial stability of social assistance benefit systems constitutes a legitimate interest that deserves protection under EC law. However, the requirement of being dependent on the worker was unnecessarily strict. Why would a child born in the host state and separated from the parent-worker be denied the right to claim social assistance benefits under the same conditions as nationals of the host state? Why should family members who have lived in the host state for a long period of time and that have been socially and culturally integrated in the host state, have to remain dependent on the worker? The denial of the right to rely on Article 7(2) is difficult to reconcile with the objectives of promoting freedom of movement and integration of the workers’ family in the host state. Even considering the potential for abuse, the dependency requirement was overly inclusive.

¹⁶² *Lebon*, 1987 E.C.R. 2811 at 13; see also, Case C-185/96, *Commission v. Hellenic Republic*, 1998 E.C.R. I-6601 at 21.

The recent judgments in *Martínez Sala* and *Grzelczyk* suggest that the ECJ has recognized this criticism and departed from *Lebon*.¹⁶³ The ECJ in *Martínez Sala* held that nationals of the Member States who are lawfully residing in the territory of another member state can invoke Article 12(1) EC¹⁶⁴ in order to claim equal treatment regarding all rights and benefits falling within the scope of Article 7(2) of Regulation No. 1612/68.¹⁶⁵ In *Grzelczyk*, the ECJ stated that students, under certain conditions, can claim equality of treatment pertaining to social assistance.¹⁶⁶ The judgments in *Martínez Sala* and *Grzelczyk* strongly suggest that independent family members who hold the nationality of a Member State¹⁶⁷ and reside with the worker in the state of employment, are entitled to rely on Article 12(1) EC. Thus, they are entitled to social assistance under the same conditions as the nationals of the host state.¹⁶⁸

163. The European Commission has already taken the initiative to repair *Lebon* by proposing to confer upon all family members an independent right to equal treatment with regard to social advantages. The proposed new Article 10(3) of Regulation No. 1612/68 reads: "Members of the family entitled to live in a Member State under the terms of paragraphs 1 and 2 shall be entitled to all financial, tax, social, cultural or other advantages available to nationals." Proposal for a European Parliament and Council Regulation Amending Council Regulation (EEC) 1612/68 on Freedom of Movement for Workers Within the Community, COM(98)394 final at 229.

164. Discrimination on grounds of nationality is prohibited within the scope of EC law. EC TREATY art. 12(1).

165. Case C-85/96, *Martínez Sala v. Freistaat Bayern*, 1998 E.C.R. I-2691 at 57, 60-61.

166. Case C-184/99, *Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve*, 2001 E.C.R. I-6193 at 46.

167. It is less certain whether independent family members who lack the nationality of one of the Member States can rely on Article 12(1) EC. See, e.g., Gillian More, *The Principle of Equal Treatment: From Market Unifier to Fundamental Right?* in *THE EVOLUTION OF EU LAW* 517, 540 (Paul Craig & Grainne De Burca eds., 1999). It is submitted that all family members who have been admitted for residence by virtue of Article 10(1) of Regulation No. 1612/68 can rely on Article 12(1) EC. In *Martínez Sala* and *Grzelczyk*, the Court only spoke of Union citizens lawfully residing in the territory of another Member State, but it seems indisputable that third country family members who have made use of the right to reside guaranteed by Article 10(1) fall within the personal scope of Community law and thus Article 12(1) EC. *Id.*

168. That dependent family members enjoy the right to equal treatment with regard to social assistance benefits does not necessarily imply that they will actually be able to receive such benefits. In principle, family members must meet the same conditions as nationals of the host state in order to obtain social assistance benefits. As in the case of workers, however, the right of family members to claim such benefits cannot be made conditional upon a minimum period of residence in the state. In *Mr. and Mrs. F.*, the Court was asked to determine whether the right to a benefit for disabled children could be preserved for nationals of the host state and non-nationals who have resided in the territory of that state for a minimum period of fifteen years. The Court answered the question within the terms of Regulation No. 1408/71. But it concluded, in rather general terms, that as

D. Non-Economic Residents

1. European Union Citizenship and the Right to Freedom of Movement

Since the early 1970's, the EC has tried to implement a general right of residence that is no longer linked to, or conditional on, the pursuit of economic activities. The EC contemplated an independent right of residence that nationals of the Member States would enjoy in their capacity as European citizens. It was undisputed that this right should not adversely affect Member States' ability to finance social assistance systems. Social tourism needed to be avoided.¹⁶⁹ When the European Commission sent its first proposal for a directive on a general right of residence to the Council in 1979,¹⁷⁰ it included a provision allowing Member States to require that nationals of other Member States "provide proof of sufficient resources for their own needs and the dependent members of their family."¹⁷¹ The inclusion of this financial means requirement did not allay the concerns and objections of the Member States. The Council negotiations¹⁷² proved to be difficult. Only following the ECJ's judgment in *Gravier*,¹⁷³ and the subsequent replacement of the original 1979 proposal with three new Commission proposals, Member States could reach agreement on Directives No. 90/366 (as replaced by

regards such, neither the worker himself nor the members of his family may, as compared with the host state's nationals, be placed in a less favorable position simply because they do not possess the nationality of the state. Case 7/75, *Mr. and Mrs. F. v. Belgian State*, 1975 E.C.R. 679 at 17. The judgment in *Mr. and Mrs. F.* still leaves room for the conclusion that durational residence requirements for eligibility for social assistance and other minimum subsistence benefits, which apply to nationals and non-nationals alike, could survive judicial scrutiny, but by analogy with the judgment in *Commission v. Belgium*, one may assume that such requirements cannot be lawfully applied to family members. *Belgium*, 1999 E.C.R. I-075.

169. See Sybilla Fries & Jo Shaw, *Citizenship of the Union: First Steps in the European Court of Justice*, 4 EUR. PUB. L. 533, 536 (1998).

170. Proposal for a Council Directive on a Right of Residence for Nationals of Member States in the Territory of Another Member State, COM(79)215 final at 14.

171. The Commission observed that the financial means requirements would discourage "population movements being undertaken with the sole aim of obtaining the most favorable social benefits." Amended Proposal for a Council Directive on a Right of Residence for Nationals of Member States in the Territory of Another Member State, COM(80) 358 final at 3, art. 4(2).

172. For the Council negotiations on the 1979 draft directive, see SIOFRA O'LEARY, *THE EVOLVING CONCEPT OF EUROPEAN CITIZENSHIP – FROM THE FREE MOVEMENT OF PERSONS TO UNION CITIZENSHIP* 109-18 (1996). See also Hans Claudius Taschner, *Free Movement of Students, Retired Persons and Other European Citizens – A Difficult Legislative Process*, in *FREE MOVEMENT OF PERSONS IN EUROPE* 427 (H.G. Schermers et al. eds., 1993).

173. Case 293/83, *Gravier v. City of Liege*, 1985 E.C.R. 593. In *Gravier*, the ECJ laid down the legal foundations for free movement of students. See also VAN DER MEI, *FREE MOVEMENT*, *supra* note 9, manuscript ch. 5, § 4.

Directive No. 93/96),¹⁷⁴ No. 90/365¹⁷⁵ and No. 90/364,¹⁷⁶ which offered a right of residence to students, pensioners, and “other”¹⁷⁷ European citizens respectively.

By adopting the three directives, the Council helped strengthen the notion of European citizenship, but its contribution was still quite modest. The non-economic residence rights were made conditional upon a financial means requirement. The rights were granted to persons who in many cases already would have been entitled to reside in other Member States on the basis of national law.¹⁷⁸ The three directives had no immediate impact on the situation of European citizens who were not able to provide for themselves; they still did not enjoy the right to establish residence in other Member States. During the 1990-1991 Intergovernmental Conferences, which ultimately led to the Treaty on European Union, several Member States proposed that the planned political and economic union should be accompanied by a strengthened European citizenship.¹⁷⁹ Such strengthened citizenship would entail, *inter alia*, an unlimited general right to freedom of movement provided for in the Treaty itself.¹⁸⁰ Ultimately, Member States agreed to formally introduce a Citizenship of the Union, which provides all Union citizens the right to move and reside freely among the Member States.¹⁸¹ However, Member States could not agree on extending free movement rights. Article 18(1) EC explicitly provides that the rights to freedom of movement are subject “to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.”¹⁸²

2. The Right to Reside and the Financial Means Requirement

The preambles to each of the directives on the right of residence emphasize that beneficiaries of the right to reside must not become an

174. 1993 O.J. (L 317). Directive No. 93/96 replaced the original Directive No. 90/366, which had been annulled by the Court on grounds of improper legal basis. Case C-295/90, *Parliament v. Council*, 1992 E.C.R. I-4193. See, e.g., Siofra O’Leary, *Annotation Case C-295/90 Parliament v Council*, 30 COMMON MARKET L. REV. 639 (1993). Substantially, Directive No. 93/96 is virtually identical to the original Directive No. 90/366.

175. 1990 O.J. (L 180).

176. *Id.*

177. The category of “other” Union citizens covers all Union citizens who do not enjoy a right to reside under any other provision of Community law.

178. See O’LEARY, *supra* note 172, at 119-20.

179. RICHARD CORBETT, *THE TREATY OF MAASTRICHT* 142-55 (1993).

180. *Id.* In a memorandum, which was presented during the Intergovernmental Conference, the Spanish Government had proposed to grant European citizens an unlimited right to move and reside freely and to adopt legislation, which would lay down “provisions to ensure a fair distribution of the resulting burden on the Member States, particularly in the area of social protection.” *Id.* at 156.

181. EC TREATY art. 17.

182. EC TREATY art. 18.

“unreasonable burden” on the public finances of the host member state. This financial safeguard is worked out in further detail in Article 1 of each directive. Pensioners are entitled to residence when they receive invalidity, early retirement or other pensions, or old age benefits, which are sufficient to avoid becoming a burden on the social security system of the host state. The residual class of “other Union citizens” must have sufficient means to provide for themselves and their family members.¹⁸³ The financial means requirement regarding students is less strict. Students only have to demonstrate that they have enough resources in order to avoid becoming a “public burden.”¹⁸⁴ It is sufficient if they can convince the immigration authorities in the host state to believe them.¹⁸⁵ In addition, all three categories must have insurance covering all medical risks in the host state.¹⁸⁶

3. *Martínez Sala and Grzelczyk*: The Right to Reside and the Right to Claim Social Assistance

The drafters of the residency directives did not intend to confer upon beneficiaries a right to equal treatment regarding social assistance benefits. First, the ECJ had concluded in its judgments in *Lair* and *Brown* that maintenance grants for students did not come within the scope of Article 12(1) EC. Such grants were matters of educational policy, which, as such, had not been brought within the ambit of the Treaty, and social policy, which fell within the competence of the Member States.¹⁸⁷ The ECJ’s reasoning suggested that European citizens could not rely on Article 12(1) EC in order to claim social assistance. Second, according to the drafters, a person’s need for such benefits would result in the loss of the right to reside. Each of the three directives states that the right of residence only exists as long as the beneficiaries of that right fulfill the financial means requirement.¹⁸⁸

183. The pensions and resources of the two categories are deemed sufficient where they are higher than the level of resources below which Member States may grant social assistance benefits to its own nationals. Where this requirement cannot be applied in a Member State, the resources are deemed sufficient if they are higher than the level of the minimum social security pension paid by the host Member State. See Council Directive 90/364, art. 1(1), 1990 O.J. (L 180) 26, 27; Council Directive 90/365, art. 1(1), 1990 O.J. (L 180) 28, 29.

184. Directive No. 93/96 does not require resources of any specific amount, nor that they be evidenced by specific documents. Case C-184/99, *Grzelczyk*, 2001 E.C.R. I-6193 at 21.

185. *Taschner*, *supra* note 166, at 434.

186. *Grzelczyk*, 2001 E.C.R. at 13.

187. See Case 39/86, *Sylvie Lair v Universität Hannover*, 1988 E.C.R. I-3161 at 14-15; Case 197/86, *Stephen Brown v. Sec’y for Scotland*, 1988 E.C.R. I-3205 at 25.

188. Council Directive 90/364, art. 3, 1990 O.J. (L 180) 26, 27; Council Directive 90/365, art. 3, 1990 O.J. (L 180) 28, 29; Council Directive 93/96, art. 4, 1993 O.J. (L317) 59, 60.

However, the rulings in *Martínez Sala* and *Grzelczyk* demonstrate that economically inactive European citizens may have a right to social assistance benefits in the host state. Need of social assistance does not necessarily end lawful residence status.

a. *Martínez Sala*

Martínez Sala involved a Spanish national who had lived in Germany since 1968. Between 1976 and 1989, Ms. María Martínez Sala had had various jobs. Since 1989, she was entirely dependent on social assistance. Ms. Martínez Sala could not be expelled. Both Germany and Spain are parties to the 1953 European Convention on Social and Medical Assistance (“ECSMA”),¹⁸⁹ which provides that nationals of contracting parties shall not be repatriated solely because they are in need of medical or social assistance. In 1993, Ms. Martínez Sala applied for a child-raising allowance for her newborn child. Her application was denied because she did not possess a valid residence permit. Ms. Martínez Sala only possessed a document certifying that she had applied for a residence permit.

Was Germany entitled to make the right to social security benefits conditional upon the presentation of a residence permit? If Ms. Martínez Sala was still a worker, the answer to the question would be negative. Previous case law indicated that the German child-raising allowance falls within the scope of Article 7(2) of Regulation No. 1612/68¹⁹⁰ and that the requirement of having to present a residence permit constitutes discrimination based on nationality because no comparable duty is imposed on nationals of the host State.¹⁹¹ However, the referring German court had not submitted enough information to the ECJ to determine whether Ms. Martínez Sala could be regarded as a worker for the purposes of the Regulation. Therefore, the question arose whether Ms. Martínez Sala could invoke Article 12(1) EC, which prohibits within the scope of the EC Treaty any discrimination based on nationality,¹⁹² in order to challenge the

189. ETS 14, Social & Medical Assistance, Dec. 11, 1953, available at <http://conventions.coe.int/Treaty/en/Treaties/Word/014.doc>.

190. Case C-85/96, *Martínez Sala v. Freistaat*, 1998 E.C.R. I-2691, at 26.

191. In *Royer* the Court had already held that for the purposes of the right of residence, a residence permit can only have declaratory and probative force. See Case 48/75, *Jean Noël Royer*, 1976 E.C.R. 497. In *Martínez Sala*, the Court concluded that the same must apply for the purposes of the grant of social security benefits. See *Martínez Sala*, 1998 E.C.R. at 53-54.

192. Article 12(1) contains the general provision of the Treaty prohibiting discrimination on grounds of nationality. EC TREATY art. 12(1). The provision is worked out in various specific non-discrimination provisions such as Article 39(2) EC (workers), Article 43 EC (self-employed persons) and Article 7(2) of Regulation No 1612/68 (workers - “social advantages”). See EC TREATY art. 39(2), 43; Council Regulation 1612/68 on

German law. The German government argued that Ms. Martínez Sala could not invoke Article 12(1) EC because the benefit in question would fall outside the material scope of Article 12(1), EC and Ms. Martínez Sala herself would not fall within the personal scope of the Treaty.

The ECJ disagreed. Regarding the material scope of Article 12 EC, the Court held that the German child-raising allowance fell within the scope of both Regulation No. 1408/71 and Article 7(2) of Regulation No. 1612/68. Consequently, the allowance “indisputably” fell within the scope of EC law, and thus Article 12(1) EC.¹⁹³ As to the personal scope of Article 12, the European Commission argued that Ms. Martínez Sala did have a right to reside under Article 18(1) EC and that she thus fell within the scope of the Treaty. The ECJ did not address the potential importance of Article 18(1) EC. The Court did not consider it necessary to examine whether a person like Ms. Martínez Sala can rely on Article 18 EC in order to obtain recognition of a right to reside in the territory of the host state since she had already been authorized to reside there. As a national of a Member State who lawfully resides in the territory of another Member State, Ms. Martínez Sala fell within the personal scope of the Treaty provisions on European Citizenship. Article 17(2) attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right to be free from discrimination based on nationality. Consequently, citizens of the Union lawfully residing in the territory of another member state can rely on Article 12 of the Treaty in “all situations which fall within the scope *ratione materiae* of Community law.”¹⁹⁴

Similar to the child-raising allowances, Ms. Martínez Sala had applied for social assistance benefits covered by Article 7(2) of Regulation No. 1612/68. Therefore, the judgment in *Martínez Sala* could have been interpreted to imply that non-economic residents lawfully residing in the territory of another member state are entitled to claim minimum subsistence benefits under the same conditions as nationals of the host state.¹⁹⁵ However, no certainty existed. First, caution was warranted not to read too much into the *Martínez Sala* judgment because it involved unique facts, and the ECJ did not provide extensive reasoning for its conclusions.¹⁹⁶ Second, the judgment did not clarify the concept of lawful

Freedom of Movement for Workers Within the Community, art. 7(2), 1968 O.J. (L 257). Article 12(1) EC applies independently only in cases where none of the more specific anti-discrimination provisions are applicable. See Case C-193/94, *Criminal Proceedings against Sofia Skanavi and Another*, 1996 E.C.R. I-929 at 20; Case C-18/93 *Corsica Ferries Italia Srl v. Corpo Dei Piloti del Porto di Genova*, 1994 E.C.R. I-1783 at 19.

193. *Martínez Sala*, 1998 E.C.R. at 57.

194. *Id.* at 60-65.

195. See, e.g., Siofra O'Leary, *Putting Flesh on the Bones of European Union Citizenship*, 24 EUR. L. REV. 68 (1999); Annette Schrauwen, *Sink or Swim Together? Developments in European Citizenship*, 23 FORDHAM INT'L L.J. 778, 780 (2000); C. Tomuschat, *Annotation Martínez Sala*, 37 COMMON MKT. L. REV. 449, 451 (2000).

196. See Tomuschat, *supra* note 195 (discussing how the judgment was criticized by

residence.

While the judgment indicated that lawful residence may be derived from international or national law,¹⁹⁷ it left unanswered the question whether economically inactive European citizens who are not able to provide for themselves can derive lawful residence status from Community law, particularly Article 18(1) EC. The issue was of the utmost significance. If the right to reside would not be based on Article 18(1), it would have to be considered as a right accorded by Member States in accordance with the provision of Directive No. 90/364. Under this interpretation, the reference in Article 18(1) EC to the “limitations and conditions laid down in this Treaty and by the measures adopted to give it effect” would have to be read in relation to the existence of the right itself. European citizens who do not, or no longer, meet the financial means requirement would have no right of residence under Community law and fall outside the personal scope of Community law and Article 12(1) EC.¹⁹⁸ However, if Article 18(1) EC would constitute the source of the general right of residence, the “limitations and conditions” would have to be interpreted to relate to the exercise of the right to reside. This would mean that European citizens living in a member state other than their country of citizenship would have to be considered as lawful residents, and be entitled to equal treatment under Article 12(1), for as long as the host state does not make use of its power to refuse residence to, or to end lawful residence status of, nationals of other Member States in need of social assistance.

b. *Grzelczyk*

In *Martínez Sala* the ECJ did not address the issue whether economically inactive European citizens requiring social assistance benefits can rely on Article 18(1) EC to claim a right of residence. However, the ECJ addressed the issue in *Grzelczyk*. The case involved a French student studying sports at the University of Louvain, Belgium. During the first three years of his studies Mr. Grzelczyk defrayed his own costs of maintenance, accommodation and studies by taking on various minor jobs and obtaining loans. In the fourth and final year of his studies he was no longer able to combine his studies with employment. Since his parents were unable to afford payment of his living expenses, Mr. Grzelczyk applied for a social assistance allowance. Initially, the Belgian social security authority awarded the allowance, but it later withdrew the allowance because of Mr. Grzelczyk’s nationality. According to Belgian law, persons who do not possess Belgian nationality are only eligible for a minimum subsistence allowance if they fall within the scope of EC Regulation No. 1612/68 on the free movement of

legal commentators).

197. See, e.g., Fries & Shaw, *supra* note 169, at 558.

198. *Martínez Sala*, 1998 E.C.R. at 15 (La Pergola, Advocate General).

workers. The Belgian authorities argued that Mr. Grzelczyk was not a worker but a student. Mr. Grzelczyk challenged the decision withdrawing the allowance in a Belgian court, which stayed the proceedings to ask the ECJ whether the refusal to grant Mr. Grzelczyk the allowance was compatible with Articles 12(1) and 18(1) EC.¹⁹⁹

The ECJ answered the question by stating that a student of Belgian nationality who found himself in the same circumstances as Mr. Grzelczyk, would have been entitled to receive social assistance. Therefore, Mr. Grzelczyk was discriminated against based on his nationality. Since Article 12(1) EC prohibits discrimination on grounds of nationality only within the scope of application of the Treaty, the question was whether Mr. Grzelczyk's situation was covered by Community law. The ECJ reasoned that Article 12 EC must be interpreted in conjunction with the Treaty provisions on European Union citizenship, which is "destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of nationality."²⁰⁰ Confirming *Martínez Sala*, the ECJ held that European citizens lawfully residing in the territory of another member state could rely on Article 12 EC in all situations falling within the scope *ratione materiae* of Community law. Such situations include those "involving the exercise of fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside freely in other Member States, as conferred by Article [18] of the Treaty."²⁰¹ Article 12(1) must be read in conjunction with Article 18(1) EC, which provides for the rights to move and reside freely within the Community, subject to conditions and limitations laid down in the Treaty and EC legislation. The Court held that the 1990 residency directives did not prevent Member States from taking the view that a student who has access to social assistance no longer satisfies the conditions for the right to reside. Further, the directives do not prevent Member States from taking measures, within the limits imposed by Community law, either to withdraw the residence permit or not to renew it.²⁰² However, in no case may such measures become the automatic consequence of a student having recourse to social assistance. Article 4 of Directive No. 93/96 provides that the right of residence exists, as long as beneficiaries satisfy the conditions for acquiring that right, including the financial means requirements. However, the sixth recital of the preamble to the directive provides that beneficiaries must not become an unreasonable burden on the public finances of the host state. The ECJ concluded that Directive No. 93/96, like Directives No. 90/364 and No. 90/365, "accepts a certain degree of solidarity

199. EU citizens who wish to challenge a national law under EC law must do so in a court in the country in question. National courts may, and in some cases must, stay proceedings when a question on the interpretation of EC law arises and refer this question to the ECJ for preliminary ruling. See EC TREATY art. 234.

200. Case C-184/99, *Grzelczyk*, 2001 E.C.R. I-6193 at 30-31.

201. *Id.* at 33.

202. *Id.* at 42.

between nationals of the host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary.²⁰³ In conclusion, Articles 12(1) and 17(1) EC preclude application of national rules, which make the entitlement of nationals of other Member States to non-contributory social benefits conditional upon their falling within the scope of Regulation No. 1612/68 if no such condition is imposed on nationals of the host state.²⁰⁴

4. Conclusions

Grzelczyk confirms that all European citizens lawfully residing in the territory of another member state can rely on Article 12(1) EC in order to claim social assistance under the same conditions as nationals of the host state. Further, the judgment shows that economically inactive Union citizens who are unable to provide for themselves can claim lawful residence on the basis of Community law. Article 12(1) EC guarantees a right to equal treatment to all Union citizens who have exercised the fundamental freedoms guaranteed by the Treaty or the right to move and reside freely in another member state, “as conferred by Article 18 EC.”²⁰⁵ The general non-economic right of residence is based on Article 18(1) EC. The “conditions and limitations” mentioned in Article 18(1) EC relate to the exercise rather than the existence of the right to reside. Consequently, Member States which do not use their power to take measures ending the lawful residence status of economically inactive nationals of other Member States must award these Union citizens social assistance benefits under the same conditions as their

203. *Id.* at 44. The Court added that a student’s “financial position may change with the passage of time for reasons beyond his control” and that the “truthfulness of a student’s declaration” concerning his resources “is therefore to be assessed only at the time that it is made.” *Id.* at 45.

204. *Id.* at 46.

205. The conclusion that the right to reside is now protected by the Treaty is also the most, if not the only, logical interpretation of Article 18(1) EC. In the words of Advocate General La Pergola:

Now that Article 8a (now 18: APvdM) of the Treaty has entered into force, the right of residence can no longer be considered to have been created by the directive That legislation was adopted by the Council to cover situations in which citizens did not enjoy a right of residence under other provisions of Community law. Now, however, we have Article 8a of the Treaty. The right to move and reside freely throughout the whole Union is enshrined in an act of primary law and does not exist or cease to exist depending on whether or not it has been made subject to limitations under other provisions of Community law, including secondary legislation. The limitations provided for in Article 8a itself concern the actual exercise but not the existence of the right.

Martínez Sala, 1998 E.C.R. I-2691 at 18 (La Pergola, Advocate General).

own nationals.²⁰⁶ In other words, European Union citizens who are actually residing in the territory of another Member State are entitled to be treated equally regarding social assistance benefits until the host state executes measures to end their lawful residence status.²⁰⁷

206. This conclusion raises a series of new questions. What should the measures taken by the Member States include? At what point does lawful residence become unlawful residence? O'Leary has argued that Union citizens must be regarded as lawful residents until they are subject to formal proceedings to effect deportation. Siofra O'Leary, *The Principle of Equal Treatment on Grounds of Nationality in Article 6 EC – A Lucrative Source for Member State Nationals?* in CITIZENSHIP AND NATIONALITY STATUS IN THE NEW EUROPE 105, 134 (Siofra O'Leary & Teija Tiilikainen eds., 1998). Yet, what does this imply? Are European citizens unlawful residents from the moment they are informed by the immigration authorities that they have to leave the host State's territory? Probably, European citizens have a right to appeal expulsion decisions. See European Convention on Human Rights, Sept. 16, 1963, Protocol 4, art. 4; Council Directive 64/221, arts. 8, 9, 1964 O.J. (P 56) 850-857.

It could be argued that such citizens retain the status of lawful resident, and thus the right to equal treatment in regard to social assistance benefits, until they have been able to complete the formalities to avail themselves of that remedy and the competent authority has reached a decision. Compare Case 48/75, Jean Noël Royer (preliminary ruling), 1976 E.C.R. 497, with Case C-175/94, *The Queen v. Sec'y of State for the Home Dep't, ex parte, John Gallagher*, 1996 E.C.R. I-4253. If European citizens challenging decisions of immigration authorities are indeed to be regarded as lawful residents until the moment a decision on appeal has been made, can the institutions responsible for payment of social assistance benefits require the presentation of a document stating that they have actually started the procedure, or are they obliged to grant benefits to those who can prove to be actual residents until they have received the decision of the appeal body? Does a negative decision on appeal end lawful residence, or does such a decision merely imply an authorization for the immigration authorities to end lawful residence? In answering such questions, is any distinction to be made between European citizens who apply for a residence card for the first time and European citizens who have acquired such a card but later cease to meet the financial means requirement? Can European citizens who know in advance that they are unable to meet the financial means requirement in another Member State, but nonetheless move there, claim lawful residence status and social assistance benefits for the duration of the appeal procedure?

207. The most remarkable aspect of *Grzelczyk* is that the Court has imposed limitations on Member States' powers to end lawful residence status of needy nationals of other Member States. Having recourse to social assistance is not a sufficient reason for withdrawing residence permits or refusing to offer new permits. In order to take measures, Member States must demonstrate that nationals of other states have or will become an "unreasonable" burden on the social assistance scheme. Contrary to the intentions of those who drafted and adopted Directives No. 93/96, No. 90/365 and No. 90/364, the Court reads into these directives "a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States." Case C-184/99, *Grzelczyk*, 2001 E.C.R. I-6193.

The Court is likely to be criticized on this point. In comments on *Martínez Sala*, the Court had already been accused of going too far and not giving sufficient regard to the

E. Conclusions

The legal status of European citizens needing social assistance benefits has been strengthened in the last three decades. By the end of the 1960's, Member States still enjoyed broad discretion on deciding whether indigent nationals of other states would be granted residence status in their territory, and whether they could obtain social assistance benefits. Today, all Union citizens enjoy a right to equal treatment in the field of social assistance, as long as they are lawfully residing in the territory of another Member State. Both the Community provisions on free movement of workers and the 1990 residency directives represent a certain degree of solidarity between nationals of the various Member States. This solidarity, however, is still limited. The ECJ, largely responsible for the progress made, has not ignored the financial interests of Member States. It has upheld national laws limiting the entitlement to social assistance to European

Member States' interests. Article(s) 12 (and 18) EC, so it was argued, should not be interpreted as to impose on Member States the obligation to grant benefits that have not been anticipated for and that "have not been earned by the claimant on account of his or her participation in the collective work process of a given society." Tomuschat, *supra* note 195, at 455. *Grzelczyk* suggests that the Court has dismissed such critiques altogether and it is submitted that it was right in doing so. The crux of the problem concerns the possible burden on social welfare systems. It seems unlikely, however, that the funding of social assistance systems will be seriously affected as a result of *Martínez Sala* and *Grzelczyk*. First, and most important, the Court remained wholly silent on the financial means requirement contained in Article 1 of the three 1990 residence directives. Economically inactive European citizens who wish to install themselves in other Member States can still be required to present proof that they will not become a burden on the host State's social assistance systems. *Grzelczyk* does not imply recognition of a general, unconditional right to freedom of movement. The ruling merely implies that Union citizens who have initially convinced the host State's authorities that they are able to provide for themselves but who, contrary to initial expectations, become temporarily in financial need do not automatically lose their right to reside. Second, *Grzelczyk* does not necessarily imply that Community students can actually claim social assistance in the host State. The ruling merely implies that Community students can claim social assistance benefits where, and under the same conditions as, national students have rights to such benefits. National social assistance laws, however, may contain eligibility criteria which students often are unable to meet, such as the requirements that social assistance recipients must seek or be available for full-time employment. In many cases persons pursuing studies are even categorically excluded from social assistance entitlement. Further, Article 12(1) EC does not object to national rules, which make entitlement to social assistance and other minimum subsistence benefits subject to requirements of "habitual residence" or "domicile" on the national territory. As a rule, pensioners and "other" European citizens meet such requirements, but the same does not hold true for Community students. As a rule, Community students must be regarded as having their habitual residence in the State where they lived prior to their studies. *See, e.g., A.P. van der Mei, Freedom of Movement and Financial Aid for Students: Some Reflections on Grzelczyk and Fahmi Esmoris-Cerdeiro Pinedo Amoris*, 3 EUR. J. SOC. SECURITY 181, 191 (2001).

citizens lawfully residing within their borders. Moreover, the ECJ has allowed Member States to deny residency status to nationals of other Member States who do not perform “effective and genuine” work and are unable to provide for themselves and their families.

IV. THE UNITED STATES AND THE EUROPEAN COMMUNITY COMPARED

The comparison of American constitutional law and EC law regarding the rights to freedom of movement and non-discrimination of indigents shows that the conflict between the constitutional rights of citizens to freedom of movement and the financial interests of the states has been settled differently. On both sides of the Atlantic, states are entitled to make the eligibility for minimum subsistence benefits conditional upon the requirement of residency in the state territory.²⁰⁸ However, the degree to which indigents can establish residency and claim benefits in other states differs. In the United States, all citizens are free to choose the state in which they wish to reside and claim welfare benefits. The states lack legal powers to protect themselves against a potential influx of free-riding welfare applicants. EC law has not guaranteed an unconditional right to establish residence in other states. Member States can protect themselves against social tourism by enforcing the threshold requirements of “effective and genuine work” and sufficient financial means.²⁰⁹

What explains the differences between American constitutional law and EC law? Why has it been possible to realize a general freedom of movement in the United States and not in the EC? Given the different historical, political, and legal backgrounds under which the law governing freedom of movement has developed, a simple or definite answer to these questions is impossible. However, a number of factors may help to explain the differences.

First, the legal tools that the U.S. Supreme Court and the ECJ have had at their disposal vary significantly. The U.S. Constitution has always guaranteed a right to freedom of movement, and since 1868, it contains an Equal Protection Clause, a Privileges and Immunities Clause, and a Citizenship Clause. The right to travel and these clauses enabled the Supreme Court to recognize a right to freedom of movement for indigents and a right to claim equal access to welfare as soon as U.S. citizens establish residency in the territory of another state. Until recently, the ECJ could not rely on similar provisions.²¹⁰ The notions of European

208. *See supra* notes 52, 216-223 and accompanying text.

209. In one respect, American law seems to be stricter than EC law. *Shapiro* and *Saenz* strongly suggest that relatively short waiting period requirements are constitutional when applied to establish bona fide residence. *See cases cited supra* notes 79, 123. Community law, however, seems to object to such requirements. *See infra* note 150.

210. If the Court had accepted that all part-time workers, including those who only work for a very small number of hours, could obtain the status of worker and the rights

Union citizenship and a general right to freedom of movement for all citizens were only incorporated in the Treaty in 1993 and the right to freedom of movement is still conditional upon meeting particular requirements, such as sufficient financial means and health insurance coverage.

Second, the structure of the American and European welfare systems differs tremendously. The reasoning of the Supreme Court in *Edwards, Shapiro*, and *Saenz* was largely based on the sink-or-swim-together rationale provided in the SSA. Since 1935, poverty and problems caused by the “migrating poor” have been perceived as issues requiring the cooperation of the states and the federal government. Federal funding did not constitute the basis upon which welfare waiting periods could be invalidated.²¹¹ However, the shared responsibility for welfare has inspired the Court to hold that states were no longer entitled to resolve those problems by “closing the gates” to their territory. In the EC, there is still the predominant notion that the responsibility for citizens who do not contribute to, but rather constitute a burden on, economic development must be borne by the Member States individually, and not by the Community. To speak of “the” American welfare state might be inappropriate, but the United States has evolved much further than the EC in developing a “welfare Union.”²¹²

Third, concerns about welfare migration or social tourism explain the differences between the law and rules governing freedom of movement for indigents. In *Shapiro*, the Supreme Court did not affirm *Edwards*’ right to travel nor did the Court confer upon the “migrating poor” a right to equal treatment regarding welfare benefits because federal funding ensured the financial stability of welfare systems. At least theoretically, the welfare magnet problem still existed and still does so today. As *Saenz* indicates, the Court recognized a “genuine” right to freedom of movement for indigents because it does not expect that welfare recipients will move to other states in such large numbers as to have sufficient adverse effects on welfare benefit systems. However, in the European Community the fear of becoming a welfare magnet is still a prevalent sentiment among the Member States. The requirement of “effective and genuine work” for obtaining the status of worker and the financial means requirements contained in the 1990 residence directives reflect this sentiment.

attached to that status, it would *de facto* have come close to reading into Article 39 EC a general right of residence. The introduction of the requirement of “effective and genuine work” (*infra* note 153 and accompanying text) suggests that the Court has carefully wished to avoid reaching such a conclusion. In essence, Article 39 EC provides for a right to work in other Member States, not for a general right of residence. See A.P. van der Mei, *The Elusive and Exclusive Concept of Union Citizenship, A Review Essay*, 5 MAASTRICHT J. EUR. & COMP. L. 391, 397 (1998).

211. See *infra* note 74 and accompanying text.

212. See Bryant Garth, *Migrant Workers and Rights of Mobility in the European Community and the United States: A Study of Law, Community and Citizenship in the Welfare State*, in INTEGRATION THROUGH LAW – EUROPE AND THE AMERICAN FEDERAL EXPERIENCE 115 (M. Cappeletti et al., 1986).

V. TOWARD A GENERAL RIGHT OF RESIDENCE IN THE EUROPEAN COMMUNITY?

A. Introduction

The prior discussion raises the question whether the EC could move closer to or even realize a general right of residence. Is it possible to create a right of residence which is not subject to a financial means requirement and which, for all Union citizens, encompasses a right to claim social assistance in the member state of residence?²¹³ Can such a right be realized without threatening the financial integrity of the national benefit systems? What lessons can be learned from the United States?

To answer these questions, I will consider three options²¹⁴ that could be taken by either the Community legislator or the ECJ: (1) durational residence requirements; (2) a right to export social assistance; and (3) the abolition of the financial means requirements currently contained in Directive No. 90/364.²¹⁵

B. Durational Residence Requirements

The need to safeguard financial stability of social assistance systems is a legitimate and compelling member state interest deserving protection under EC law. However, in order to protect the states' financial interests, is it really necessary to deny indigent and economically inactive Union citizens the right to establish residence in other Member States? There are alternative ways available to states to protect their interests. Using the United States as an example, the EC could explore the possibility of replacing the financial requirement contained in Article 1 of Directive No. 90/364 with a provision that would allow Member States to make eligibility for social assistance benefits dependent upon a minimum period of residence in their territory. Under this approach, Member States would still have the right to deny newcomers social assistance. Further, another

213. I will not address the question of whether, and if so, how, the health insurance requirement contained in Article 1 of each of the three residence directives could possibly be abolished. *See infra* note 186 and accompanying text.

214. I will not consider the possibilities of establishing a common social assistance scheme, harmonizing benefit levels and eligibility criteria, or setting up some kind of compensation mechanism to the benefit of states that are net-importers of social assistance recipients. These options could pave the way for the realization or recognition of a general right to reside. However, the measures required can only be taken by the Community legislature. Due to the Member States' fear of social tourism, and the constant concerns about the funding of social benefit systems, one must assume that the legislator, at least in the near future, will not be willing to take such measures. *See, e.g., VAN DER MEI, FREE MOVEMENT, supra* note 9, manuscript ch. 3, § 10.2.2.

215. *See infra* note 183 and accompanying text.

possibility would be the implementation of waiting periods during which states merely offer a percentage of the amount paid to long-term residents in accordance with the lower benefit level of the Member State from where the beneficiaries moved.

The idea of a waiting period has appealing features. Waiting period requirements would bring a general right of residence one step closer because it limits the period during which migrating indigents have to provide for themselves, while they would still provide Member States with a legal measure to protect themselves against social tourism. Nevertheless, the feasibility of such a waiting period option is questionable. First, waiting periods are inconsistent with the objectives of social assistance systems and the evolution of EC law. Because the right to reside would not include an immediate right to obtain social assistance benefits, such a waiting period option is contrary to the policies and responsibilities of Member States to guarantee all lawful residents minimum means for subsistence. The ECJ judgments in *Levin*, *Hoeckx*, *Martínez Sala*, and *Grzelczyk* indicate that EC law has developed along comparable lines. These judgments provide that Member States can no longer protect their welfare state interests by distinguishing between lawful residents. Instead, Member States should have to resort to their immigration powers to protect the funding of their welfare systems.

Second, waiting periods are inconsistent with the Member States' obligations under international agreements and treaties. For example, Article 1 of the ECSMA²¹⁶ stipulates that the contracting parties must ensure that nationals of other contracting parties lawfully residing within their territory and without sufficient resources, shall be entitled to social assistance under the same conditions as the states' own nationals. It is safe to assume that Member States are not willing to retreat from previous legal commitments. Furthermore, it is unlikely that the ECJ would accept the validity of requirements prohibited under international treaties ratified by all or most Member States.

C. Export of Social Assistance

A second possibility to establish a genuine right to freedom of movement consists of the right to export social assistance benefits. The recognition of such a right would make it easier for many Union citizens to satisfy the financial means requirements in other Member States. The recent ruling in *Elsen*²¹⁷ raises the question whether national rules providing that entitlement to social assistance is lost the moment beneficiaries move to other states, are compatible with Article 18(1) EC. *Elsen* involved a German national who was living with her husband

216. See *supra* note 189.

217. Case C-135/99, *Elsen v. Bundesversicherungsanstalt für Angestellte*, 2000 E.C.R. I-10409.

and son in France. Mrs. Elsen, who had worked in Germany but never in France, requested the German social security institutions to take into consideration the periods she had spent rearing her son as insurance periods for the purposes of her old-age pension. The German institutions refused the request because the applicable German laws only allowed such consideration when the child-rearing occurred in Germany. The ECJ held that the German laws disadvantaged European citizens wishing to exercise their non-economic free movement rights. Thus, by not taking into account the periods devoted to child-rearing completed in France, the German social security institution had acted contrary to Article 18 EC.²¹⁸

The judgment in *Elsen* indicates that Article 18(1) may prohibit rules that obstruct the right to establish residence in other Member States. Nevertheless, it is unlikely that Union citizens can claim a right to export social assistance benefits under Article 18(1) EC. In fact, in *Snares* the ECJ already implicitly rejected such an interpretation of Article 18(1) EC. In this case, the ECJ was asked to determine whether the Community legislator had exceeded its powers in the area of the free movement of workers by inserting in Regulation No. 1408/71 a provision stating that so-called “mixed” or “special non-contributory,”²¹⁹ benefits shall be granted exclusively in the territory of the Member State in which beneficiaries reside.²²⁰ In *Snares*, the ECJ held that the Community legislator had not exceeded its powers. Additional observations suggest that national laws limiting portability of minimum subsistence benefits are consistent with Article 18(1) EC. The ECJ recognized that the non-portability of social benefits could diminish the financial means of beneficiaries and that economically inactive persons may be unable to satisfy the financial means requirements when they wish to establish residence in other Member States. However, the ECJ reasoned that this inability was only due to the differences between national social security

218. *Id.* at 34-36.

219. Mixed or special non-contributory benefits are tax-funded benefits that intend to provide specific groups such as the elderly and the disabled, with minimum means for subsistence and that have features of both social assistance benefits and social insurance benefits.

220. This provision was inserted in response to a series of judgments in which the Court had held that mixed benefits that fall within the scope of Regulation No. 1408/71 can be exported on the basis of Article 10 of the same Regulation. Council Regulation 1408/71 on The Application of Social Security Schemes to Employed Persons and their Families Moving Within the Community, art. 10(a), 1971 O.J. (L 149) 2-50. *See, e.g.*, Case 139/82, *Piscitello v. Istituto Nazionale della Previdenza Sociale*, 1983 E.C.R. 1471; Case 24/74, *Caisse Regional d'Assurance Maladie de Paris v. Biason*, 1974 E.C.R. 999; *see also* Case 236/88, *Commission v. France*, 1990 E.C.R. I-3163 (stating Member States had always opposed this case law, arguing that they cannot, and should not, be obliged to award tax-funded benefits that are “closely linked with the social environment” in the Member State concerned to persons residing outside their territory); A.P. van der Mei, *Regulation No. 1408/71 and the Co-ordination of Special Non-Contributory Benefits*, 27 EUR. L. REV. 551 (2002).

systems.²²¹

Although no certainty exists, a right to export social assistance does not seem feasible because the Member States are strongly opposed to the recognition of such a right. The ECJ's judgment in *Snares* suggests that the Court is unwilling to prohibit residence requirements for entitlement to social assistance. EC law is based on the rule that tax-funded benefits intended to offer indigents minimum means for subsistence and "closely linked with the social environment"²²² in the respective member state can only be enjoyed in the state of residence.²²³ Article 18(1) EC does not demand the portability of social assistance benefits.²²⁴

D. Elimination of the Financial Means Requirement

If durational residence requirements and the portability of social assistance allowances are unlikely to constitute feasible alternatives, then the only plausible option left for extending the right to freedom to indigent citizens of the European Union is the simple elimination of the financial means requirements contained in the 1990 residence requirements.²²⁵ Two objections can be raised to

221. Case C-20/96, *Snares v. Adjudication Officer*, 1997 E.C.R. I-6057 at 55.

222. Case 313/86, *Lenoir v. Caisse d'allocations familiales des Alpes-Maritimes*, 1988 E.C.R. 5391 at 16.

223. The United States Constitution does not provide for a right to export welfare benefits either. *See, e.g., Califano v. Torres*, 435 U.S. 1 (1978). The case involved a section of the Social Security Act, which denied SSI-benefits to persons living in Puerto Rico. The District Court there had held that the Constitution requires that a person who moves to Puerto Rico must be given benefits "superior to those enjoyed by other residents of Puerto Rico if the newcomer enjoyed those in the State from which he came." *Id.* The Supreme Court, however, disagreed by stating that:

[This] Court has never held that the constitutional right to travel embraces any such doctrine, and we decline to do so now Such a doctrine would apply with equal force to any benefits a State might provide for its residents, and would require a State to continue to pay those benefits indefinitely to any person who had once resided there. And the broader implications of such a doctrine in other areas of substantive law would bid fair to destroy the independent power of each State under our Constitution to enact laws uniformly applicable to all of its residents.

Id. at 4-5.

224. For a useful comparison, see O'LEARY, *supra* note 172, at 131.

225. A distinction could be made between the requirement for establishing the right to reside and the requirement for retaining the right to reside. *See* Council Directive 90/364, art. 1, 1990 O.J. (L 180) 26, 27. For example, the European Commission has proposed to grant all EU citizens, after four years of continuous residence in another Member State, a right of permanent residence, which will not be subject to a financial means requirements or any other condition. *See* Proposal for a European Parliament and Council Directive on the Right of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of the Member States, COM(01) 257 final at 3. This article will be

the conclusion that the requirements are incompatible with Article 18(1) EC. First, it is too risky to grant indigents a right of residence. The recognition of such a right could trigger social tourism and potentially a “race to the bottom.”²²⁶ The second objection is that the abolition of the financial means requirements runs counter to the wishes of Member States and the intentions of the Treaty’s drafters.

1. Social Tourism

Would economically inactive European Union citizens, who are unable to provide for themselves, move to other states in order to collect higher benefits if given the right to freedom of movement? It is unlikely that the number of free-riders would be so significant as to seriously affect the funding of the benefit systems. In the late 1950’s, Member States feared that the introduction of the free movement of workers would trigger considerable labor movement. However, experience has shown that this movement has never been considerable.²²⁷ Social, cultural, and linguistic obstacles have precluded many European citizens from working in other Member States. It is reasonable to assume that these obstacles would also prevent extensive movement of indigents. Moreover, even in the United States, a country where citizens are generally more mobile than in the EC, no conclusive evidence of welfare migration has been found. Therefore, the conclusion that the possible introduction of a general right of residence in the EC would not result in excessive inter-state flow of free-riding social assistance recipients is appropriate.

Further, it seems reasonable to assume that in deciding whether to move to other Member States, EU citizens requiring social assistance benefits would include the geographical distance to states with higher benefits in their decision. In the United States, differences among welfare benefit levels in neighboring states are often quite considerable. However, the differences among neighboring states within the EC appear to be comparatively insignificant. For example, it is unlikely that the differences in benefit levels among the Benelux²²⁸ countries will trigger social tourism. Significant differences exist only between the northern and the southern Member States.²²⁹ Social tourism is predominantly a north-south problem, and it is questionable whether many of the southern citizens of the Union

limited to the question whether there is at all a need for a financial means requirement either for obtaining or retaining residency.

226. See *infra* note 99.

227. See, e.g., Philip Muus, *A Study on the Expected Effects of Free Movement for Legally Residing Workers from Third Countries Within the European Community*, in *FREE MOVEMENT FOR NON-EC WORKERS WITHIN THE EUROPEAN COMMUNITY* 5 (Paul Muus & C. Curtin eds., 1997); J. Penninx & Philip Muus, *No Limits for Migration after 1992? – The Lessons of the Past and a Reconnaissance of the Future*, 27 *INT’L MIGRATION* 373 (1989).

228. The Benelux countries are Belgium, The Netherlands, and Luxembourg.

229. See *infra* note 124.

would be willing to move to the northern Member States.²³⁰

However, there are also reasons why the objections to the introduction of a general right of residence should not be ignored. First, the accession of Eastern European states to the European Union²³¹ could possibly trigger social tourism. Benefit levels between the Eastern European countries and several of the current Member States differ significantly. Benefit systems of countries like Germany and Austria might have a magnetic effect on Polish or Hungarian indigents.

Second, even if it could be demonstrated that EU citizens are unlikely to become free-riders, the funding of Member States' social assistance systems might be burdened. The funding of such welfare systems is not adversely affected because Union citizens intend to obtain benefits, but because Member States may be required to grant benefits to a larger group of people. EU citizens requiring social assistance who primarily move to other Member States in order to find employment, to live closer to family members or friends, or to live in a better climate, may burden social assistance systems.

Third, the race to the bottom theory is not based on the assumption that social tourism or welfare migration actually occurs, but on the mere possibility that it might occur.²³² States do not lower their benefit levels once confronted with an influx of free-riders from other states. They often lower benefit levels in advance in an attempt to discourage the immigration of free-riders. The lowering of benefits in the race to the bottom is often a preventive act by states to ensure that the funding of their welfare systems is secure.

Finally, even if Member States would not lower benefit levels to deter immigration of free-riders or the departure of taxpayers, there is the possibility this potential influx or outflow may prevent Member States from increasing benefits. The possible introduction of a general right of residence might not trigger a race to the bottom, but it might hamper a "race to the top."²³³

230. It could be, and it indeed has been, argued that there are no strong financial objections to a general right of residence, and that such a right could "simply" be recognized without there being a need to take any protective measures for the benefit of the more generous Member States. See P. von Wilmsky, *Zugang zu Öffentlichen Leistungen Anderer Mitgliedstaaten*, Zeitschrift, für AUSLÄNDISCHES AND ÖFFENTLICHES RECHT 231, 259 (1992); see also GUIDO SHULTZ, FREIZÜGIGKEIT FÜR UNIONSBUERGER 339 (1997).

231. The Commission has recommended that the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, the Slovak Republic, Slovenia, Cyprus, and Malta will join the Union in 2004. Bulgaria and Romania are considered to be ready for membership in 2007. Press release, The European Commission, Towards the Enlarged Union—Commission Recommends Conclusion of Negotiations with Ten Candidate Countries, IP/02/1443, (Oct. 9, 2002), available at <http://www.europa.eu.int/comm/enlargement/report2002>.

232. See, e.g., Susan Bennett, *The Threat of the Wandering Poor: Welfare Parochialism and its Impact on the Use of Housing Mobility as an Anti-Poverty Strategy*, 22 FORDHAM URB. L.J. 1207, 1216 (1995); Zubler, *supra* note 14, at 934; Note, *Devolving Welfare Programs to the States: A Public Choice Perspective*, 109 HARV. L. REV. 1984, 1992 (1996).

233. Furthermore, if social tourism were to occur and if states were indeed to respond

These objections should not be entirely dismissed. Member States take them seriously. Therefore, it is unlikely that the Community legislator will abolish the financial means requirements. Although the ECJ might be aware of these objections, the substantive objections to a general right of residence are not compelling enough to deprive indigent EU citizens of the right to establish residence in the Member States of their choice. The recognition of a general, unconditional right to reside for all Union citizens could encourage citizens to move to other states solely for the purpose of collecting higher benefits. However, considering the American and previous European experiences, it remains questionable whether the potential influxes of free-riders would have a significant adverse affect on social assistance systems. If, as the U.S. Supreme Court calculated in *Saenz*, a state with high benefits such as California, could secure the funding of its benefit systems by reducing benefits by seventy-two cents per month, then it is unlikely that an eventual invalidation of the financial means requirements in the EC would disrupt the funding of the benefit systems of the wealthier Member States. Further, the possibility remains that some states will lower, or refuse to increase, benefits because they fear an influx of free-riding social assistance recipients. However, it is questionable whether this fear constitutes a sufficient reason for denying indigent EU citizens the fundamental right to move to other Member States. There are no compelling substantive reasons why the ECJ should not follow the American example and recognize a general right of residence by condemning the financial means requirements contained in Directive No. 90/364.

2. The Intentions of the Drafters of the EC Treaty

A reason that could prevent the ECJ from concluding that the financial means requirements are incompatible with Article 18(1) EC is that such a finding would be contrary to the intentions of the drafters of the Treaty.²³⁴ By expressly stating that the free movement rights are “subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect,” the drafters made it patently clear that the inclusion of Article 18(1) EC did not imply a change in the free movement regime. According to the drafters, any change had to be made by the Community legislator.²³⁵

by increasing taxes, taxpayers might decide to move elsewhere and this may again be a reason for states to choose the option of lowering benefit levels. Yet, would this not be a reason to impose limits on the free movement rights of these taxpayers rather than on the right of those in need of social assistance benefits? See e.g., Frances Fox Piven, *The Race Among the States in Welfare Benefits: A Comment*, 28 PUBLIUS: J. FEDERALISM 39, 40 (1998).

234. See, e.g., R. Kovar & D. Simon, *La Citoyenneté Européenne*, 3-4 CAHIERS DE DROIT EUROPEEN 284, 295 (1993).

235. Article 18(2) EC provides that the Council, acting unanimously and in

So far, the ECJ has never addressed the compatibility of the financial means requirements contained in Article 1 of Directive No. 90/364 with Article 18(1) EC. However, recent case law suggests that the intention of the drafters may indeed constitute a serious, and perhaps insurmountable, obstacle. The judgment *Grzelczyk* demonstrates that the Court considers Article 18(1) EC to be a provision which, despite the drafters' intentions, may provide additional rights. Other cases, however, cast doubt as to whether the judiciary will interpret the provision as to prohibit the financial means requirement for establishing residence in another member state. The Court of First Instance ("CFI"),²³⁶ for example, has already accepted the validity of the health insurance requirement mentioned in Directive No. 90/364. In *Kuchlenz-Winter*, the former wife of an EU citizen working for the EC claimed that the impossibility of obtaining sickness insurance in a member state constitutes a restriction on her right to move freely. The CFI held that Article 18(1) EC expressly provides that the right to reside is subject to the conditions and limitations laid down in secondary legislation. It follows from Directives No. 90/364 and No 90/365, and persons who are not in active employment must have sickness insurance in order to claim a right to reside.²³⁷

The recent judgment in *Kaba* suggests that the ECJ holds a similar view. In *Kaba*, the ECJ had to determine whether Article 7(2) of Regulation No. 1612/68 prohibited a United Kingdom law, according to which spouses of United Kingdom nationals and persons who are settled in the country could apply for indefinite leave to remain under more favorable conditions than EU citizens who have been issued a residence permit valid for five years. The ECJ held that Member States are entitled to rely on any difference between their own nationals and those of other Member States when establishing the conditions under which leave to remain must be granted to spouses of these nationals and non-nationals. The ECJ reached this conclusion because:

The right of nationals of a Member State to reside in another Member State is not unconditional. That situation derives . . . from . . . Article 8a of the EC Treaty (now, after amendment, Article 18 EC) which, whilst granting citizens of the Union the right to move and reside freely within the Member States, expressly refers to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect.²³⁸

accordance with the co-decision procedure (Article 251 EC), may adopt provisions aimed at facilitating the exercise of free movement rights. EC TREATY art. 18(2).

236. The CFI was established in 1988 to relieve the burden on the ECJ. The CFI has jurisdiction over most direct actions initiated by individuals. EC TREATY art. 225.

237. Case T-66/95, *Kuchlenz-Winter v. European Commission*, 1997 E.C.R. II-637 at 47.

238. Case C-356/98 *Kaba v. Sec'y of State for the Home Dep't*, 2000 E.C.R. I-2623 at 30. For a discussion of *Kaba*, see Steve Peers, *Dazed and Confused: Family Members' Residence Rights and the Court of Justice*, 26 EUR. L. REV. 76 (2001).

Although the issue was not directly addressed by the ECJ, the judgment in *Kaba* suggests that the ECJ is unlikely to overrule the intentions of the drafters²³⁹ in the near future by stating that financial means requirements applied as conditions for establishing residence in other Member States are incompatible with Article 18(1) EC.²⁴⁰

E. Conclusions

The financial means requirements contained in the 1990 residence directives imply a *de facto* denial of the right to reside in other Member States. Such a denial is problematic considering the concept of EU citizenship. Union citizenship is a political rather than economic concept, which has limited meaning, as long as certain citizens can be denied the right to reside in other Member States due to their economic status.²⁴¹ The Community legislator, dominated by the Member States, is unlikely to make significant changes in the near future. The realization of a general right of residence for Union citizens that includes indigents is not an important item on the legislator's agenda. Recent case law suggests that the ECJ will not recognize the legality of durational residence requirements or the right to export social assistance. Further, the ECJ is unlikely to find that the financial means requirement of Article 1 of Directive No. 90/364 is incompatible with Article 18(1) EC. Considering the wording of Article 18 EC, and the intentions of its drafters, the ECJ's position is comprehensible. However, the ECJ could draw inspiration from the U.S. Supreme Court, which assumed

239. For a further comparison, in *Baglieri*, the Court was asked to interpret Article 14 EC, which provides for the adoption of measures aimed at progressively establishing the internal market by December 31, 1992. In answering the question whether Article 14 EC imposes on Member States from that date onward an obligation to admit persons who have been subject to compulsory insurance in another Member State to voluntary affiliation to their social security systems, the Court held that such an obligation presupposes the harmonization of social security legislation within the Community. Case C-297/92, *Instituto Nazionale della Previdenza Sociale v. Baglieri*, 1993 E.C.R. I-5211 at 16-17. Even though the Court did not refer to the Declaration, it would seem that the Court did not wish to interpret Article 14 EC in a way which runs directly counter to the intentions of the drafters. *Id.*

240. The Court was also asked in *Wijsenbeek* whether Articles 14 and 18 EC preclude national legislation that requires persons entering national territory to present a passport. The Court held that even if European citizens were to enjoy a right to freedom of movement under Article 14 or Article 18 EC, they do not have a right to move freely and unconditionally within the Community. For as long as national immigration, visa, and asylum policies have not been harmonized, Member States remain free to carry out identity checks at the internal frontiers of the Community in order to establish whether a person is a Community citizen having the right to move freely. Case C-378/97, *Criminal proceedings against Florus Ariel Wijsenbeek*, 1999 E.C.R. I-6207 at 42-43.

241. O'LEARY, *supra* note 166, at 99.

responsibility for strengthening the notion of U.S. citizenship, the right to freedom of movement, and the legal status of indigents by obliging the states to admit free-riding indigents for residency and to grant them, upon arrival, welfare benefits. The Supreme Court expressly overruled the Congress that allowed states to deny indigents welfare benefits during an initial period of time. The Court was not persuaded that welfare waiting periods were necessary for protecting states' welfare interests. Although the legal and political settings regarding freedom of movement for indigents may differ, from an economic-political perspective the issues concerning the "wandering poor" on both sides of the Atlantic are essentially similar. The problems of welfare migration and social tourism appear not as serious as they are often presented. Therefore, the need to fully respect the intentions of the drafters of the Treaty on European Union on this point can be questioned.

VI. CONCLUSIONS

Political systems based on multi-tiered systems of government, such as the United States and the EC, face the conflict between the constitutional value of guaranteeing freedom of movement and the need to safeguard the funding of minimum subsistence benefit systems of individual states. This Article demonstrated that this conflict has been dealt with differently on both sides of the Atlantic. In the United States, all citizens can choose the state in which they wish to reside and claim welfare benefits. The American states lack the legal powers to protect themselves against a possible influx of free-riding welfare applicants and recipients. EC law has not developed in the same degree. Although the legal status of indigent EU citizens who have established, or wish to establish, residence in other Member States has been strengthened, EC law still does not confer upon these citizens an unconditional right to choose their state of residency. Member States can protect themselves against social tourism by applying the threshold requirements of "effective and genuine work" and the possession of sufficient financial means. Despite the absence of compelling substantive objections, a general right to freedom of movement that would enable the European indigents to choose the Member States in which they wish to reside and enjoy minimum subsistence benefits, is unlikely to be realized in the near future. The Community's legislature is unwilling to implement the necessary legislative changes. The ECJ does not consider the recognition of a general right to freedom of movement to be a task for the judiciary. Although the ECJ might be correct, it would be unfortunate if the Community as a whole, which claims to pursue social objectives and has formally introduced a common citizenship, is unable to solve a problem which seems more theoretical than real. In order to be taken seriously, European Union citizenship must be developed in such a way that both the rich and the poor can enjoy its inherent rights.