EU CITIZENSHIP FOR LATVIAN "NON-CITIZENS": A CONCRETE PROPOSAL

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I. INTRODUCTION AND THE STRUCTURE OF THE ARGUMENT

This contribution explains that European Union (EU) law allows for the extension of the status of EU citizenship and important rights associated with it to "non-citizens of Latvia."[1] It argues that such an extension, while having no internal effect

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1. *See infra* Part I (defining a non-citizen as a person with a special legal status that essentially amounts to a resident of Latvia who is not entitled citizenship or political participation).

in the Republic of Latvia and building on the doctrine of continuity with the pre-World War II Latvian Republic,[2] will clearly contribute to the improvement of the legal situation of the "non-citizens," who are in a vulnerable position.[3] The authors fully realize that extending EU citizenship does not, as such, amount to a grant of full Latvian citizenship. This will obviously be viewed by many as disappointing. It is submitted, however, that ignoring the likely positive impact of EU citizenship, with its rights and entitlements, on purely ideological grounds would be unwise. Even if not full Latvian citizenship, EU citizenship – which could be extended automatically, immediately and at virtually no cost (either

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2. The doctrine of continuity is enshrined in the 1990 Declaration "On the Restoration of Independence of the Republic of Latvia." Par Latvijas Republikas neatkarības atjaunošanu [On the Restoration of Independence of the Republic of Latvia] May 5, 1990, ¶ 1. As the Constitutional Court put it, "[i]f a state, independence of which has been illegally terminated, restores its statehood, it can under the doctrine of continuity recognize itself as the same State which had been illegally terminated. In this case it is necessary that the state itself establishes its continuity and acts in accordance with the claims of this doctrine both in international relations and domestic policy, and it is also necessary that such self-assessment of the state is accepted by the international community. . . A State may be said to be the 'same' State (with the consequence that the same legal rules, including conventional rules, continue to apply) where it is continuous in the sense defined or where after temporary suppression, an entity with substantially the same constituent features is re-established and its claim to continuity is accepted." Latvijas Republikas Satversmes tiesa [Constitutional Court of the Republic of Latvia] Nov. 29, 2007, Case No. 2007-10-0102, ¶ 32.2, http://www.satv.tiesa.gov.lv/upload /judg_2007_10_0102.htm (citations omitted). *See* KRYSTYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 412 (1954) (stating that "it may safely be concluded that the greater part of the international community has so far refused to recognize the Soviet annexation of [the Baltic States] and has, expressly or impliedly, upheld their continued legal existence"); INETA ZIEMELE, STATE CONTINUITY AND NATIONALITY: THE BALTIC STATES AND RUSSIA – PAST, PRESENT AND FUTURE AS DEFINED BY INTERNATIONAL LAW 34 (2005) ("The *Constitutional Law* thus confirmed the constitutional continuity and identity of the Latvian State of 18 November 1918."); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 689–90 (2d ed. 2006) (discussing the proposition that annexation of the territory of a State as a result of the illegal use of force does not bring about the extinction of the State); Aleksejs Dimitrovs & Vadim Poleshchuk, *Kontinuitet kak osnova gosudarstvennosti i ètnopolitiki v Latvii i Èstonii*, *in* ÈTNOPOLITIKA STRAN BALTII (Vadim Poleshchuk & Valery Stepanov, eds., 2013) (Rus.).

3. *See generally* VLADIMIRS BUZAJEVS ET AL., LATVIAN HUMAN RIGHTS COMM., CITIZENS OF A NON-EXISTENT STATE 22–23 (2d ed. 2011) (raising concerns non-citizens and stateless persons in Latvia have become tantamount to second-class citizens who are deprived of the right to be naturalized).

economic or political) to Latvia – should not be dismissed outright.[4] If there is a viable possibility to improve the legal situation of a vulnerable group, such a possibility should be discussed in the most serious terms. This is even more so in the current international context, marked by the clear attempts of the Russian Federation to use the Russian-speaking minorities in the 'near-abroad' as a vehicle of destabilization of the neighbouring countries.[5] Such attempts have intensified with the illegal annexation of the Crimean peninsula,[6] which has strained EU-Russia relations.[7] The intention of this paper is to

4. This idea made the rounds ten years ago, but it did not receive serious elaboration or discussion in Latvian society. *See* Ineta Ziemele & Kristine Krūma, *Eiropas Savienības pilsonība un Latvijas nepilsoņi* [*Citizenship of the Union and Latvian Non-Citizens*], 33 JURISTA VĀRDS 291 (2003) (Lat.) (discussing the importance of EU citizenship for Latvian non-citizens, and emphasizing the public interest in a continued integration process in order to facilitate the consolidation of society).

5. *See generally,* Roman Petrov, *The Principle of Good Neighbourly Relations in the European Neighbourhood Policy*, *in* GOOD NEIGHBOURLINESS IN THE EUROPEAN LEGAL CONTEXT (Dimitry Kochenov & Elena Basheska eds., 2015) (for the general context); Nariné Ghazaryan, *'Good Neighbourliness' and Conflict Resolution in Nagorno-Karabakh: A Rhetoric or Part of the Legal Method of the European Neighbourhood Policy?*, *in* GOOD NEIGHBOURLINESS IN THE EUROPEAN LEGAL CONTEXT (Dimitry Kochenov & Elena Basheska eds., 2015); Øyvind Jæger, *Securitizing Russia: Discursive Practices of the Baltic States*, 7 J. PEACE & CONFLICT STUD. 17, 26 (2000) ("Russia's minority linkage was persistently resisted by Estonia and Latvia, but the Russian stance, together with out of context official statements from Russian politicians to the effect that Russia's national interest would be served by actively coming to the rescue of Russians in the "near abroad" caused apprehension to the Balts and fueled [sic] the essentialist notion embedding political loyalty in ethnicity." (citations omitted)).

6. *See generally* Christian Walter, *Postscript: Self-Determination, Secession, and the Crimean Crisis 2014*, *in* SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW 293, 293–94 (Christian Walter, Antje von Ungern-Sternberg & Kavus Abushov eds., 2014) (discussing the legal side of Russia's annexation of Crimea, which is a violation of international law, presented by Russia in terms of self-determination and protection of civilians); Antonello Tancredi, *La Crisi in Crimea*, 8 DIRITTI UMANI E DIRITTO INTERNAZIONALE 480 (2014) (analyzing the relationship between referendum and self-determination); Enrico Milano, *The Non-Recognition of Russia's Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question*, 1 QUESTIONS INT'L L. 35, 35 (2014) (examining the non-recognition practice with regard to Crimea).

7. European Parliament, Comm. on Foreign Affairs, *Report on the State of EU-Russia Relations*, at C, A8-0162/2015 (May 13, 2015), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-551.764+04+DOC+PDF+V0//EN&language=EN; Paul Kalinichenko, 'Some Legal Issues of the EU-Russia Relations in the Post-Crimea Era: From Good Neighbourliness to Crisis and Back?', *in* GOOD NEIGHBOURLINESS IN THE EUROPEAN LEGAL CONTEXT (Dimitry Kochenov & Elena Basheska eds., 2015).

discuss seriously the viable legal possibilities for Latvian non-citizens and to put on the table a concrete proposal for the Latvian authorities. A draft Declaration for the Latvian government to append to the EU Treaties in order to act on this proposal is included in the Annex.

In the short- to medium-term future, any political change leading to the full embracing of minorities is difficult to imagine in a divided society like Latvia's.[8] The starting assumption of this paper is thus: the large number of Russian-speaking Latvians without Latvian citizenship will not disappear. Consequently, the problem of the societal split between "citizens" and "non-citizens" should be solved by looking in all directions for possible tools. Particularly, in order to ensure that the "non-citizens" are not utilized by Russia to destabilize the situation in Europe even further. The paper demonstrates that EU citizenship can help this marginalized group of "non-citizens" by providing a viable (even if only partial) solution to the current problems. Such a solution is in everybody's interest.

The starting assumption underlying this article is chiefly based on four interrelated factors. Firstly, at more than 250,000 (in a country of 2,000,000), the number of persons holding "non-citizen" status is quite high and has remained so over the years.[9]

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8. James Hughes, 'Exit' in Deeply Divided Societies: Regimes of Discrimination in Estonia and Latvia and the Potential for Russophone Migration, 43 J. COMMON MKT. STUD. 739, 759 (2005); HOW INTEGRATED IS LATVIAN SOCIETY? AN AUDIT OF ACHIEVEMENTS, FAILURES AND CHALLENGES (Nils Muižnieks ed., 2010); Priit Järve, *Sovetskoje nasledije i sovremennaja ètnopolitika stran Baltii*, *in* ÈTNOPOLITIKA STRAN BALTII (Vadim Poleshchuk & Valery Stepanov, eds., 2013) (Rus.).

9. As of January 1, 2015, the population of Latvia was 2,160,125. Of this, 1,813,466 (84%) are citizens; 262,622 (12.1%) are non-citizens; 84,209 (3.9%) are citizens of foreign states, stateless or refugees. There are almost no non-citizens among ethnic Latvians; conversely, among 868,211 persons belonging to minorities, 261,993 (or 30.2%) are non-citizens. *See* OFFICE OF CITIZENSHIP AND MIGRATION AFFAIRS, LATVIJAS IEDZIVOTAJU SADALIJUMS PEC DZIMŠANAS GADA UN VALSTISKAS PIEDERIBAS [LATVIAN POPULATION BY YEAR OF BIRTH AND NATIONALITY] (2015) (showing Latvian population at the beginning of 2015), http://www.pmlp.gov.lv/lv/assets/documents/statistika/01.01.2015/ISVG_Latvija_pec_DZGada_VPD.pdf; OFFICE OF CITIZENSHIP AND MIGRATION AFFAIRS, LATVIJAS IEDZIVOTAJU SADALIJUMS PEC VALSTISKAS PIEDERIBAS [LATVIAN POPULATION BY NATIONALITY] (2015) [hereinafter CITIZENSHIP OFFICE] (showing citizens and non-citizens in Latvian population at the beginning of 2015), http://www.pmlp.gov.lv/lv/assets/documents/statistika/01.01.2015/ISVP_Latvija_pec_VPD.pdf; OFFICE OF CITIZENSHIP AND MIGRATION AFFAIRS, LATVIJAS IEDZIVOTAJU SADALIJUMS PEC NACIONALA SASTAVA UN VALSTISKAS PIEDERIBAS [LATVIAN POPULATION BY NATIONAL

Secondly, their naturalisation rates are low,[10] ensuring, alongside the inheritability of the non-citizenship status,[11] that the group will not disappear within the body of Latvian citizens in the immediate future: the status is "no longer treated as temporary."[12] Thirdly, discrimination against this group is widespread, causing concerns, *inter alia*, in the UN Human Rights Committee.[13] Fourthly, because non-citizens cannot

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COMPOSITION AND NATIONALITY] (2015) (showing Latvian population by national composition at the beginning of 2015), http://www.pmlp.gov.lv/lv/assets/documents /statistika/01.01.2015/ISVN_Latvija_pec_TTB_VPD.pdf.

10. It was expected that the naturalisation process would solve the issue of non-citizens in Latvia. Naturalisation began on 1 February 1995. *Citizenship in Latvia*, MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF LAT. (2015), http://latviaspb.ru/en/policy/4641/4642/4651/. As of 1 January 2015, 142,961 naturalisation applications had been received, 143,061 people (including the children of the naturalised) were granted citizenship. OFFICE OF CITIZENSHIP AND MIGRATION AFFAIRS, INFORMĀCIJA PAR NATURALIZĀCIJAS GAITU LĪDZ 2015.GADA 31.JANVĀRIM [INFORMATION ABOUT THE PACE OF NATURALIZATION BEFORE JANUARY 31, 2015] (2015) (Lat.), http://www.pmlp.gov.lv/en/home/statistics/naturalization.html. Between 5 October 1995 and 1 January 2015, the number of non-citizens fell from 731,078 to 262,622. *See* KRISTĪNE KRŪMA, IVARS INDĀNS & LAURA MEIJERE, ENACTING EU CITIZENSHIP IN LATVIA: THE CASE OF NON-CITIZENS 14 (2008), http://www.enacting-citizenship.eu /index.php/global/download/deliverables/WP8D1b.pdf/ (showing the number of non-citizens residing in Latvia in 1995); CITIZENSHIP OFFICE, *supra* note 9 (showing the number of non-citizens residing in Latvia as of 1 January 2015). Thus the naturalisation process reduced the number of non-citizens by only 30% in ten years, even if we presume that all those naturalized had been non-citizens (the remaining decrease could be explained by emigration, negative population growth and taking foreign citizenship, mainly Russian). The low rates of naturalisation have been criticized by international bodies. *See, e.g.*, Human Rights Comm., Concluding Observations on the Third Periodic Report of Latvia, ¶ 7, U.N. Doc. CCPR/C/LVA/CO/3 (Apr. 11, 2014) (expressing concern about the status of non-citizen residents); Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Latvia, ¶ 13, U.N. Doc. CERD/C/63/CO/7 (Dec. 10, 2003) (expressing concern about the limited results of the State party's measures taken to increase the rate of naturalization of non-citizens).

11. *See* Par to bijušās PSRS pilsoņu statusu, kuriem nav Latvijas vai citas valsts pilsonības [Law on the Status of Former U.S.S.R. Citizens Who Do Not Have the Citizenship of Latvia or That of Any Other State] art. 8(2) (63 Latvijas Vēstnesis 346) (stating the law is also applicable to children of non-citizens).

12. Kristine Krūma, *Country Report: Latvia*, *in* EUDO CITIZENSHIP OBSERVATORY 9, 18 (Eur. Univ. Inst. 2013) [hereinafter *Country Report: Latvia*].

13. Human Rights Comm., *Concluding Observations of the UN Human Rights Committee: Latvia*, Seventy-Ninth Sess., ¶ 18, U.N. Doc. CCPR/CO/79/LVA (Dec. 1, 2003) [hereinafter Human Rights Comm.]. The Committee expressed the following concern:

participate in elections, they lack the political power to effectuate change within the democratic society in Latvia[14], which demonstrates clearly decipherable ethnically-biased traits.[15]

The argument proceeds as follows. The status of a "non-citizen of Latvia," although not a nationality *sensu stricto*, does not amount to statelessness either.[16] Under Latvian law, it implies mutual obligations between the "non-citizens" on the one hand and the Republic of Latvia on the other, signifying a durable legal bond between the holders of this status and the Latvian state.[17] Under EU law – just as under international

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> [T]he Committee is concerned about the large proportion of non-citizens in the State party, who by law are treated neither as foreigners nor as stateless persons but as distinct category of persons with long-lasting and effective ties to Latvia, in many respects comparable to citizens but in other respects without the rights that come with full citizenship. The Committee expresses its concern over the perpetuation of a situation of exclusion, resulting in lack of effective enjoyment of many Covenant rights by the non-citizen segment of the population, including political rights, the possibility to occupy certain State and public positions, the possibility to exercise certain professions in the private sector, restrictions in the area of ownership of agricultural land, as well as social benefits. *Id.*

14. Hughes, *supra* note 8, at 745 (2005); *see* LATVIJAS REPUBLIKAS SATVERSME [LV] Feb. 15, 1922, arts. 8, 101 (specifying that only citizens of Latvia may take part in elections).

15. *See* Hughes, *supra* note 8, at 745 (discussing restrictions on the rights of non-citizens); Svetlana Diatchkova, *Ethnic Democracy in Latvia*, *in* THE FATE OF ETHNIC DEMOCRACY IN POST-COMMUNIST EUROPE (Sammy Smooha & Priit Järve eds., 2005); *see also* Sammy Smooha, *Types of Democracy and Modes of Conflict Management in Ethnically Divided Societies*, 8 NATIONS & NATIONALISM 423, 425-26 (2002) (describing the development of "ethnic democracy," in Eastern European countries like Latvia, a deficient form of democracy that lacks civic equality and guarantees preferred status to the majority based on ethnicity); Richard C. Visek, *Creating the Ethnic Electorate Through Legal Restorationism: Citizenship Rights in Estonia*, 38 HARV. INT'L L.J. 315, 357 (1997) (discussing allegations that Estonia's approach to citizenship is part of a policy aimed at forcing ethnic Russians to emigrate to Russia); Alfred Stepan, *Kogda logika demokratii protivorechit logike natzional'nogo gosudarstva*, 3 ROSSIJSKIJ BIULLETEN' PO PRAVAM CHELOVEKA 100 (1995) (Rus.).

16. *See, e.g.*, Latvijas Republikas Satversmes tiesa [Constitutional Court of the Republic of Latvia] Mar. 7, 2005, Case No. 2004-15-0106, ¶ 15, http://www.satv.tiesa.gov.lv/upload/2004-15-0106E.rtf (explaining that non-citizens do not fall neatly into the categories of stateless persons or aliens, but instead non-citizens are category of citizens that hasn't existed in international public law until now).

17. Par to bijušās PSRS pilsoņu statusu, kuriem nav Latvijas vai citas valsts pilsonības [Law on the Status of Former U.S.S.R. Citizens Who Do Not Have the

law[18] – it is up to Latvia to decide who its nationals are.[19] This includes such determinations for the purposes of EU law as who among the Latvian population will acquire EU citizenship[20] – an autonomous legal status that depends on the nationality of a Member State.[21] A Member State nationality for the purposes of

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Citizenship of Latvia or That of Any Other State] art. 2 (63 Latvijas Vēstnesis 346) (mutual obligations); Latvijas Republikas Satversmes tiesa [Constitutional Court of Latvia] Mar. 7, 2005, Case No. 2004-15-0106 ¶ 17, http://www.satv.tiesa.gov.lv /upload/2004-15-0106E.rtf (durable legal bond); *see* discussion *infra* Part I.

18. Convention on Certain Questions Relating to the Conflict of Nationality Laws, arts. 1-2, Apr. 12, 1930, 179 L.N.T.S. 89 [hereinafter Convention on Nationality Laws]. The Convention laid out the principle that "[i]t is for each State to determine under its own law who are its nationals." *Id.* art. 1. In addition, the Convention deferred to State law to resolve "[a]ny question as to whether a person possesses the nationality of a particular State." *Id.* art. 2.

19. *See* Case C-135/08, Rottmann v. Bayern, 2010 E.C.R. I-1449, Judgment, ¶ 59 ("It is to be borne in mind here that, according to established case-law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality." (citations omitted)); Case C-192/99, The Queen v. Sec'y of State for the Home Dep't *ex parte* Kaur, 2001 E.C.R. I-1237, Judgment, ¶¶ 27-28 (holding that it is for each member state to decide the conditions for the acquisition and loss of nationality); Case C-369/90, Micheletti v. Delegación del Gobierno en Cantabria, 1992 E.C.R. I-4239, Judgment, ¶ 15 (holding that a member state may not restrict the effects of another member state's grant of nationality regarding the exercise of a fundamental freedom provided for in the EEC Treaty); *see also* Stephen Hall, *Determining the Scope* Ratione Personae *of European Citizenship: Customary International Law Prevails for Now*, 28 LEGAL ISSUES OF ECON. INTEGRATION 355 (2001) (analyzing who is to be considered as possessing nationality of a member state for the purposes of Community law).

20. *See generally* Jo Shaw, *Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism*, *in* THE EVOLUTION OF EU LAW 575 (Paul Craig & Gráinne de Búrca eds., 2d ed. 2011) (exploring the different ways in which citizenship has played a role in polity formation beyond the state, specifically in relation to the EU as an emergent non-state polity); Ferdinand Wollenschläger, *A New Fundamental Freedom Beyond Market Integration: Union Citizenship and Its Dynamics for Shifting the Economic Paradigm of European Integration*, 17 EUR. L.J. 1 (2011) (discussing how the EU has replaced the functional market citizen with an autonomous Union citizen); Dimitry Kochenov, *The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?*, 62 INT'L & COMP. L.Q. 97 (2013) (scrutinizing ten years of academic debate on EU citizenship law by commenting on nine fundamental disagreements among scholars as starting points).

21. *Ex parte* Kaur, 2001 E.C.R. I-1252, Judgment, ¶¶ 4, 19-24. *See also* Dimitry Kochenov, Ius Tractum *of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights*, 15 COLUM. J. EUR. L. 169, 186–90 (2009) [hereinafter Ius Tractum] (analyzing the fact that not all the nationals of the Member States are European citizens); *Rottmann*, 2010 E.C.R. I-1252, Opinion of Advocate General Maduro, ¶ 23 (noting that EU Citizenship is a separate legal status from the

EU law can have a different meaning and scope compared with "citizenship" in national law.[22] A simple declaration clarifying who Latvian nationals are for the purposes of EU law, if issued by the Latvian government, would suffice with immediate effect, to extend EU citizenship to all those in possession of the "non-citizen of Latvia" status.[23] EU citizenship, with its attached rights of work, residence and equal treatment across the territory of the EU, represents a considerable bundle of rights of potential benefit for the "non-citizens of Latvia."[24] The extension of EU citizenship to the "non-citizens of Latvia" is particularly attractive, as it will have virtually no economic or political cost for the Latvian Republic: it is associated with rights in *other* Member States, like France, Croatia, and the United Kingdom,

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nationality of a State); Dimitry Kochenov & Richard Plender, *EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, 37 EUR. L. REV. 369 (2012) (analyzing how and whether the Maastricht promise of EU citizenship has been implemented by the Court of Justice of the European Union).

22. *See, e.g.*, BRIAN BERCUSSON, EUROPEAN LABOUR LAW 263 (2d ed. 2009) (explaining that the EU confers rights on Member State nationals that go beyond what they would obtain under Member State law, including wider social rights, and that those rights are conferred on individuals with no regard to Member State nationality); *See* Richard Plender, *An Incipient Form of European Citizenship*, *in* EUROPEAN LAW AND THE INDIVIDUAL 39 (Francis G. Jacobs ed., 1976) (for criticism) [hereinafter *An Incipient Form of European Citizenship*].

23. *Cf.* Treaty of Accession to the European Communities of the Kingdom of Denmark, Ireland, and the United Kingdom of Great Britain and Northern Ireland, 1st U.K. Declaration, Jan. 22, 1972, 1972 O.J. (L 73) 196 (giving a definition of "United Kingdom national" for the purposes of the Community Treaties at the time of signature of the Treaty of Accession). It was later updated upon the entry into force of the 1981 British Nationality Act. *See, e.g.*, A.C. Evans, *Nationality Law and the Free Movement of Persons in the EEC: With Special Reference to the British Nationality Act 1981*, 2 Y.B. EUR. L. 173, 173 (analyzing the problems that may result from the British Nationality Act failing to take account of the consequences of freedom of movement for nationality law); K.R. Simmonds, *The British Nationality Act 1981 and the Definition of the Term "National" for Community Purposes*, 21 COMMON MKT. L. REV. 675 (1984) (outlining the effects of the 1981 British Nationality Act on the ad hoc definition of "United Kingdom nationals" that is necessary for Community purposes); Ius Tractum, *supra* note 23, at 189–90 (analyzing the U.K. declarations' role in outlining the scope of European citizenship). For more information on the legal nature and legal effects of declarations in EU law, see generally A.G. Toth, *The Legal Status of the Declarations Annexed to the Single European Act*, 23 COMMON MKT. L. REV. 803 (1986).

24. *See, e.g.*, Wollenschläger, *supra* note 20, at 31–33 (analyzing the emergence of a European citizenship); Ius Tractum, *supra* note 23, at 193–209 (providing an overview of EU citizenship rights); discussion *infra* Part II.

not at home.[25] Equally, it will not create burdens on the other Member States[26] due to the relatively small number of "non-citizens" involved compared to the half a billion EU citizens and given that all of them cannot possibly leave Latvia to benefit from these newly-acquired rights.[27] It thus makes sense to discuss the conferral of EU citizenship in the interests of the "non-citizens of Latvia" in all seriousness.

II. THE STATUS OF A "NON-CITIZEN" OF LATVIA

For historical reasons, the weight of guilt by association for the Soviet aggression against the tiny Latvian Republic has been born by the ethnic minorities whose ancestors settled in its territory after the Second World War. For such minorities, a special legal status has been created by the Latvian state: they are the "non-citizens" of Latvia, unless they naturalize.[28] This status is now held by more than 250,000 people belonging to ethnic minorities – a large share of the population of a tiny state – and this situation is self-perpetuating: "non-citizens" are born every day.[29] Moreover, Latvian law in some cases allows foreign national parents to register their child as a "non-citizen."[30]

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25. Alina Tryfonidou, *In Search of the Aim of the EC Free Movement of Persons Provisions*, 46 COMMON MKT. L. REV. 1591, 1592–95 (2009); Niamh Nic Shuibhne, *The Resilience of EU Market Citizenship*, 47 COMMON MKT. L. REV. 1597, 1614 (2010) [hereinafter *The Resilience of EU Market Citizenship*].

26. Gerard-René de Groot argued that the grant of Member State nationality to considerable groups of third-country nationals without informing the other Member States could violate EU law. *See* Gerard-René de Groot, *Towards a European Nationality Law*, 8.3 ELECTRONIC J. COMP. L. 3, at 1, 12–13 (Oct. 2004) [hereinafter *Towards a European Nationality Law*] (discussing prior grants of nationality to parts of the population of non-EU member states, without protests from other member states). *See also* Evans, *supra* note 23, at 177–78 ("The connection which an individual must have a Member State in order to qualify as a national of that State for the purposes of Community law may be a matter to be determined by Community Law itself.").

27. *See* discussion *infra* Part III.

28. *See* Par to bijušās PSRS pilsoņu statusu, kuriem nav Latvijas vai citas valsts pilsonības [Law on the Status of Former USSR Citizens Who Do Not Have the Citizenship of Latvia or of Any Other State], LATVIJAS VĒSTNESIS, 63(346) § 1 (1995) (outlining who is considered to be a "non-citizen").

29. *Basic Facts About Citizenship and Language Policy of Latvia and Some Sensitive History-Related Issues*, MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF LAT. (Mar. 12, 2015, 5:38 PM), http://www.mfa.gov.lv/en/policy/society-integration/citizenship-in-latvia/citizenship-policy-in-latvia/basic-facts-about-citizenship-and-language-policy-of-latvia-and-some-sensitive-history-related-issues. In accordance with

Legally speaking, "non-citizenship of Latvia" verges on a nationality without citizenship or political participation.[31] To the bearers it brings a large array of rights traditionally associated with citizenship, including the unconditional right to enter Latvian territory, to remain, and to build a life there: work, non-discrimination and permanent residence are all included in the package.[32] It definitely does not imply "classical" statelessness in the sense of international law. The Latvian

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Article 8(2) of the Law on the Status of Former USSR Citizens Who Do Not Have the Citizenship of Latvia or of Any Other State, a child also becomes a non-citizen if both of his/her parents are non-citizens, or one is non-citizen and the other one is stateless. Law on the Status of Former USSR Citizens Who Do Not Have the Citizenship of Latvia or of Any Other State, § 8(2). This situation has been criticized by the U.N. Committee on the Rights of the Child. *See Concluding Observations of the Committee on the Rights of the Child: Latvia*, U.N. Doc. CRC/C/LVA/CO/2 ¶¶ 26-27 (2006) (expressing concern about the number of "non-citizen" and stateless children despite some improvements in the law). In accordance with article 3(1) of the Latvian Citizenship Law, however, either parent may register such a child as a citizen, if some administrative formalities are fulfilled. Pilsonības likums [Latvian Citizenship Law], LATVIJAS VĒSTNESIS 93(224) ch. 1, art. 3(1) (1994). This is problematic from the point of view of international law. *See also* Gérard-René de Groot, *Strengthening the Position of Children: Council of Europe's Recommendation 2009/13*, *in* CONCEPTS OF NATIONALITY IN A GLOBALISED WORLD (Council of Europe 2011).

30. If one of the parents is a non-citizen and the other one is a foreign national, the parents are entitled to choose non-citizen status for the child, instead of foreign nationality (an administrative practice which imposed only foreign nationality for such cases was recognized as illegal by the Senate of the Supreme Court on Apr. 13, 2005, in Case No. SKA-136). *See also* Krūma, *Country Report: Latvia*, *supra* note 12, at 19–20 (providing an overview of case law regarding who may become a "non-citizen" and how that status may be revoked).

31. *See* COSTICA DUMBRAVA, NATIONALITY, CITIZENSHIP, AND ETHNO-CULTURAL BELONGING: PREFERENTIAL MEMBERSHIP POLICIES IN EUROPE 2 (2014) (discussing the acquisition and loss of citizenship). And it is thus different from, for instance, American Samoa in the U.S. context, as Samoans, although non-citizen nationals of the United States enjoy political rights in a number of contexts. *See* Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71, 84-86 (2013) (providing a brief overview of the citizenship rights of American Samoans).

32. Krūma, *Country Report: Latvia*, *supra* note 12, at 8. *See also* LATVIJAS REPUBLIKAS SATVERSME [LV] Feb. 15, 1922, arts. 91, 97, 106-07 (providing that everyone in Latvia has a right to be free from discrimination under the law, the right to move, choose where to live, and to work and receive compensation). For a multi-faceted discussion of citizenship and its effects, see Christian Joppke, *Transformation of Citizenship: Status, Rights, Identity*, *in* CITIZENSHIP RIGHTS 237, 242 (Jo Shaw & Igor Štiks, eds. 2013) (discussing the extension of social rights to non-citizens of Member States).

Constitutional Court clarified that the status of "non-citizens" is a "new, up to that time unknown category of persons"[33] but was careful not to describe them in terms of Latvian nationality, despite the durable connection with the Latvian government and many of the associated rights and obligations of nationals. This venture into the unknown has been criticized by the UN Human Rights Committee, which underlined the problematic nature of perpetuating this kind of half-way solution.[34] The very "continued existence" of the status of "non-citizens" caused concern for the UN Committee Against Torture among other international bodies.[35]

Crucially, while a number of differences in Latvian law persist in the treatment of citizens and "non-citizens," two particularly important distinguishing features of the latter status can be outlined. The first of the two is full exclusion from elections.[36] To vote, naturalisation is required.[37] The second is full exclusion from the enjoyment of EU citizenship rights in the territory of the EU, which Latvia joined more than ten years ago on May 1, 2004. This paper is concerned with EU law as a

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33. *See* Latvijas Republikas Satversmes tiesa [Constitutional Court of Latvia] Mar. 7, 2005, Case No. 2004-15-0106 ¶ 15, http://www.satv.tiesa.gov.lv/upload/2004-15-0106E.rtf (stating that "non-citizens" were a "new, up to that time unknown category of persons" but reiterating they are not "stateless persons"). Translation by author, original text as follows: "Radās jauna, līdz šim starptautiskajās tiesībās nezināma personu kategorija."

34. *See* Human Rights Comm. *supra* note 13, ¶ 18 ("[T]he Committee is concerned about the large proportion of non-citizens in [Latvia], who by law are treated neither as foreigners nor as stateless persons but as distinct category of persons with long-lasting and effective ties to Latvia. . .").

35. *Concluding Observations of the Committee against Torture: Latvia*, U.N. Doc. CAT/C/LVA/CO/3-5, ¶ 16 (Dec. 23, 2013) (expressing concern over the number of "non-citizens" despite changes in the naturalization law); *see, e.g.*, Comm'r for Human Rights, *Memorandum to the Latvian Government / Assessment of the Progress Made in Implementing the 2003 Recommendations of the Council of Europe Commissioner for Human Rights*, CommDH (2007) 9, ¶¶ 29-39 (May 16, 2007).

36. *See* LATVIJAS REPUBLIKAS SATVERSME [LV] Feb. 15, 1922, arts. 8, 101 (providing that only citizens may vote, hold elected office, and working in civil service jobs).

37. *See* Latvian Citizenship Law, 93(224) (1994) (providing that naturalization is the "granting of citizenship" and thus the right to vote). Similarities with Samoan non-citizen nationals of the US are quite straightforward here. *See* Morrison, *supra* note 33, at 85 (explaining that American Samoans may be denied the right to vote in some states, unless they are naturalized and become full citizens).

possible way of improving the situation of these "non-citizens," thus dealing merely with one of the two core limitations of this legal status outlined above.

The legal history of the status of "non-citizens of Latvia" is closely intertwined with the recent past of the Republic itself. On October 15, 1991 the Latvian Supreme Council (interim Parliament) passed the Decision "On the Renewal of the Rights of the Citizens of the Republic of Latvia and on the Fundamental Principles of Naturalisation," which was based on the concept of continuity of the citizenship of the Latvian Republic that existed before the Soviet occupation.[38] The doctrine of continuity holds that only those persons who had been citizens of independent Latvia in 1940 and their descendants had their citizenship restored.[39] This approach was confirmed by the Citizenship Law of 1994,[40] which reflects the continuity of Latvian citizenship between those who were citizens in the Latvian Republic, which gained independence after World War I, and those in the current Latvian state, which regained independence after the dissolution of the USSR.

The legal status of people who were not recognized as citizens of Latvia remained unclear until 1995 when the Law on the "Status of Former USSR Citizens Who Do Not Have the Citizenship of Latvia or of Any Other State" was adopted. The law introduced a special legal status of "non-citizens," granted to those who enjoyed registered domicile in Latvia on July 1, 1992 and who did not have citizenship of Latvia or any other country (except for some retired USSR army officers and members of their families).[41]

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38. Latvian Supreme Council, Par Latvijas Republikas pilsoņu tiesību atjaunošanu un naturalizācijas pamatnoteikumiem**,** atvijas Republikas Augstākās Padomes un Valdības Ziņotājs [On the Renewal of the Rights of the Citizens of the Republic of Latvia and on the Fundamental Principles of Naturalisation] (1991).

39. *See* Latvijas Republikas Satversmes tiesa [Constitutional Court of Latvia] Mar. 7, 2005, Case No. 2004-15-0106 ¶ 15, http://www.satv.tiesa.gov.lv/upload/2004-15-0106E.rtf (explaining that Latvian Supreme Council merely reinstated citizenship for those who had it before the occupation and had not granted it).

40. Pilsonības likums [Latvian Citizenship Law], LATVIJAS VĒSTNESIS, 93(224) (1994).

41. Law on the Status of Former USSR Citizens Who Do Not Have the Citizenship of Latvia or of Any Other State, LATVIJAS VĒSTNESIS, 63(346) § 1(1), (3) (1995) (explaining who will be considered "non-citizens").

Latvia has consistently insisted that "non-citizens" are *not* stateless persons – a fact tacitly accepted by some organs of the EU[42] but not always by the UN and other international organizations.[43] According to the helpful clarification by the Latvian Constitutional Court, "non-citizens" "can be regarded neither as the citizens, nor as aliens and stateless persons."[44] Latvian and international courts clarified that this status amounts to a permanent legal bond between the Latvian Republic and its "non-citizens" and, thus, precludes statelessness.[45] The far-reaching nature of "non-citizenship" has been underlined in the context of situations where this status

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42. *See, e.g.*, FUNDAMENTAL RIGHTS AGENCY OF THE EUROPEAN UNION, FUNDAMENTAL RIGHTS: CHALLENGES AND ACHIEVEMENTS IN 2012 § 1.2 (F.R.A. 2013) (referring to "non-citizens of Latvia" as "recognized non-citizens," and distinguishing them from stateless persons).

43. Nils Muižnieks, *Governments should act in the best interest of stateless children*, COMM'R'S HUMAN RIGHTS COMMENTS (Jan. 15, 2013), http://www.coe.int/en/web/commissioner/-/governments-should-act-in-the-best-interest-of-stateless-childr-1 (for an example of another international organization not accepting the idea that non-citizens are not stateless persons). Latvia is considered to be in breach of its commitments under the 1961 Convention on the Reduction of Statelessness. *See, e.g.*, Doudou Diène (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance), *Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance, Follow-Up To and Implementation of the Durban Declaration and Programme of Action*, U.N. Doc. A/HRC/7/19/Add.3, annex ¶ 88 (Mar. 5, 2008) (stating that Latvia should take action to honor its commitments under the 1961 Convention on the Reduction of Statelessness). Some U.N. bodies make a clear distinction between "non-citizens" and stateless persons in Latvia, however. *See, e.g.*, U.N. High Comm'r for Refugees, *Submission by the UN High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report: Universal Periodic Review: Latvia*, at 5–6 (2010), http://www.refworld.org/publisher,UNHCR, ,LVA,4cd8f3992,0.html, (stating that a total of 3,221 people acquired Latvian citizenship of which 2 were "stateless persons" and 3,100 were "non-citizens," and explaining the differences between the rights of "stateless persons" and "non-citizens").

44. Latvijas Republikas Satversmes tiesa [Constitutional Court of Latvia] Mar. 7, 2005, Case No. 2004-15-0106, ¶ 15, http://www.satv.tiesa.gov.lv/upload/2004-15-0106E.rtf (stating that "non-citizens" are not "stateless persons" or aliens because they have a "specific legal status").

45. *Id.*; *see also* Department of Administrative cases, the Senate of the Supreme Court of Latvia, Case No. SKA – 89 (C27261801), ¶ 9 (2004) (explaining that "non-citizens" have a stronger link with Latvia than aliens or "stateless persons"). *See Country Report: Latvia*, *supra* note 12, at 20 (explaining that the connection of "non-citizens" with Latvia is much closer than "stateless persons" or foreign nationals, and withdrawal of "non-citizens" status infringes on individual rights).

could be revoked under the law should permanent residence be acquired abroad, thus *de jure* and also *de facto* producing statelessness.[46] Such revocations were deemed unconstitutional by the Latvian Constitutional Court, given the "mutual rights and obligations" between the "non-citizens" and the Latvian Republic.[47] This was also reaffirmed by the European Court of Human Rights (ECtHR).[48]

The rights enjoyed by non-citizens suggest that we are dealing with a classical nationality, only with no voting rights: a fact criticized by the UN bodies.[49] "Non-citizens" have rights akin to citizens. These include, for example, the right to reside in Latvia without visas or residence permits,[50] the right to work without a work permit,[51] *etc*. Some rights and opportunities are reserved, however, only for "full" citizens. This includes political rights (such as the right to participate in elections[52] and the right to establish political parties),[53] the right to hold certain government positions, and social and economic rights (land

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46. Law on the Status of Former USSR Citizens Who Do Not Have the Citizenship of Latvia or of Any Other State, § 1(3)5, LATVIJAS VĒSTNESIS, 63(346) (1995).

47. Latvijas Republikas Satversmes tiesa [Constitutional Court of Latvia] Mar. 7, 2005, Case No. 2004-15-0106 ¶ 17, http://www.satv.tiesa.gov.lv/upload/2004-15-0106E.rtf.

48. *See* Slivenko v. Latvia, App. No. 48321/99, Eur. Ct. H.R. ¶¶ 114, 125 (2009) (finding that Latvia's denial of applicants' registrations as "non-citizens" because they had moved to and acquired citizenship in Russia constituted a violation of their right to a private and family life, effectively making them de facto "non-citizens").

49. *See, e.g.*, Human Rights Comm. *supra* note 13, ¶ 18 (expressing concern over, *inter alia*, the lack of political rights for "non-citizens"); Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Latvia*, ¶ 12 U.N. Doc. CERD/C/63/CO/7 (Dec. 10, 2003) ("[T]he Committee strongly recommends that the State party consider facilitating the integration process by making it possible for all non-citizens who are long-time permanent residents to participate in local elections.").

50. *See* Imigrācijas likums [Immigration Law], §§ 1, 3-4, LATVIJAS VĒSTNESIS, 169(2744) (2002) (Lat.) (exempting "non-citizens" from the definition of a foreigner and thus from the law's work permit and visa requirements).

51. *Id.*

52. *See* LATVIJAS REPUBLIKAS SATVERSME [CONSTITUTION OF THE REPUBLIC OF LATVIA] Feb. 15, 1922, arts. 8, 101.

53. Politisko partiju likums [Law on Political Parties], § 12(1), LATVIJAS VĒSTNESIS, 107(3475) (2006) (Lat.).

property rights in some territories,[54] public and private sector careers in some professions,[55] pensions for work periods accrued during the Soviet period outside Latvia – or for working in Latvia for employers from different Soviet Republics[56] – if the period is not covered by an international agreement).[57] As of October 2011, there were as many as eighty differences between the rights of citizens and "non-citizens," mainly relating to careers in the public sector.[58] The vast majority of these differences persists to this day.

Such a discrepancy between those possessing the two statuses of legal attachment to the Latvian state – *i.e.* that of Latvian citizenship as well as that of "non-citizen of Latvia" – could not but give rise to questions concerning possible discrimination. In September 2008, the Latvian Ombudsman completed an investigation into the differences in rights between citizens and "non-citizens."[59] The Ombudsman found that some restrictions on non-citizens were not proportional, such as the ban on "non-citizens" from working as advocates or patent attorneys, from receiving the highest level of clearance for security work, or from being heads or members of the boards of the investigative agencies.[60] He also found a disproportionate

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54. *See, e.g.*, Likums par zemes privatizāciju lauku apvidos [Law on Land Privatization in Rural Areas], § 29(2), ZIŅOTĀJS, 32 (1992) (Lat.) (preventing "non-citizens" from owning land, among other places, in border zones, near water sources, and in certain mineral deposits).

55. *See, e.g.*, Valsts civildienesta likums [State Civil Service Law], § 7(1)(1), LATVIJAS VĒSTNESIS, 331/333 (2242/2244) (2000) (Lat.) (requiring citizenship for civil service employment).

56. Andrejeva v. Latvia, 2009-II Eur. Ct. H.R. 71, ¶¶ 87-88, http://www.echr.coe.int/Documents/Reports_Recueil_2009-II.pdf.

57. Likums par valsts pensijām [Transitional Provisions of the Law on State Pensions], § 3, LATVIJAS VĒSTNESIS, 182 (465) (1995) (Lat.).

58. *See* BUZAJEVS ET AL., *supra* note 3, at 29–33 (2011) (listing the differences between rights of citizens and "non-citizens").

59. LATVIJAS REPUBLIKAS TIESĪBSARGA, ATZINUMS PĀRBAUDES LIETĀ [OMBUDSMAN OF THE REPUBLIC OF LAT., OPINION OF THE TEST CASE] (Sept. 2008), http://www.tiesibsargs.lv/img/content/atzinums_par_pilsonu_un_nepilsonu_tiesibam_2008_09.pdf.

60. *Id.* at 9-13. The Ombudsmand found disproportional restrictions in such laws as, Latvijas Republikas Advokatūras likums [Latvian Republic Advocacy Law], § 14(1) ZIŅOTĀJS, 28 (1993) (working as advocates); Patentu likums [Patents Law], § 26(4)1, LATVIJAS VĒSTNESIS, 34(3610) (2007) (Lat.) (working as patent attorneys); Apsardzes darbības likums [Security Activities Law], § 6(1) LATVIJAS VĒSTNESIS, 83(3451) (2006)

restriction to the legal limitations on obtaining land property in the cities by "non-citizens."[61] The Ombudsman recommended verifying whether restrictions concerning those rights guaranteed for EU citizens holding nationalities other than Latvian but denied to non-citizens of Latvia are justified.[62] Such verification has never taken place in practice, however, because the new Ombudsman, elected in March 2011, declared that the principle of equality required a differential treatment towards persons in legally different statuses and that the difference in rights between citizens and "non-citizens" was not of a discriminatory nature, since a legal status of "non-citizen" is not comparable with that of citizen.[63]

Given that no substantive arguments in favor of this finding were listed, it can only be characterized as dangerously unsubstantiated. This is especially true given that none of the nationals of the twenty-seven other Member States of the EU can be discriminated against on the same grounds, as guaranteed by the general prohibition of discrimination on the basis of nationality in Article 18 of the Treaty on the Functioning of the European Union ("TFEU").[64] The same applies to long term resident third-country nationals moving from other Member States using their rights under the EU Long

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(Lat.) (jobs with the highest level of security clearance); Detektīvdarbības likums [Law of Detective Activity], § 4(1) LATVIJAS VĒSTNESIS, 110(2497) (2001) (Lat.) (abolishing exemptions providing "non-citizens" the right to work in security or to be investigatory agency heads on October 1, 2012).

61. OMBUDSMAN OF THE REPUBLIC OF LAT., *supra* note 59, at 20-22 (citing Likums par zemes reformas pabeigšanu pilsētās [Law on Completion of Land Reform in the Cities], § 3(1) LATVIJAS VĒSTNESIS, 333(1394) (1998) (Lat.)).

62. *Id*. at 29-30.

63. OMBUDSMAN OF THE REPUBLIC OF LAT., ON THE LEGAL STATUS OF NON-CITIZENS (2011), http://www.tiesibsargs.lv/img/content/tiesibsarga_viedoklis_par_nepilsonu_tiesisko_statusu.pdf.

64. Consolidated Version of the Treaty on the Functioning of the European Union art. 18, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]; GARETH DAVIES, NATIONALITY DISCRIMINATION IN THE EUROPEAN INTERNAL MARKET 188 (2003) (concluding that the purpose of Article 18 TFEU is to give non-economic actors the right to move and the right against discrimination); Silvia Gastaldi, *L'égalité de traitement au service de la citoyenneté européenne*, *in* L'HARMONISATION INTERNATIONALE DU DROIT 326, 342–44 (Christine Chappuis et al. eds., 2007).

Term Resident Third-Country Nationals Directive.[65] The logic of the Ombudsman thus implies that it is legitimate that a Frenchman or a Pole, who decided to move to Latvia, or a Russian holding EU long-term residence status under the relevant directive should be treated better than "non-citizens"[66] who enjoy a lasting legal bond with Latvia. Such problematic reasoning is, regrettably, not uncommon in the Baltic state in question.[67] Latvia lost a number of cases in Strasbourg over

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65. Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who Are Long-term Residents, arts. 14-23 O.J. (L 16) 44, 50-53. For an illuminating analysis, see Diego Acosta Arcarazo, *Civic Citizenship Reintroduced? The Long-Term Residence Directive as a Post-National Form of Membership*, 21 EUR. L.J. 200, 208 (2015). The Directive does not apply to "non-citizens" because of how it was transposed into Latvian law. In May 2006 the *Saeima* (Parliament) adopted the Law on the Status of a Long-term Residents of the European Community in the Republic of Latvia, which stipulates that Latvian non-citizens should be subject to several requirements, in particular that they must demonstrate Latvian language skills in order to obtain the status of an EU permanent resident. *See* Par Eiropas Kopienas pastāvīgā iedzīvotāja statusu Latvijas Republikā, §§ 3-4, 7-8 LATVIJAS VĒSTNESIS, 107(33475) (2006) (Lat.) (requiring a third-country national to be economically self-sufficient, to master the Latvian language, and to have continuously and legally resided in Latvia for the status of long-term resident). The President of Latvia refused to promulgate the law and criticized the *Saeima* for the law, arguing that non-citizens belong to a special category and, therefore, do not require the imposition of integration requirements upon them. KRISTINE KRŪMA, COUNTRY REPORT LATVIA 17 (2010),https://ec.europa.eu/migrant-integration/index.cfm?action=media.download&uuid=2A3362E8-C55D-69F4-CAB1D64CFEBA2E0E. Nevertheless, the parliamentary majority confirmed the adopted provision once again. *Id.* According to the Constitution, if the President refuses to promulgate a law and returns it to Parliament for reconsideration, Parliament has to vote on the disputed provisions again. LATVIJAS REPUBLIKAS SATVERSME [CONSTITUTION OF THE REPUBLIC OF LATVIA] Feb. 15, 1922, arts. 71, 75. If the previous vote is confirmed, the President is obliged to promulgate the law. *Id*. Thus, non-citizens are not automatically recognized as long-term residents of the EU. In 2010 a total of only 265 persons possessed such status in Latvia, 64 of whom were non-citizens. MINISTRY OF THE INTERIOR OF THE REPUBLIC OF LATVIA, OFFICE OF CITIZENSHIP AND MIGRATION AFFAIRS, PUBLIC REPORT 2010 27 (2011).

66. The Parliamentary Assembly of the Council of Europe has called for the "review [of] the existing differences in rights between citizens and non-citizens with a view of abolishing those that are not justified or strictly necessary, at least by providing non-citizens with the same rights as are enjoyed by nationals of other European Union Member States within Latvian territory." Eur. Parl. Ass., *Rights of National Minorities in Latvia*, 2006 Sess., Resolution 1527, http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=17491&lang=en.

67. Dimitry Kochenov, Vadim Poleshchuk & Aleksejs Dimitrovs, *Do Professional Linguistic Requirements Discriminate? A Legal Analysis: Estonia and Latvia in the Spotlight*, 10 EUR. Y.B. MINORITY ISSUES ¶ 43 (2013) (for analysis); Ryo Nakai, *The*

such unjustifiable distinctions and restrictions of rights.[68] The UN Human Rights Committee has been explicit in condemning the discriminatory practices entrenched in Latvian law and practice.[69]

Given that "non-citizens" are fully excluded from elections, the Constitutional Court's clarification that "[it] is not and cannot be regarded as a variety of Latvian citizenship"[70] is most logical, as political participation is usually regarded as going to the essence of what citizenship means and is.[71] Calling the apolitical status of "non-citizenship" a variety of citizenship would thus amount to disregarding the essential features implied by the latter.

The Latvian Constitutional Court's clarification that distinguished "non-citizenship" from what would be commonly characterized as a nationality is more interesting. The court

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Influence of Party Competition on Minority Politics: A Comparison of Latvia and Estonia, 13 J. ON ETHNOPOLITICS & MINORITY ISSUES EUR. 57, 57-59 (2014).

68. *See, e.g.*, Andrejeva v. Latvia, 2009-II Eur. Ct. H.R. 71, ¶¶ 81-92, http://www.echr.coe.int/Documents/Reports_Recueil_2009-II.pdf (holding that unjustifiable refusal to account for a "non-citizen's" employment with the Soviet Union for pension payments violates Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms). The relevant Latvian law has not been changed since and the Constitutional Court refused to apply *Andrejeva* to other similar cases. *See, e.g.*, Latvijas Republikas Satversmes tiesa [Constitutional Court of Latvia] Feb. 17, 2011, Case No. 2010-20-0106 ¶ 11, http://www.satv.tiesa.gov.lv/upload/2004-15-0106E.rtf (distinguishing pension payments based on employment within the Soviet Union, but without the territorial boundaries of Latvia, from employment within the territories of Latvia). As a consequence, another high profile case largely following *Andrejeva* is now pending before the ECtHR. *See* Savickis v. Latvia, App. No. 49270/11, Eur. Ct. H.R. (determining whether "non-citizens" in Latvia were denied retirement benefits based on nationality).

69. *See supra* note 13 and accompanying text (arguing that discriminatory nationalization requirements and restrictions on "non-citizens" improperly distinguishes "non-citizens" from citizens).

70. Latvijas Republikas Satversmes tiesa [Constitutional Court of Latvia] Mar. 7, 2005, Case No. 2004-15-0106 ¶ 17, http://www.satv.tiesa.gov.lv/upload/2004-15-0106E.rtf (stressing that "non-citizens" willfully refused to naturalize as restrictions to nationalization were eliminated in 1998).

71. *See, e.g.*, Linda Bosniak, *Citizenship Denationalised*, 7 IND. J. GLOBAL LEGAL STUD. 477 (2000) (arguing that citizenship is established, not presumed, based on conduct which is associated with the nation state such as political participation). *See also* Will Kymlicka & Norman Wayne, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352 (1994) (advocating that participation in civil society is among the first obligations of citizenship).

found that the decision as to "whether Latvian non-citizens can be regarded as nationals in the understanding of the international law is not only a juridical but mainly a political issue, which shall be reviewed within the framework of the democratic political process of the state."[72] However, given that, as has been demonstrated, the status already meets a classical understanding of nationality in international law–a lasting legal bond between a person and a state supported by mutual rights and obligations–the political deliberation that the Constitutional Court seems to have in mind could only concern the *name* rather than the *essence* of the status in question. The Court stands to be reminded that not only names but also essential features matter in judicial decision-making. Indeed, the essence of the status in question is what drives Latvian doctrinal legal thought and where a consensus has emerged, in the words of Krūma, that "non-citizens possess the same rights as citizens except for political rights and the right to hold certain positions."[73] Crucial in this context is that "the courts interpret the status [of "non-citizen" of Latvia] according to the same principles as the status of a citizen."[74]

All in all, the status of "non-citizens" of Latvia implies the following: Its bearers are *not* stateless in the eyes of the Latvian law–notwithstanding the fact that this approach is dubious in the light of international law. The internal Latvian understanding is essential, however, for the argument that follows. As a consequence of the Latvian Constitutional Court's reading of the status, it cannot be compared with the statuses enjoyed by foreigners and migrants in Latvia. "Non-citizens" enjoy a lasting and stable legal bond with Latvia, which is sealed by mutual rights and obligations akin to those of

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72. In Latvian: "Tas, vai Latvijas nepilsoņi būtu uzskatāmi par *nationals* (angļu val.) starptautisko tiesību izpratnē, ir ne tikai juridisks, bet galvenokārt politisks jautājums, kas būtu jāizskata valstī pastāvošā demokrātiski politiskā procesa ietvaros." Latvijas Republikas Satversmes tiesa [Constitutional Court of Latvia] Mar. 7, 2005, Case No. 2004-15-0106 ¶ 24, http://www.satv.tiesa.gov.lv/upload/2004-15-0106E.rtf (concluding that the rights of nationals, including not being expelled from the territory of the State of which they are nationals, must first be made law by that State).

73. *Country Report: Latvia*, *supra* note 12, at 9. Note that the renowned expert ignores the crucial distinction between citizens and "non-citizens" related to EU law and the access to the status of EU citizenship.

74. *Id.* at 19.

nationality. The status does not amount to citizenship of Latvia but grants access to all the main rights of citizenship with the exceptions of the right to hold some offices and political rights, the latter being the focus of discussion in this article. It is not a temporary status and can only be lost upon naturalization either in Latvia – upgrading the legal position to a citizen – or abroad. The status is currently not connected with EU citizenship, thus disqualifying its bearers from the enjoying the majority of the rights stemming from the supranational legal system of the EU. The latter is an issue that can be easily resolved.

III. EU CITIZENSHIP AND THE "NON-CITIZENS" OF LATVIA

EU citizenship can be extended to the "non-citizens" of Latvia by a simple declaration and is associated with a number of important rights, the majority of which are outlined in Part II of the TFEU.[75] These originate in the EU, not individual Member States, allowing the characterization of the legal status of EU citizenship as "autonomous"[76] from the legal orders of the Member States of the EU, as per Advocate General Poiares Maduro.[77]

EU citizenship rights would be a welcome addition to the rights associated with the Latvian "non-citizen" status.[78] EU citizenship is extended to the nationals of the Member States

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75. The wording of the leading provision in this Part, Art. 20 TFEU, is quite broad, pointing in the direction of the rights "in the Treaty" and definitely also covering unwritten rights, such as the right not to be pushed to leave the territory of the Union. TFEU art. 20, *supra* note 64; *see* Case C-34/09, Ruiz Zambrano v. Office National de l'Emploi, 2011 E.C.R. I-1177, Judgment, ¶¶ 35-36, 39-46 (holding that Article 20 of the TFEU can in certain circumstances provide a right of residence for third-country nationals with EU citizen minors dependents); Dimitry Kochenov, *The Right to Have* What *Rights? EU Citizenship in Need of Clarification*, 19 EUR. L.J. 502, 511 (2013) (arguing that the Treaty text is not the only source of EU citizenship rights).

76. Case C-135/08, Rottmann v. Freistaat Bayern, 2010 E.C.R. I-1449, Opinion of Advocate General Poiares Maduro, ¶ 23. *See also* Dimitry Kochenov, Annotation*, Case C-135/08,* Janko Rottmann v. Freistaat Bayern, 47 COMMON MKT. L. REV. 1831, 1831 (2010) [hereinafter Annotation on Rottmann] (noting that the statuses of EU citizenship and member state nationality exist as separate entities, providing different legal rights).

77. Annotation on Rottmann, *supra* note 76, at 1832–38.

78. Office of the U.N. High Comm'r for Human Rights, *The Rights of Non-Citizens*, U.N. Doc. HR/PUB/06/11 (2006); *see* discussion *infra* Part II.a.

under EU law.[79] Although in the absolute majority of cases the legal scope of Member State nationality for the purposes of EU law overlaps with that of citizenship under national law, this is not necessary under the law of the EU.[80] The "non-citizens" of Latvia can be classified as nationals of Latvia for the purposes of EU law and thereby turned into EU citizens overnight.[81]

A. EU Citizenship Rights

The scale of rights coming from the EU significantly supersedes national rights of citizenship in any of the Union Member States, as EU rights apply in the territory of all Member States.[82] EU citizens enjoy the right of residence[83] and free movement around the Union,[84] which goes far beyond travel and includes virtually unlimited access to work,[85] establishment of a business,[86] and residence all over the territory of the EU[87] accompanied by a family, irrespective of a family member's individual nationality.[88] In addition, across the Union

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79. Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. C 340/1.

80. Michael A. Becker, *Managing Diversity in the European Union: Inclusive European Citizenship and Third-country Nationals*, 7 YALE HUM. RTS. & DEV. J. 132, 137–38, 140, 149–50, 152–53 (2014); *see* discussion *infra* Part II.b.

81. *Id.* at 174; *see* discussion *infra* Part II(c).

82. TFEU, *supra* note 64, art. 2.

83. *Id.* art. 21(1); Council Directive 2004/38, pmbl. ¶¶ 1, 11, 2004 O.J. (L 158) 1, 77 (EU).

84. TFEU, *supra* note 64, art. 21(1).

85. *See id.* art. 45(1) ("Freedom of movement of workers shall be secured within the Union.").

86. *See id.* art. 49 (prohibiting Member States to restrict the freedom of establishment of nationals of another Member State).

87. *See* Dimitry Kochenov, *A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe*, 18 COLUM. J. EUR. L. 56, 99–101 (2011) [hereinafter *A Real European Citizenship*] (discussing residence rights in the case of third-country nationals).

88. *See* Council Directive 2004/38 art. 3, *supra* note 83, at 88-89 (requiring Member States to "facilitate the entry and residence" of family members "irrespective of their nationality"); *cf.* Peter Van Elsuwege & Dimitry Kochenov, *On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, 13 EUR. J. MIGRATION L. 443, 443-44 (2011) (criticizing EU legislation for its restrictive application to the cases of the third-country national family members of EU citizens). *But see* Eugenia Caracciolo di Torella & Annick Masselot, *Under Construction: EU Family Law*, 29 EUR. L. REV. 32, 45

irrespective of where they reside, EU citizens enjoy voting rights in European Parliament[89] and local elections[90] and also benefit from "protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State" in the countries around the world where their own Member State is not represented.[91]

EU citizenship implies a full prohibition of direct and indirect discrimination on the basis of nationality,[92] which in fact means two things: the Member States cannot favor "their own" in their law (no, France does not love Frenchmen more than, say, Estonians or Spaniards) and effectively amounts to–to borrow from the renowned account by Gareth Davies–the "abolition"[93] of the nationalities of the Member States in the sphere of application of EU law. To put it differently, EU citizenship coupled with the prohibition of discrimination established by Article 18 TFEU disqualifies nationalities of the Member States from being a legally relevant factor.[94] In

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(2004) (discussing the discriminatory impact on nontraditional family members such as stepchildren).

89. TFEU, *supra* note 64, art. 22(2).

90. *See id*. art. 22(1); *see also* JO SHAW, THE TRANSFORMATION OF CITIZENSHIP IN THE EUROPEAN UNION: ELECTORAL RIGHTS AND THE RESTRUCTURING OF POLITICAL SPACE 131-32 (2007) (discussing how, with respect to electoral territories, minimum residency requirements that are imposed on the nationals in a Member State's can be satisfied by residence in another Member State, but minimum residence periods are still allowed with respect to residing in a particular constituency or locality).

91. TFEU, *supra* note 64, art. 23. This right should be a particular asset for EU citizens coming from a geographically smaller Member State without a broad network of consular missions such as the "non-citizens of Latvia."

92. *Id*. art. 18; *see* Pieter Boeles, *Europese burgers en derdelanders: Wat betekent het verbod van discriminatie naar nationaliteit sinds Amsterdam?*, 12 SOCIAAL-ECONOMISCHE WETGEVING 500, 502-03 (2005) (Neth.) (discussing discrimination on grounds of nationality with respect to fundamental rights); *see also* Tamara Hervey, *Migrant Workers and Their Families in the European Union: The Pervasive Market Ideology of Community Law*, *in* NEW LEGAL DYNAMICS OF EUROPEAN UNION 91, 95 (Jo Shaw & Gillian More eds., 1995) (analyzing the scope of article 18).

93. *See* Gareth Davies, *'Any Place I Hang My Hat?' or: Residence is the New Nationality*, 11 EUR. L.J. 1, 43-45, 55 (2005) (explaining how the prohibition of discrimination on the basis of nationality effectively "abolishes" nationality for EU citizens).

94. Gareth Davies, *The Humiliation of the State as a Constitutional Tactic*, *in* THE CONSTITUTIONAL INTEGRITY OF THE EUROPEAN UNION 147, 150-52, 173-74 (Fabian Amtenbrink & Peter van den Bergh eds., 2010) [hereinafter *Humiliation of the State*].

addition to the fundamental principles of supremacy[95] and direct effect[96] of EU law within the ambit of its application,[97] this ensures that EU citizens' rights are effectively protected. Any national law installing a requirement discriminatory on the basis of nationality will be set aside by national courts and administrations: no formal annulment is required.[98]

EU citizens' protection goes even further: non-discriminatory restrictions on the enjoyment of EU citizenship rights are equally prohibited by EU law and are regularly struck down by the Court of Justice of the European Union (ECJ).[99]

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95. *See* Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, Judgment, 593-94 (noting that if the laws of any of the Member States were permitted to override supranational law governing all Member States, it would render the latter meaningless, as any one state could "nullify its effects by means of a legislative measure").

96. *See* Case 26/62, N.V. Algemene Transport en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1, Judgment, 13 (interpreting Article 12 of the Treaty establishing the European Economic Community as "producing direct effects and creating individual rights which national courts must protect," Treaty Establishing the European Economic Community, art. 12, Nov. 13, 1962); *see also* Bruno de Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order*, *in* THE EVOLUTION OF EU LAW 323, 323-25, 329 (Paul Craig & Gráinne de Búrca eds., 2d ed., 2011) (defining direct effect as "the capacity of a norm of Union law to be applied in domestic court proceedings" as compared to supremacy, which "denotes the capacity of that norm of Union law to overrule inconsistent norms of national law in domestic court proceedings").

97. *See* Eleanor Spaventa, *Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects*, 45 COMMON MKT. L. REV. 13, 15-17, 23 (2008) (stating that the material scope of the Treaty of the European Union provisions addressing economic free movement relates to the rights granted by those provisions, such as the right not to be discriminated against based on grounds of nationality).

98. *Humiliation of the State*, *supra* note 94, at 159-60.

99. *See, e.g.*, Case 192/05, Tas-Hagen en Tas v. Raadskamer WUBO van de Pensioen-en Uitkeringsraad, 2006 E.C.R. I-10451, Judgment, ¶¶ 31-32, 35, 40 (striking down a residence requirement for receiving benefits as a civilian war victim); Case C-224/02, Pusa v. Osuuspankkien Keskinäinen Vakuutusyhtiö, 2004 E.C.R. I-5763, Opinion of Advocate General Jacobs, ¶¶ 14-22 (striking down as discriminatory the Finish method of income tax calculation that did not take into account the tax payer's Spanish income tax). *But see* Case C-403/03, Schempp v. Finanzamt München V, 2005 E.C.R. I-6421, Opinion of Advocate General Geelhoed, ¶¶ 35-36, 38-40 (finding that a Member State's refusal to allow an income tax deduction for spousal support did not restrict the taxpayer's freedom of movement). For a detailed analysis of *Pusa* and *Schempp*, see Francis Jacobs, *Citizenship of the European Union: A Legal Analysis*, 13 EUR. L.J. 591, 597, 608 (2007).

Exceptions to EU laws are interpreted very strictly.[100] While the Member States are allowed to reserve some public functions to the holders of their own nationality,[101] abuse of this is not allowed–the ECJ will scrutinize whether the arguments of the Member State in question make sense.[102] Ample ECJ cases illustrate the strengths of this EU-level status. Member States cannot demand EU citizens from other parts of the Union pay higher University tuition[103] or deport those engaged in professions which are permitted for nationals–prostitutes are also protected by EU law.[104] Even the permanent banishment of EU citizens from the territory of a particular Member State for committing a crime is prohibited as discriminatory on the basis of nationality.[105]

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100. TFEU, *supra* note 64, art. 45(3); *see, e.g.*, Joined Cases C-482/01 & C-493/01, Orfanopoulos, Oliveri v. Land Baden-Württemberg, 2004 E.C.R. I-5257, Judgment, ¶ 65 ("[A] particularly restrictive interpretation of the derogations from that freedom is required. . ."); Case C-149/79, Comm'n v. Belgium, 1980 E.C.R. 3881, Judgment, 3886 ("It is not permissible to interpret that derogation widely. . ."); *see also* Niamh Nic Shuibhne, *Derogating from the Free Movement of Persons: When Can EU Citizens Be Deported?*, 8 CAMBRIDGE Y.B. EUR. LEGAL STUD. 187, 188-89 (2006) (commenting on the ECJ's pattern of strict interpretation of exceptions to EU law).

101. *See* TFEU, *supra* note 64, art. 45(4) ("The provisions of this Article shall not apply to employment in the public service."); *see also* J.E. BEENEN, CITIZENSHIP, NATIONALITY AND ACCESS TO PUBLIC SERVICE EMPLOYMENT 139-68 (2001) (discussing the practical application of the public service exception in some Member States).

102. *See, e.g.*, Comm'n v. Belgium, 1980 E.C.R., Judgment, ¶¶ 12-19, 23 (examining and answering specific claims made by the Belgian and French governments).

103. *See* Case 293/83, Gravier v. City of Liège, 1985 E.C.R. 593, Judgment, ¶¶ 4-5, 12-15 (finding an enrollment fee charged to foreign art students at a Member State university to be discriminatory); *see also* Dorothea Charlotte Ringe, Tuition Fees and Equal Access to Higher Education in Germany and the EU 106 (June 25, 2009) (unpublished Dr. rer. pol. dissertation, University of Hamburg) (on file with authors).

104. *E.g.*, Joined Cases 115 & 116/81, Adoui v. Belgian State & City of Liège; Cornuaille v. Belgian State, 1982 E.C.R. 1666, Judgment, 1668, 1712.

105. *See, e.g.*, Case C-348-96, Criminal Proceedings Against Calfa, 1999 E.C.R. I-11, Judgment, ¶¶ 26-28, 31 (finding automatic expulsion for life as a penalty for criminal conviction to fall short of triggering the exception to the non-discrimination requirement for public policy reasons); *see also* Cathryn Costello, Annotation, *Case C-348/96,* Donatella Calfa, 37 COMMON MKT. L. REV. 817, 820-21 (2000) (discussing the proportionality requirement for permanent deportation from Member States, under which States need to demonstrate that the sanctions imposed on nationals were, "although perhaps not identical [to those imposed on non-nationals,] effectively designed to combat [illegal conduct]"); Dimitry Kochenov & Benedikt Pirker, *Deporting EU*

The emergence of EU citizenship as a meaningful legal status put the nationalities of the Member States in a new perspective[106]: it is impossible to claim that EU citizens are foreigners in any of the EU Member States given that plenty of the rights they enjoy and which would normally be associated with national citizenship–from non-discrimination on the basis of nationality to the right to work, to be joined by a spouse of any nationality, and to remain in the territory–are effectively removed from the realm of national law and provided by the EU directly. All in all, EU citizenship is a meaningful legal status that empowers individuals through a *de facto* multiplication of classical nationality rights by a factor of twenty-eight: as a Latvian citizen one can work in Latvia – as an EU citizen, in twenty-eight states; as an Irish citizen, one can reside in Ireland – as an EU citizen, in twenty-eight states; as a Maltese citizen one enjoys direct diplomatic protection in only a handful of capitals outside the EU[107] – as an EU citizen, all over the world.

B. Acquisition of EU Citizenship

The TEU pronounced that "[e]very national of a Member State shall be a citizen of the Union." [108] There is no other way to acquire EU citizenship. In other words, while the status itself is autonomous, its acquisition is based on a derivation: *ius tractum*, as opposed to *ius soli* or *ius sanguinis*.[109] Under international law–fully recognized by EU law in this particular

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Citizens: A Counter-Intuitive Trend, 19 COLUM. J. EUR. L. 369, 379-80 (2013) (discussing the legal requirements for internal deportation from Member States).

106. *See* Dimitry Kochenov, *Member State Nationalities and the Internal Market: Illusions and Reality*, *in* FROM SINGLE MARKET TO ECONOMIC UNION 241, 244-45 (Niamh Nic Shuibhne & Laurence W. Gormley eds., 2012) [hereinafter *Member State Nationalities*] (introducing the complexity of the relationship between Member State nationality and EU citizenship).

107. The network of Maltese consulates and embassies is not really extensive. *See Maltese Missions Websites*, MINISTRY FOR FOREIGN AFFAIRS, http://foreignaffairs.gov.mt /en/Pages/Missions-Websites.aspx (last visited Sept. 12, 2015).

108. Consolidated Version of the Treaty on European Union art. 9, May 9, 2008 [hereinafter TEU]; *accord* TFEU, *supra* note 64, art. 20(1) ("Every person holding the nationality of a Member State shall be a citizen of the Union.").

109. Ius Tractum, *supra* note 21, at 181. *Ius tractum* comes from the Latin "*ius*" (law) and "*trahere*" (to draw [from]). POCKET OXFORD LATIN DICTIONARY (3d ed. 2005). *Ius soli* comes from the Latin "*ius*" (law) and "*solum*" (earth). *Id. Ius sanguinis* comes from the Latin "*ius*" (law) and "*sanguis*" (blood). *Id.*

context[110]–states are free to establish who their citizens are.[111] There is no uniformity around the world and, similarly, around the EU about how the legal regulation of the acquisition of citizenship should work.[112] This variety allows states to give full expression to their specificity and find an approach to defining who "belongs" that suits them best.[113] In fact, in the context of the EU, Member States are endowed with even more freedom in outlining the scope of EU citizenship than what the plain reading of the treaties would suggest. A historical approach to the law is required to understand its intricacies.[114]

Before EU citizenship was officially introduced by the Treaty of the Maastricht in the early 1990s,[115] the majority of the rights now associated with this status had already been extended to the nationals of the Member States of the then

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110. For a general overview of the interaction between EU law and International Law, see Dimitry Kochenov & Fabian Amtenbrink, *Introduction: The Active Paradigm of the Study of the EU's Place in the World*, *in* THE EUROPEAN UNION'S SHAPING OF THE INTERNATIONAL LEGAL ORDER 1, 5-6 (Dimitry Kochenov & Fabian Amtenbrink eds. 2013).

111. *See* Convention on Nationality Laws, *supra* note 18, art. 1 ("It is for each State to determine under its own law who are its nationals."); *see also id*. art. 2 ("Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State."). For a spectacularly detailed analysis of how States distribute citizenship, see Serena Forlati, *Nationality as a Human Right*, *in* THE CHANGING ROLE OF NATIONALITY IN INTERNATIONAL LAW 18 (Alessandra Annoni & Serena Forlati eds., 2014).

112. For an up-to-date overview, please consult the EUDO citizenship database of the European University Institute in Florence, *European Union Democracy Observatory on Citizenship*, EUR. UNIV. INSTITUTE, http://eudo-citizenship.eu/ (last visited Sept. 12, 2015).

113. *See* Leonard Besselink et al., *Legal Competence with Regard to External Borders*, *in* EUROPE'S 21ST CENTURY CHALLENGE: DELIVERING LIBERTY 129, 137-38 (Didier Bigo et al. eds. 2010) ("[T]he dynamic of Europeanization limits powers of member states through measures adopted at EU level, but also reinforces the monopoly of member states of determining full membership of the respective policies, and hence EU citizenship, that is personal citizenship of the EU. . ."); *see also* Matthew J. Gibney, *The Rights of Non-Citizens to Membership*, *in* STATELESSNESS IN THE EUROPEAN UNION: DISPLACED, UNDOCUMENTED, UNWANTED 41, 56-57 (Caroline Sawyer & Brad K. Blitz eds., 2011) (outlining the different approaches to the framing of belonging in political theory).

114. For an overview of the development of the case law on EU citizenship, see Kochenov & Plender, *supra* note 20, at 384, 392.

115. TEU, *supra* note 117, art. 8.

European Communities.[116] Rather than simply granting supranational rights to all the citizens of the Member States, a notion of a "national for the purposes of Community law" emerged, which underlined the possible differences in scope between Member States' nationalities and those of their citizens entitled to benefit from the impending EU law.[117] The choice to separate the nationality of a Member State from "nationality for the purposes of Community law" is understandable when regarded from two perspectives. Germany and the United Kingdom supply relevant historical examples.

Germany wanted to ensure a broader scope of nationality compared with the actual scope of its citizenship, which would incorporate, even if somewhat ephemerally, all the Germans left behind the Iron Curtain – in Poland, East Germany, the Soviet Union, and elsewhere.[118] Although merely a symbolic gesture, this potentially enlarged the scope of EU law to cover a number of individuals who, *de jure* at least, were not German nationals by operation of law.[119] A special declaration to this effect has been appended by Germany to the founding EU treaties.[120]

Another important example emerged following the accession of the United Kingdom to the European Community in the early 1970s. After the swift deterioration of the Empire, the United Kingdom began to recognize a large number of different classes of citizenship and other types of attachments to the State and the crown with regard to the individuals located in its former

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116. ANTJE WIENER, 'EUROPEAN' CITIZENSHIP PRACTICE: BUILDING INSTITUTIONS OF A NON-STATE 4 (1998).

117. *See, e.g.*, Ius Tractum, *supra* note 23, at 186–90 ("Before European citizenship became part of the primary law of the Community, a distinction existed between Member State nationals for the purposes of Community law, who could benefit from the rights stemming from the Community legal order, and those nationals of the Member States who found themselves outside the scope *ratione personae* of Community law."); Hall, *supra* note 20, at 358 ("[T]he Member States may, 'for information', declare who are to be considered their nationals for Community purposes."); D.F. Edens & S. Patijn, *The Scope of the EEC System of Free Movement of Workers*, 9 COMMON MKT. L. REV. 322, 323 (1972) (stating that Member states have the authority to define 'nationals' for purposes of the EEC).

118. Ius Tractum, *supra* note 23, at 188; Eberhard Grabitz, *L'unité allemande et l'intégration européenne*, *in* CAHIERS DE DROIT EUROPEEN 423, 428 (1991).

119. Ius Tractum, *supra* note 23, at 188.

120. *Id.*

colonies. In this context – and given that EU-level rights affect *all* the Member States, since they include, *inter alia*, residence and work rights all over the Union – the founding Member States of the Union demanded that the United Kingdom choose among all the categories of its citizens, extending "nationality for the purposes of Community law" only to some of these categories rather than to all.[121] This is exactly what was done. Following the German example, the United Kingdom appended a declaration to the treaties outlining who would be its "nationals for the purposes of Community law". Just as in the case of Germany, there was no direct correlation between this concept and U.K. citizenship *sensu stricto*. The U.K. Declaration,[122] which was later updated following a change in national law,[123] extended "nationality for the purposes of Community law" to some categories of persons who were not considered United Kingdom citizens, although unquestionably enjoyed a stable legal bond with the UK. Cases dealing with legal resident "British Subjects without citizenship" in particular are on point.[124] The precedent has been set: "nationality for the purposes of Community law" does not necessarily overlap in full with the understanding of citizenship in the national law of the Member States.[125] Both German and U.K. examples testify to this.

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121. Edens & Patijn, *supra* note 126, at 326-27.

122. Treaty of Accession to the European Communities of the Kingdom of Denmark, Ireland, and the United Kingdom of Great Britain and Northern Ireland, 1st U.K. Declaration, Jan. 22, 1972, 1972 O.J. SPEC. ED. 196 [hereinafter 1st U.K. Declaration].

123. The Declaration was later updated upon the entry into force of the 1981 British Nationality Act. New Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the Definition of the Term 'Nationals', 1983 O.J. (C 23) 1 [hereinafter the 2nd U.K. Declaration]. The text of the 2nd U.K. Declaration, currently in force, does not correspond to the current categories of British nationality; it has also been argued that an update of the Declaration is necessary. *See Towards a European Nationality Law*, *supra* note 29, at 6–7, 14 (stating the difficulties in categorizing British nationality and suggesting a review of the issue is needed).

124. 1st U.K. Declaration, *supra* note 131, at 196.

125. This has long being accepted by EU institutions. *See* European Parliament's Resolution on the British Nationality Bill, 1981 O.J. (C 260) 100, 101 (discussing the European Parliament's recognition of the difference between British citizenship and nationality for the purposes of Community law).

When the concept of EU citizenship made its way into the treaties with the fall of the Berlin Wall, the reading of the essential scope of supranational law was thereby left unchanged. The ECJ found in *Kaur* that the personal scope of EU citizenship is not co-extensive with that of the citizenships of the Member States in the same sense as the national law of the Member States, but rather follows the concept of "nationality for the purposes of Community law" in the sense of the special declarations, where such declarations exist.[126] As a result, Kaur, who possessed a British passport of a category not allowing her to benefit from Community law (British Overseas, which does not grant a right of abode in the United Kingdom), could not, as a result, take advantage of EU citizenship, which had just recently been established at the time.[127] Although a U.K. national (albeit of a very special category, not granting her any rights in the United Kingdom), she had never been an EU citizen.[128] The approach of the Court is only understandable in light of the principle of conferral[129]; it would be unreasonable to expect the EU to disregard the express wishes of the Member States, given the derivative nature of the EU's competences.[130]

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126. Case C-192/99, The Queen v. Sec'y of State for the Home Dep't *ex parte* Kaur, 2001 E.C.R. I-1237, Judgment, ¶ 27.

127. *See id.* ¶¶ 11, 25 (The "adoption of [the 1st U.K.] declaration did not have the effect of depriving any person who did not satisfy the definition of a national of the United Kingdom of rights to which that person might be entitled under Community law. The consequence was rather that such rights never arose in the first place for such a person.").

128. *Id.* ¶ 11; *see* NICOLA ROGERS ET AL., FREE MOVEMENT OF PERSONS IN THE ENLARGED EUROPEAN UNION 79 (2d ed. 2012) ("The [Court of Justice of the European Union] was categorical in its response that Union citizenship was conferred only on 'nationals of member states' and that the declarations entered by the United Kingdom defining who its 'nationals' are for the purposes of EU law valid and unchallengeable."). *Cf.* Case C-135/08, Rottmann v. Bayern, 2010 E.C.R. I-1449, Judgment, ¶ 49 (distinguishing *Kaur* by noting that "Dr Rottmann has unquestionably held Austrian and then German nationality and has, in consequence, enjoyed that status and the rights attaching thereto").

129. TEU, *supra* note 117, art. 4(1) ("[C]ompetences not conferred upon the Union in the Treaties remain with the Member States.").

130. *See The Division of Competences in the European Union*, pt. G (European Parliament, Working Paper Political Series No. W 26a, 1997), http://www.europarl.europa.eu/workingpapers/poli/w26/drawing_en.htm (explaining the derivative nature of the EU's competences). *But see An Incipient Form of European Citizenship*, *supra* note 24.

In other words, the introduction of EU citizenship did not result in the redundancy of the general pre-Maastricht approach to defining the personal scope of nationality for the purposes of EU law by the Member States distinctly from regulating citizenship in national law. This profoundly affects the reading of the term "national" in Articles 9 of the Treaty on the European Union (TEU) and 20 TFEU.[131] "National" in the sense of these provisions does not necessarily overlap with the term "citizen" and its equivalents in the national law of the Member States. As the examples of Germany and the UK demonstrate, EU citizenship can thus be denied to certain groups of nationals in the sense of national law, as well as extended to those who, while enjoying a legal bond with a Member State, cannot be characterized as full citizens under national law.

The discretion of the Member States in deviating from national law on citizenship when defining the scope of their nationals for the purposes of EU law is not unlimited. The general duty of loyalty applies: the definition of the scope of those who will benefit from EU citizenship is not supposed to harm the goals of the European integration project as outlined in Article 3 TEU.[132] A number of examples of possible limitations on the Member States' discretion arising out of EU law can be listed. The Member States are not free to disregard the nationalities that activate EU citizenship conferred in compliance with the law of other Member States.[133] For example, in *Micheletti*, Spain had to recognize, for the purposes of EU law, the Italian nationality of a dual Argentinian-Italian citizen, Dr. Micheletti, notwithstanding the fact that his bond with Argentina was presumably stronger.[134] Moreover, in *Rottmann*, the ECJ specified that even when revoking a fraudulently acquired Member State nationality the Member State had to apply the EU law principle of proportionality,

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131. Dimitry Kochenov & Aleksejs Dimitrovs, *EU Citizenship For Latvian "Non-Citizens": A Concrete Proposal* 20 (The Jean Monnet Program, Working Paper No. 14/13, 2013), http://jeanmonnetprogram.org/wp-content/uploads/2014/12/KochenovDimitrovs.pdf.

132. TEU, *supra* note 117; *id.* art 4 (duty of loyalty).

133. Case C-369/90, Micheletti v. Delegación del Gobierno en Cantabria, 1992 E.C.R. I-4239, Judgment, ¶ 11.

134. *Id.*, ¶ 2-3.

weighing their interest in denaturalizing a person against the individual's distress caused by the loss of EU citizenship rights.[135] Lastly, the Member States cannot apply purely territorial logic to limiting the scope of the EU citizenship status: even nationals residing outside the EU proper retain their EU citizenship and the possibility of benefitting from the extra-territorial rights attached to it.[136] In general the freedom of the Member States to take sovereign decisions on citizenship and, equally, on nationality for the purposes of EU law (*i.e.* EU citizenship) is limited by the duty of Union loyalty and finds its expression in the declarations appended by the Member States to the Treaties.

C. EU Citizenship for the "Non-citizens" of Latvia

The most obvious way to remedy one of the main discrepancies between the citizenship of Latvia and the status of a "non-citizen" of Latvia is thus to extend EU citizenship to all the "non-citizens" of Latvia. This will result in a tangible broadening of the their horizon of opportunities, as Amartya Sen put it.[137] It will also comport with the recommendations of virtually *all* the international bodies monitoring the situation of

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135. Case C-135/08, Rottmann v. Bayern, 2010 E.C.R. I-1467, Judgment, ¶ 56; Jo Shaw, *Setting the Scene: the* Rottmann *Case Introduced, in* HAS THE EUROPEAN COURT OF JUSTICE CHALLENGED THE MEMBER STATE SOVEREIGNTY IN NATIONALITY LAW? 1, 1 (Jo Shaw ed., European Univ. Inst., RSCAS Working Paper No. 2011/62, 2011), http://cadmus.eui.eu/bitstream/handle/1814/19654/RSCAS_2011_62.corr.pdf?sequence=3; *see* Kochenov, Annotation on Rottmann, *supra* note 85, at 1843-44 (criticizing the proportionality approach); Gerard-René de Groot, *Overwegingen over de* Janko Rottmann-*beslissing van het Europese Hof van Justitie* [*Considerations about the* Janko Rottmann-*decision of the European Court of Justice*], 5/6 ASIEL & MIGRANTENRECHT [ASYLUM & IMMIGR. L.] 293, 297 (2010) (Neth.) (stating that the proportionality test is derived from EU law).

136. *See* Case C-300/04, Eman v. College van burgemeester en wethouders van Den Haag, 2006 E.C.R. I-8055, Judgment, ¶¶ 29, 72.1 ("Persons who possess the nationality of a Member State and who reside or live in a territory which is one of the overseas countries and territories referred to in Article 299(3) EC may rely on the rights conferred on citizens of the Union. . ."); *see also* Dimitry Kochenov, *EU Citizenship in the Overseas*, *in* EU LAW OF THE OVERSEAS 199, 204-206 (Dimitry Kochenov ed., 2011) (discussing the prohibition of residence-based deprivation of EU citizenship).

137. *See* AMARTYA SEN, DEVELOPMENT AS FREEDOM 39, 143 (1999) (arguing for an expansion of social opportunities in developing countries); *see also* Gianluigi Palombella, *Whose Europe? After the Constitution: A Goal-Based Citizenship*, 3 INT'L. J. CONST. L. 357, 377 (2005) (referring to Sen's work in the context of EU citizenship).

the "non-citizens" in Latvia, who decry the innately discriminatory nature of this status. The status of "non-citizen" of Latvia unquestionably denotes a lasting legal bond that implies rights and responsibilities between the holders of the status and the Latvian Republic. Moreover, similar to the categories of British nationals without U.K. citizenship included by the 1st and 2nd U.K. Declarations within the ambit of "nationals for the purposes of Community law," it also implies an unlimited right of abode.

Given that EU law respects the sovereignty of its constituent Member States under the general principle of conferral, the EU itself cannot decide who its own citizens are; at most, it may merely intervene in the individual cases where Member States, in applying their national laws, fail to honor fully the principles of EU law in areas where the EU is not directly competent to act.[138] It will thus definitely be up to Latvia, not the supranational or international bodies, to take the legal step of extending EU citizenship to the "non-citizens." The majority of the Member States simply extend EU citizenship to all those who enjoy the status of a citizen under national law, thus equating "citizenship" with "nationality for the purposes of EU law."[139] Others, like the United Kingdom, however, use their sovereign competence to shape the two differently.[140] Latvia, having chosen the first option by default – as did the absolute majority of other Member States[141] – can amend its view at any time.

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138. For examples of EU intervention cases not directly related to EU law, see Case C-369/90, Micheletti v. Delegación del Gobierno en Cantabria, 1992 E.C.R. I-4239, Judgment, ¶ 10; Case C-135/08, Rottmann v. Bayern, 2010 E.C.R. I-1449, Judgment, ¶ 56.

139. *See* Ius Tractum, *supra* note 23, at 191 (indicating the majority of the Member States provide no divergence between scopes of Member State nationality and European citizenship).

140. *See* Edens & Patijn, *supra* note 126, at 326-27 (confirming that the United Kingdom should define "nationals" as persons who are citizens of the United Kingdom or British subjects who are not citizens but live in the United Kingdom, and persons who are citizens of the United Kingdom by birth, naturalization, or registration in Gibraltar, or whose father was born, naturalized, or registered in Gibraltar).

141. *See* Protocol No. 2 to the Act of Accession, Relating to Faroe Islands, Jan. 22, 1972, art. 4, 1972 O.J. S Spec. Ed. 160, 163; Treaty Amending, With Regard to Greenland, the Treaties Establishing the European Communities, Jan. 2, 1985, 1985 O.J. (L 29) 1 (providing that Danish nationals residing in the Faroe Islands shall be

Indeed, just as any other sovereign state, Latvia is free to change its citizenship law. This includes the definition and redefinition of the scope of the "nationality for the purposes of EU law."[142] No steps on the part of the EU are required to make this change, as evidenced by the 2nd U.K. Declaration. Moreover, crucially, as full overlap between the scope of national citizenship and "nationality for the purposes of EU law" is not required[143] – deviations from the usual outline of the scope of citizenship in national law are possible in declarations specifying the scope of the latter. Moreover, the 1st U.K. Declaration, read in conjunction with the ECJ judgment in *Kaur*, clearly demonstrates that a Member State is free to exclude some groups of citizens as well as include groups of those who are *not*, strictly speaking, citizens of that Member State.[144] The latter is precisely the situation of the "non-citizens" of Latvia. Although enjoying a lasting legal bond with the Republic under national law, they are not citizens of Latvia. They can, however, be turned into Latvian "nationals for the purposes of EU law" – a concept distinct from national citizenship or indeed nationality of Latvia *senso stricto* – by a special declaration of the Republic of Latvia. Leaving the status of the "non-citizen" of Latvia largely intact in the context of national Latvian law, such a declaration will connect it with the status of EU citizenship in EU law, thus extending all the rights of EU citizenship to the "non-citizens" at the very moment of bringing the declaration. The "non-citizens" of Latvia will become Latvian "nationals for the purposes of EU law" and,

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considered nationals of a member state within the meaning of the original treaties only from the date on which those original treaties became applicable to those islands). For a discussion on a rare exception, see Friendl Weiss, *Greenland's Withdrawal from the European Communities*, 10 EUR. L. REV. 173, 180 (1985) (laying out the implications of Greenland's withdrawal from the European Community in order to become one of the Overseas Countries and Territories).

142. *See* Edens & Patijn, *supra* note 126, at 326-27 (stating that states have the authority to define nationals for purpose of EEC).

143. Should this be the case, the whole process of making declarations to specify, *de facto*, who among a country's population is or is not to be considered an EU citizen would be entirely redundant. *See* Hall, *supra* note 20, at 357-58 (discussing how as a matter of international law, Member States have the responsibility to lay down conditions of nationality).

144. See *supra* notes 131-36 and accompanying text.

thus, EU citizens. As the *Micheletti* case has demonstrated, this status is not subject to approval by other Member States, who must respect the exercise Republic of Latvia's sovereign right to determine who its nationals are for the purposes of EU law.[145]

IV. THE QUESTION OF COSTS

Making the "non-citizens" of Latvia EU citizens imposes virtually no costs for the Republic of Latvia. This is due to the fact that EU citizenship and the rights associated with it are practically confined to the scope of EU law in its operation.[146] The vertical division of powers in the EU between the Union and the Member States functions in such a way that the EU is only responsible for the regulation of the factual constellations spanning several Member States or having a material EU law dimension, called "cross-border situations."[147] All other cases are uniquely regulated by the national law of the Member States and are referred to as "wholly internal."[148] While the border-line

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145. *Towards a European Nationality Law*, *supra* note 29, at 11–12; Evans, *supra* note 26, at 177–78.

146. *See* Dominik Hanf, *'Reverse Discrimination' in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?*, 18 MAASTRICHT J. EUR. & COMP. L. 29 (2011) (explaining that "reverse discrimination" is often allowed to persist because of the limited powers the European Union has in influencing the internal law of Member States); *see also* Peter Van Elsuwege & Stanislas Adam, *Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'Assurances soins flamande*, CAHIERS DE DROIT EUROPEEN 655 (2008) (stating the limited ability of the ECJ to resolve the issue of reverse discrimination); Alina Tryfonidou, *Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe*, 35 LEGAL ISSUES ECON. INTEGRATION 43, 55 (2008) (referring to the Court of Justice's postulation that Member State nationals are "first and foremost Union citizens," and that their economic actions within Member States are secondary to their status as Union citizens). *See generally* ALINA TRYFONIDOU, REVERSE DISCRIMINATION IN EC LAW (2009) (analysing the essence of wholly internal situations in different areas of EU law); HANNEKE VAN EIJKEN, EU CITIZENSHIP & THE CONSTITUTIONALISATION OF THE EUROPEAN UNION (2015) (analyzing the concept of EU citizenship as it relates to the development of constitutionalisation of the EU).

147. *A Real European Citizenship*, *supra* note 87, at 57-60.

148. *E.g.*, Niamh Nic Shuibhne, *Free Movement of Persons and the Wholly Internal Rule: Time to Move On?*, 39 COMMON MKT. L. REV. 731, 733 (2002) [hereinafter *Free Movement of Persons*] (explaining that the European Union's freedom of movement provisions do not apply to situations that are wholly internal in a Member State (citation and quotation marks omitted)); Niamh Nic Shuibhne, *The European Union and Fundamental Rights: Well in Spirit but Considerably Rumpled in Body?*, *in* CONVERGENCE AND DIVERGENCE IN EUROPEAN PUBLIC LAW 177, 187 (Paul Beaumont et

between the two is not always entirely clear[149] – for instance, the ECJ has established that physical cross-border movement is not necessary to establish a cross-border situation – there is always a factual dimension to the case that gives it broader implications compared with all the situations uniquely confined to a single Member State.[150] The analysis of the delimitation of the scopes of the law always focuses on the essence of the facts of the situation in question. As a result, being born in the territory of one Member State with a nationality of another[151] or where an EU citizen leaves his or her spouse and moves to another Member State[152] are circumstance that bring EU law into play. In the same way, actions of the Member States able to deprive EU citizens of the essence of the rights acquired via the supranational status can also result in the activation of EU law

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al. eds., 2002) (explaining that the European Union is limited in its power to regulate matters that are "purely internal" such as member states' internal discrimination, but also stating that regulation of discrimination might be accomplished in some areas through the Union's power under the market integration provisions); Miguel Poiares Maduro, *The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, *in* THE FUTURE OF REMEDIES IN EUROPE 117 (Claire Kilpatrick et al. eds., 2000); Haris Tagaras, *Règles communautaires de libre circulation, discriminations à rebours et situations dites "purement internes"*, *in* 2 MÉLANGES EN HOMMAGE Á MICHEL WAELBROECK 1499, 1502, 1506 (1999) (giving the freedom of circulation and establishment as an example of a European right that cannot be invoked in a "wholly internal" situation); Giorgio Gaja, *Les discriminations à rebours: Un revirement souhaitable*, *in* 2 MÉLANGES EN HOMMAGE Á MICHEL WAELBROECK 993, 1000 (Marianne Dony ed., 1999) (clarifying that the cases where courts have excluded the application of E.U. law to wholly internal situations were cases where no allegations were made that the another member state's citizen was treated more favorably); Enzo Cannizzaro, *Producing 'Reverse Discrimination' Through the Exercise of EC Competences*, 17 Y.B. EUR. L. 29 (1998) (analyzing reverse discrimination as an indirect consequence of interactions that are wholly internal).

149. Dimitry Kochenov, *Citizenship without Respect: The EU's Troubled Equality Ideal* 45 (Jean Monnet Working Paper No. 08/10, 2010), http://jeanmonnetprogram.org /wp-content/uploads/2014/12/100801.pdf [hereinafter *Citizenship without Respect*].

150. *See, e.g.*, Case C-403/03, Schempp v. Finanzamt München V, 2005 E.C.R. I-6421, Judgment, ¶ 22 ("[T]he situation of a national of a Member State who. . . has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation.").

151. Case C-200/02, Zhu & Chen v. Sec'y of State for the Home Dep't, 2004 E.C.R. I-9925, Judgment, ¶¶ 7-19.

152. Case C-403/03, Schempp v. Finanzamt München V, 2005 E.C.R. I-6421, Judgment, ¶¶ 21-22.

with no regard to a cross-border situation.[153] This, however, mostly covers those extreme cases[154] where the Member States seemingly disregard their own law, thereby forcing the EU to intervene to protect the rights and status of EU citizenship held by the nationals of the Member State in question, as was the case in *Ruiz Zambrano* for instance.[155]

In other words, the scope of application of EU citizenship rights is confined almost entirely to the rest of the Union, *not* to the territory of the Latvian Republic as such.[156] EU citizens who cannot demonstrate a logical connection with a cross-border situation do not benefit from EU law, as their situation is only covered by the law of the Member State. In practice this might lead to seemingly paradoxical results, like when the residents of a Member State who never moved or otherwise benefited from EU law enjoy fewer rights than EU citizens moving in from other Member States. While this situation, branded as "reverse

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153. *See, e.g.*, Case C-34/09, Ruiz Zambrano v. Office National de l'Emploi, 2011 E.C.R. I-1177, Judgment, ¶¶ 40-41 (holding that in the cases where this might result in requiring an EU citizen to leave the territory of the Union, Member States may not refuse third country nationals with EU citizen dependents a right of residence); Case C-434/09, McCarthy v. Sec'y of State for the Home Dep't, 2011 E.C.R I-3375, Judgment, ¶¶ 14-19, 22 (addressing an application for a right of residence under EU law in one of the Member States of nationality by a Union citizen holding two Member State nationalities); Koen Lenaerts, 'Civis Europaeus Sum'*: From the Cross-border Link to the Status of Citizen of the Union*, 3 ELECTRONIC J. FREE MOVEMENT WORKERS EU 6, 18 (2011) (exploring the concept that a link with EU citizenship may exists despite lack of cross-border element, in contrast to Treaty provisions); *A Real European Citizenship*, *supra* note 96, 56-59 (pointing out recent developments in situations where a cross-border element was formerly not required); Sara Iglesias Sánchez, *¿Hacia una nueva relación entre la nacionalidad estatal y la cuidadanía europea?*, 37 REVISTA DE DERECHO COMUNITARIO EUROPEO 933, 937 (2010) (discussing how *Rottmann* departs from traditional cross-border element jurisprudence).

154. *See* Eleanor Spaventa, *Earned Citizenship: Understanding Union Citizenship Through Its Scope*, *in* EU CITIZENSHIP AND FEDERALISM: THE ROLE OF RIGHTS (Dimitry Kochenov ed., forthcoming 2016) (analyzing the *Ruiz Zambrano* case law).

155. Kochenov & Plender, *supra* note 22, at 387; *see Zambrano*, 2011 E.C.R., judgment, ¶¶ 42-46.

156. For an analysis, see Loïc Azoulai, *Transfiguring European Citizenship: From Member State Territory to European Territory*, *in* EUROPEAN CITIZENSHIP AND FEDERALISM: THE ROLE OF RIGHTS (Dimitry Kochenov ed., forthcoming 2016).

discrimination" in EU law, has been consistently criticized by scholars,[157] it is the law.[158]

Applied to the situation of the "non-citizens" of Latvia, it means that the legal position of these individuals, if turned into EU citizens, would not actually change much as long as they stay in Latvia: the rights of European citizenship will only manifest themselves upon moving to other Member States or conducting cross-border business. The Latvian legislature will thus be able to maintain the full extent of the legal differences between the two statuses of personal attachment to the Republic recognized in its national law. This consideration is of utmost importance, since the newly-extended status of EU citizenship for the "non-citizens" would not have immediate implications in Latvia internally so the political costs of bringing the declaration in question are non-existent for any given member of the legislature. Given that reverse discrimination, however criticized, is not only allowed but also entrenched in EU law at its current stage of its development,[159] Latvia will be legitimately empowered to use it in order to enforce the differentiated approach to the two statuses in national law. It is probably one of the rare examples when reverse discrimination could actually play an overtly positive role: guaranteeing that the extension of EU citizenship to "non-citizens" will not mean sacrificing the essential difference of principle between the two statuses and going back to the core of the doctrine of Latvian State continuity with the pre-war Republic. Moreover, it will also lead to the reduction of the number of "non-citizens," as EU citizens enjoy preferential treatment when naturalizing in other Member States of the Union.[160] While it would take a Ukrainian national, for example, ten years of residence and enormous effort

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157. *See, e.g.*, *Free Movement of Persons*, *supra* note 158, at 770 (explaining that while reverse discrimination is a long-standing consequence of the wholly internal rule, legal revisions have made the existence of reverse discrimination difficult to justify); *Citizenship Without Respect*, *supra* note 159, at 48-51 (discussing how certain protections for products and commerce are stronger than those for people).

158. Hanf, *supra* note 157, at 34-35.

159. *Id.*; *The Resilience of EU Market Citizenship*, *supra* note 28, at 1614-15.

160. *See Member State Nationalities*, *supra* note 115, at 246 (discussing the consequences of establishing diverging naturalization requirements for EU citizens and third country nationals).

to be granted residency and a work permit on the way to becoming an Italian, an EU citizen, say, a Latvian can gain Italian nationality after four years and with no administrative formalities related to entry and settlement in the territory.[161] The benefits of the EU citizenship status in this context are clear.

The only area where problems could arise even in the context of reverse discrimination is the area of voting rights. EU law empowers EU citizens to vote and stand as candidates in municipal and European Parliament elections.[162] The Treaty provisions are worded in such a way, however, that they only extend voting rights to those EU citizens who have *moved* to a different Member State, leaving the outline of the scope of those who enjoy voting rights in the Member State to that State's national law to decide.[163] The ECJ has already clarified that the Member States do not enjoy absolute discretion in this respect and have to respect the general principle of equality: there can be no disenfranchisement of a group of EU citizens based uniquely on the territorial factors.[164] In *Eman and Sevinger*, the Court struck down the Dutch law excluding EU citizens of Dutch nationality residing on the island of Aruba – an Overseas Country or Territory Associated with the Union, which is under the sovereignty of the Kingdom of the Netherlands – finding that extending the right to vote to all the Dutch citizens outside of the Union with the exception of those residing in the Caribbean amounted to a breach of the general, unwritten principle of equality in EU law.[165]

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161. *Id.* (noting preferences given to EU citizens in Austria, Hungary, Italy, and Romania).

162. TFEU, *supra* note 73, art. 20(2)(b).

163. Case C-145/04, Spain v. United Kingdom, 2006 E.C.R. I-7917, Judgment, ¶¶ 66, 78-79.

164. Joined Cases 117/76 & 16/77, Ruckdeschel et al v. Hauptzollamt Hamburg-St Annen, 1977 E.C.R. 1753, Judgment, ¶ 7 (introducing a general unwritten principle of equality into EU law).

165. Case C-300/04, Eman v. College van burgemeester en wethouders van Den Haag, 2006 E.C.R. I-8055, Judgment, ¶¶ 16, 18, 23, 72.1; *see* Comm'n of the European Communities, Report on the European Community and the Overseas Countries and Territories, DE 76 (Oct. 1993). For background on the case, see generally Mike Eman, *Defending the Democratic Rights of EU Citizens Overseas: A Personal Story*, *in* EU LAW OF THE OVERSEAS 3, 47-53 (Dimitry Kochenov ed., 2011).

At the same time, however, the ECtHR did not find any breach of provisions of the European Convention on Human Rights (ECHR) by the Dutch in depriving Arubans of voting rights in the Kingdom of the Netherlands of which Aruba is part at the national level.[166] Moreover, plenty of countries disenfranchise all their citizens residing abroad.[167] Crucially, however, EU laws on voting only contain a general non-discrimination principle applicable outside of the territory of the Member State, not a general right as such.[168] Coupled with an undisputed right enjoyed by the Member States to enfranchise (or not) any category of citizens or non-citizens as it sees fit[169] as long as the basic requirements of the relevant protocol to the ECHR are met,[170] it is clear that differentiation depending on the particular status of attachment to a Member State – albeit dubiously akin to the status of "non-citizenship" itself in theory – is nevertheless perfectly possible. All in all, although EU law does not itself provide for voting rights for EU citizens in their Member State, it is overwhelmingly clear that it is presumed that the Member States would extend it, at least at the levels where the EU principle of non-discrimination applies, *i.e.* in municipal and European Parliament elections. Should this not

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166. Sevinger v. The Netherlands, App. No. 17173/07, Eur. Ct. H.R. *See* Leonard F.M. Besselink, Annotation, *Case C-145/04,* Spain v. United Kingdom*, Judgment of the Grand Chamber of 12 September 2006; Case C-300/04*, Eman and Sevinger, *Judgment of the Grand Chamber of 12 September 2006*; *ECtHR (Third Section), 6 September 2007, Application Nos. 17173/07 and 17180/07*, Oslin Benito Sevinger and Michiel Godfried Eman v. the Netherlands (Sevinger and Eman), 45 COMMON MKT. L REV. 787, 792-93 (2008) (discussing the reasoning of the ECtHR in *Sevinger and Eman*).

167. *See generally* Dimitry Kochenov, *Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link?*, 16 MAASTRICHT J. EUR. & COMP. L. 197 (2009) (recognizing that the norms of international law are not inconsistent with disenfranchisement of expatriates while the same cannot necessarily be said about the norms of EU law).

168. For a detailed analysis, see Federico Fabbrini, *The Political Side of EU Citizenship in the Context of EU Federalism*, *in* EU CITIZENSHIP RIGHTS SHAPING EU FEDERALISM (Dimitry Kochenov ed., forthcoming 2016).

169. Case C-145/04, Spain v. United Kingdom, 2006 E.C.R. I-7917, Judgment, ¶¶ 76, 78.

170. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Mar. 20, 1952, 213 U.N.T.S. 262. *See also* Matthews v. United Kingdom, App. No. 24833/94, 28 Eur. Ct. H.R. 361, ¶ 35 (1999) (holding that the United Kingdom is responsible for securing the rights guaranteed by Article 3 of the First Protocol regardless of whether elections were domestic or European).

be the case, however, it would most likely not be EU law, but rather ECHR law, that would apply, which would allow for a greater degree of appreciation of the historical context of the country in question. This means that, while extending voting rights to the newly-minted EU citizens who are "non-citizens" of Latvia is not *per se* one of the requirements of EU law, it would be much better to take this step to ensure that Latvia is in compliance with the ECHR and its Protocols.[171]

In summation, given the architecture of the vertical division of powers in the context of the multi-level legal system of the EU, EU citizenship is largely confined to the situations which are cross-border in nature, not affecting those who do not move around the Union or conduct much cross-border business.[172] In this context, granting EU citizenship to Latvian "non-citizens" will have only marginal consequences for national law, as it will empower these people *outside* of the Republic in other EU Member States. This will definitely reduce the political cost of making the decision to extend EU citizenship to this group. Moreover, as far as voting rights are concerned, while extending voting rights at the municipal and EU level is most desirable, it is not an absolute requirement of EU law at this stage.

Finally, one has to take into account current geopolitical realities in the region. The ongoing conflict in Ukraine raised many issues concerning the security of Latvia and the sense of belonging and attachment. More Latvian citizens belonging to minorities (69.1%) than non-citizens (56.4%) consider themselves patriots of Latvia;[173] only 24.3% of non-citizens (compared to 41.8% of citizens) would be ready to defend Latvia

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171. Such a step will also be in line with virtually *unanimous* recommendations of all the international bodies monitoring the situation of the "non-citizens," and following the example of Estonia, largely facing a similar problem, but solving it slightly differently. *See* Kohaliku omavalitsuse volikogu valimise seadus [Estonian Local Government Council Election Act], section 5(2)1, RIIGI TEATAJA, I 2002, 36, 220.

172. Dimitry Kochenov, *The Citizenship Paradigm*, 15 CAMBRIDGE Y.B. EUR. L. POL'Y 196 (2013); *see Free Movement of Persons*, *supra* note 158, at 736-37 (discussing the cross-border element of the wholly internal rule in the context of reverse discrimination).

173. TIRGUS UN SABIEDRISKĀS DOMAS PĒTĪJUMU CENTRS, PIEDERĪBAS SAJŪTA LATVIJAI [MKT. & PUB. OP. RESEARCH CTR., A SENSE OF BELONGING TO LATVIA], 15 (2008) (Lat.), http://www.mk.gov.lv/sites/default/files/editor/atskaite_piederiba_08_2014.pdf.

with arms, if necessary.[174] In the meanwhile, fighters of Latvian origin have been (at a micro-level probably, but still) contributing to destabilizing the situation in Ukraine, joining the Russian-backed separatist groups.[175] The conferral of EU citizenship will unquestionably improve security of Latvia in turbulent times.

V. CONCLUSION

This paper made three essential points which, if taken seriously, are capable of improving the situation of "non-citizens" of Latvia at no political or economic cost for the Republic.

Firstly, based on a brief overview of the Latvian legislation and court practice, it was demonstrated that the status of a "non-citizen" of Latvia is not to be compared with statelessness *i.e.* not having any citizenship at all. Indeed, this *is* an inheritable, quasi-citizenship status seemingly recognized as such by a number of states and international organizations. Latvian courts are explicit on the matter.

Secondly, based on a brief overview of Europe-wide practice of EU citizenship conferral, it was demonstrated that the *ius tractum* status of EU citizenship does not always follow neatly from full Member State nationality/citizenship under the national law of a Member State. Rather, it builds on the EU law notion of "nationality for the purposes of EU law," which can include all categories of persons. Historical examples from Germany and the United Kingdom demonstrate that both narrow and expansive readings are possible regarding those who are "nationals for the purposes of EU law." With *Kaur*, the ECJ has fully embraced Member States' practice of making declarations to clarify who is to be considered a citizen of the

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174. TIRGUS UN SABIEDRISKĀS DOMAS PĒTĪJUMU CENTRS, LATVIJAS IEDZĪVOTĀJU VIEDOKLIS PAR VALSTS AIZSARDZĪBAS JAUTĀJUMIEM [MKT. & PUB. OP. RESEARCH CTR., LATVIAN CITIZENS' OPINION ON MATTERS OF NATIONAL DEFENSE], (SKDS) 37 (2014) (Lat.), http://www.mod.gov.lv/~/media/AM/Ministrija/Sab_doma/2014/Iedzivotaju_viedoklis_par_valsts_aizsardzibu_2014.ashx.

175. DROŠĪBAS POLICIJA, 2014 PUBLISKAIS PĀRSKATS PAR DROŠĪBAS POLICIJAS DARBĪBU 2014.GADĀ [POLICE SECURITY, 2014 PUBLIC REPORT ON THE ACTIVITIES OF THE POLICE SECURITY] 15 (2015), http://www.iem.gov.lv/tools/download.php?file=files/text/DP_paarskats_2014.pdf.

EU. Moreover, other Member Statesdo not have a right, following the *Micheletti* case law, to disregard the responsible exercise of sovereignty by their peers in this field.

The third point combines the other two: a strong citizenship-like personal status of legal attachment to the Latvian Republic enjoyed by ethnic minorities offers a possibility of extending, by declaration, EU citizenship to the "non-citizens" of Latvia, thereby granting them important rights throughout all the EU Member States, including a virtually unlimited right to work, reside and to be free from discrimination across the EU. Given the importance of drawing a clear line between the scopes of application of national law of the Member States in "wholly internal situations" and EU law in "cross-border situations," the extension of EU citizenship to Latvian "non-citizens" will not affect the internal situation in the country Instead, it will empower these individuals elsewhere in the Union, thus reducing the political and economic cost of this decision, adding to its feasibility.

A draft of the necessary declaration that would instantly activate the EU citizenship of the "non-citizens" of Latvia is appended (in Latvian with an English translation).

ANNEX I: DRAFT DECLARATION OF THE REPUBLIC OF LATVIA

Latvijas Republikas deklarācija par termina "pilsoņi" definīciju

Attiecībā uz Latvijas Republiku termini „pilsoņi" vai „Dalībvalstu pilsoņi", kas tiek lietoti Līgumā par Eiropas Savienību, Līgumā par Eiropas Savienības darbību vai Eiropas Atomenerģijas kopienas dibināšanas līgumā, vai arī jebkurā aktā, kas vai nu atvasināts no minētajiem Līgumiem, vai paliek spēkā saskaņā ar minētajiem Līgumiem, attiecināmi uz:

(a) Latvijas pilsoņiem;

(b) Latvijas nepilsoņiem, kuriem šis statuss piešķirts saskaņā ar likumu „Par to bijušās PSRS pilsoņu statusu, kuriem nav Latvijas vai citas valsts pilsonības".

Declaration by the Republic of Latvia on the definition of the term "nationals"

As to the Republic of Latvia, the terms "nationals" or "nationals of Member States", wherever used in the Treaty on the European Union, the Treaty on the Functioning of the European Union, or the Treaty establishing the European Atomic Energy Community, or in any of the acts deriving from those Treaties or continued in force by those Treaties, are to be understood to refer to:

(a) Latvian citizens;

(b) Non-citizens of Latvia enjoying this status by virtue of the Law on the Status of Former Soviet Citizens who are not Citizens of Latvia or Any Other State.