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Welcome to Europe, but Please Stay Out: Freedom of Movement and the May 2004 Expansion of the European Union

By
Natalie Shimmel

I.

INTRODUCTION

On May 1st, 2004, the European Union (EU) welcomed to its fold ten new members: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.¹ Fireworks erupted across the continent at 12:01 a.m. while newly minted EU citizens celebrated to the triumphant strains of Beethoven's "Ode to Joy," the EU anthem. Europeans drank toasts, traveled across newly relaxed borders, and attended concerts and parties.² The next morning, representatives from all 25 EU Member States gathered in Dublin for a symbolic ceremony to raise the flags of the new members besides those of the fifteen previous members.³ EU and national leaders addressed messages of celebration, unification, and welcome to the new countries. "Welcome to the new Europe," declared Romano Prodi, President of the European Commission. "Today Europeans are celebrating the fact that they are no longer kept apart by phony ideological barriers."⁴ The Chancellor of Germany, Gerhard Schröder, proclaimed: "Today we have the unique chance to change this Europe into a

1. Denis Staunton, *New Dawn for United Europe as 10 States Join EU*, IRISH TIMES, May 1, 2004, at 1.

2. MONIKA BYRSKA, EUROPEAN CITIZEN ACTION SERVICE, 'THE UNFINISHED ENLARGEMENT': REPORT ON FREE MOVEMENT OF PEOPLE IN EU-25, at 2 (Monika Byrska & Tony Venables eds., 2004), available at http://www.ecas.org/file_uploads/498.pdf (cited in Euractiv, *Action Group Calls for Early End to Restrictions on Free Movement of Labour*, May 28, 2004, <http://www.euractiv.com/Article?tcaturi=tcu:29-118050-16&type=News>).

3. Robert MacPherson & Jitendra Joshi, *Europe Reunited as 10 Nations Join the Family*, AGENCE FRANCE-PRESSE, May 1, 2004, available at 5/1/04 AGFRP 10:50:00. Prior to the May 2004 expansion, the EU consisted of Belgium, France, Germany, England, the Netherlands, Spain, Portugal, Italy, Austria, Ireland, Sweden, Greece, Finland, Luxemburg, and Denmark. These countries are known as the EU-15.

4. *Welcome to a New Europe, Trumpet World Leaders*, AGENCE FRANCE-PRESSE, May 1, 2004, available at 5/1/04 AGFRP 14:13:00 [hereinafter *Welcome to a New Europe*].

place of lasting peace and prosperity.”⁵

Indeed, these accolades and congratulatory predictions seemed well-deserved by the European Union and its architects. The EU traces its humble roots to the European Coal and Steel Community (ECSC), created in 1951 by Belgium, France, Germany, Italy, Luxemburg, and the Netherlands to manage Europe’s coal and steel supply and prevent Germany from rearming itself after World War II.⁶ The ECSC was soon joined in 1957 by the European Atomic Energy Community (Euratom), created to establish a mutual atomic energy policy,⁷ and the European Economic Community (EEC),⁸ designed to coordinate economic policy and build a common internal market organized around four fundamental freedoms: the free movement of capital, the freedom to provide services, the free movement of goods, and the free movement of people.⁹ With the accession of more and more countries, the EEC gradually became a site of political as well as economic coordination. The Maastricht Treaty of 1992 formalized and further advanced this political integration with the creation of the European Union, a political entity composed of three pillars.¹⁰ The first pillar contains the European Community, as embodied in its three basic treaties, the EC Treaty (formally the EEC Treaty), the ECSC Treaty, and the Euratom Treaty. The second pillar consists of the EU’s “Common Foreign and Security Policy,” and the third pillar of cooperation in justice and home affairs.¹¹ By the beginning of the 21st century, the EU had grown into a complex and powerful multinational organization that integrated its members’ economic, social, cultural, fiscal, and political policies on an unprecedented scale.

Today, four main institutional actors coordinate the EU: the European Council, the European Commission, the European Parliament, and the European Court of Justice (ECJ). The Council consists of one minister from each Member State¹² and has policymaking and legislative authority.¹³ The Council also has

5. Christopher Adams & George Parker, *European Union Hails its Biggest Expansion Yet*, FIN. TIMES UK, May 1, 2004, available at 2004 WLNR 9732934.

6. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty]; GEORGE A. BERMANN ET AL., EUROPEAN UNION LAW 9 (2d ed. 2002). For a general history of the development of the EU, see *id.* at 3-27; Hon. John P. Flaherty & Maureen E. Lally-Green, *The European Union: Where Is It Now?*, 34 DUQ. L. REV. 923 (1996).

7. Treaty Implementing the European Atomic Energy Community, March 25, 1957, 298 U.N.T.S. 167, 5 EUR. Y.B. 454 [hereinafter Euratom Treaty].

8. Treaty Establishing the European Economic Community, Mar. 25, 1957, 261 U.N.T.S. 11, 4 EUR. Y.B. 412 [hereinafter EEC Treaty].

9. Treaty Establishing the European Community, Dec. 24, 2002, O.J. (C325) (as amended) art. 3(c) [hereinafter EC Treaty]; Andrew L. Lee, *The Bosman Case: Protecting Freedom of Movement in European Football*, 19 FORDHAM INT’L L.J. 1255, 1264 (1996).

10. Treaty on European Union, Dec. 24, 2002, O.J. (C325) (as amended) [hereinafter Maastricht Treaty]; Flaherty & Lally-Green, *supra* note 6, at 944-45.

11. BERMANN ET AL., *supra* note 6, at 17; see Markus G. Puder, *Salade Niçoise from Amsterdam Left-overs—Does the Treaty of Nice Contain the Institutional Recipe to Ready the European Union for Enlargement?*, 8 COLUM. J. EUR. L. 53, 55 (2002); Flaherty & Lally-Green, *supra* note 6, at 944-45.

12. EC Treaty, *supra* note 9, art. 203.

the exclusive power to initiate all EU legislation. For extremely important issues (for example, the accession of new Member States), unanimity among Council members is required; for most matters, voting proceeds by “qualified majority,” meaning that the votes of larger states receive more weight than those of smaller states.¹⁴ The Presidency of the Council rotates among Member States every six months,¹⁵ and some commentators have suggested that the President’s role has grown more important since the Council’s founding as Presidents increasingly use their terms of office to advance their own political agenda.¹⁶

The Commission is a quasi-executive branch that drafts legislation for the Council, undertakes studies at the request of the Council, and enforces compliance with EU law.¹⁷ The Commission has 20 members; originally each small Member State generally nominated one member, while each large Member State could nominate two.¹⁸ However, in light of the May 2004 accession, the Treaty of Nice changed the composition of the Commission so that as of January 1, 2005, each Member State has the right to nominate one Commissioner, bringing the total number of Commissioners to 25.¹⁹ Unlike members of the Council who primarily advance the interests of their respective Member States, members of the Commission act independently to promote the development and integration of the EU itself.²⁰

The Parliament is the EU legislature, but it enjoys relatively little power in comparison with national parliaments. At first, Parliament’s authority was exclusively advisory, with no authority over proposed legislation or budgets. However, each successive EU treaty added powers to Parliament’s repertoire and today the Parliament can review proposed Council legislation with a limited veto power, request that the Council initiate legislation on a particular topic, and conduct confirmation hearings on proposed Commissioners.²¹ It is also the only major EU institution whose members are elected directly by the EU populace. The 732 Members of Parliament (MEPs) serve for five-year terms and “represent the European people rather than a Member State government.”²²

The Court of Justice (ECJ) enforces compliance with “the interpretation and application” of the EC Treaty.²³ It consists of 15 independent judges with six-year terms whom Member States do not have the power to dismiss.²⁴ The

13. *Id.* art. 202.

14. *Id.* art. 205; BERMANN ET AL., *supra* note 6, at 36-37.

15. EC Treaty, *supra* note 9, art. 203.

16. BERMANN ET AL., *supra* note 6, at 35.

17. EC Treaty, *supra* note 9, art. 207(3); BERMANN ET AL., *supra* note 6, at 42-43.

18. EC Treaty, *supra* note 9, art. 213; BERMANN ET AL., *supra* note 6, at 43.

19. Protocol on the Enlargement of the European Union, Treaty of Nice, art. 4(1). The Treaty of Nice also reweighted votes for qualified majority voting in the Council. *Id.* art. 3(1)(a).

20. EC Treaty, *supra* note 9, art. 213; BERMANN ET AL., *supra* note 6, at 44.

21. BERMANN ET AL., *supra* note 6, at 51-55.

22. *Id.* at 53. The Treaty of Nice increased the total number of MEPs from 535 to 732. *Id.* at 52.

23. EC Treaty, *supra* note 9, art. 220.

24. *Id.* art. 221; BERMANN ET AL., *supra* note 6, at 59.

ECJ reviews the legality of EU legislation and hears suits against other EU institutions and Member States for alleged noncompliance with EU law.²⁵ Such suits can be brought by the Commission, other Member States, and EU nationals.²⁶ National courts can also certify questions about EU law directly to the ECJ.²⁷ With the ECJ's docket increasingly burdened, a Court of First Instance (CFI) was added in 1987.²⁸ Most cases now must first pass through the CFI to reach the ECJ; while CFI decisions are appealable as a matter of right, defeated parties may only appeal points of law.²⁹

The complexity of EU governance represents to many a remarkable achievement in international cooperation in which the ten new Member States would finally be able to participate.³⁰ Furthermore, most of the new Member States are Central and Eastern European countries (CEECs)³¹ that had only recently shaken off the yoke of Communism and Soviet domination. For many people in these nations, joining the EU was a proud moment, symbolic of their democratic and economic accomplishments and their reentry into the community of their free European siblings.³² There were also important practical benefits that the CEECs would receive from membership, including access to the EU's Single Market, the implementation of the Common Agricultural Policy (CAP) in the new Member States, increased transfers of CAP and structural funds, and the eventual introduction of the euro.³³

In reality, however, the May 2004 expansion did not fully live up to the promises of the triumphant rhetoric and joyful celebrations. Many old Member States were fearful that the inclusion of their poor, newly democratic neighbors

25. EC Treaty, *supra* note 9, arts. 226-27, 230; BERMANN ET AL., *supra* note 6, at 59.

26. EC Treaty, *supra* note 9, arts. 226-27; Case 26/62, *NV Algemene Transport v. Nederlandse Administratie Der Belastingen*, 1963 E.C.R. I (holding that a Dutch importer could bring suit in national court challenging Dutch law as violative of provisions of the EC Treaty). This case clarified the doctrine of "direct effect": the EC Treaty and certain types of EU legislation are self-executing and EU nationals can claim the rights they confer even if Member States do not pass implementing legislation.

27. BERMANN ET AL., *supra* note 6, at 59.

28. EC Treaty, *supra* note 9, art. 225; BERMANN ET AL., *supra* note 6, at 65.

29. BERMANN ET AL., *supra* note 6, at 66-69. For a more thorough explanation of the roles of each EU governing body, see generally *id.* at 33-74.

30. Flaherty & Lally-Green, *supra* note 6, at 926.

31. Cyprus and Malta represent the exception to this rule. Both are small islands whose accession concerns are for the most part quite different from those of the CEECs. This paper will focus almost exclusively on the highly contested issues surrounding the accession of the CEECs which are largely absent from the accessions of Cyprus and Malta.

32. See generally Catherine Phuong, *Enlarging 'Fortress Europe': EU Accession, Asylum, and Immigration in Candidate Countries*, 52 INT'L & COMP. L.Q. 641 (2003). Not all segments of the population of acceding countries were pleased about joining the EU. In Poland, for example, despite an overwhelming "yes" vote to join the EU at the polls, portions of the population remained wary of the effects of accession and further integration. See Peter S. Green, *Poles Vote Yes to Joining European Union*, N.Y. TIMES, June 9, 2003, available at 2003 WLNR 5182584; Joanna Mizgala, *A Fresh Face to Head Europe*, FIN. TIMES USA, June 25, 2004, available at 2004 WLNR 9783662; Jan Cienski & Stefan Wagstyl, *The Papal Legacy: Kwasniewski Warns Nationalists Might Use Death to Push Agenda*, FIN. TIMES USA, Apr. 6, 2005, available at 2005 WLNR 5321098.

33. European Union, *The Economic Impact of Enlargement*, at 6, http://europa.eu.int/comm/economy_finance/publications/enlargement_papers/2001/elp04en.pdf.

to the East would destabilize the EU and cause its economic growth to stagnate. In particular, citizens of the old Member States worried that their labor markets would be flooded with poor migrants from the East, who would take already scarce jobs away from current EU citizens by their willingness to work for low wages.³⁴ Therefore, to prevent a flood of unwanted migrants, during accession negotiations the old Member States demanded and won the right to impose transitional measures that would temporarily deny the citizens of the new Member States their right to complete freedom of movement as enjoyed by citizens of old Member States.

This paper was conceived as an argument against the imposition of these transitional measures. In Part I, this paper will provide a brief overview of the right to freedom of movement as embodied in EU treaties, legislation, and jurisprudence and its symbolic importance to the EU integration project. Part II of this paper will examine both the accession process and the transitional measures adopted by the old Member States in conjunction with the May 2004 expansion. Part III of this paper will argue that these transitional measures are discriminatory, unnecessary, and without any legitimate economic purpose. They are incompatible with the emphasis the EU places on freedom of movement as part of the integration process, and serve only to legitimize Western European fears and biases while symbolically and actually preventing the true integration of the Central and Eastern European states into the European Union.

II.

THE RIGHT TO FREE MOVEMENT OF PERSONS IN THE EU

A. Freedom of Movement for Workers

Freedom of movement for workers is essential to European integration in both the political and economic spheres. As one of the four freedoms that serve as the building blocks of the common market, freedom of movement for workers represents a key piece of European economic integration. In keeping with the original conception of the European Union as an economic entity, workers were the first group to receive the right to move freely throughout all Member States. With the development of greater political integration came the goal of extending freedom of movement to all EU citizens. The right of free movement for workers remains a crucial component of achieving this objective, for without the means with which to support themselves, most EU citizens would be unable to take advantage of the opportunity to live in another Member State. Thus, freedom of movement for workers is an indispensable tool for furthering both politi-

34. European Union, *Freedom of Movement for Workers After Enlargement*, June 18, 2004, <http://europa.eu.int/scadplus/printversion/en/cha/c10524.htm> (last visited 4/24/05) [hereinafter EU website]; DIRECTORATE-GENERAL FOR PRESS AND COMMUNICATION, EUROPEAN COMMISSION, MORE UNITY AND MORE DIVERSITY: THE EUROPEAN UNION'S BIGGEST ENLARGEMENT (2003), available at <http://europa.eu.int/comm/publications/booklets/move/41/en.doc> [hereinafter MORE UNITY AND MORE DIVERSITY].

cal and economic integration.

Article 39 of the EC Treaty represents the core of freedom of movement in the EU and guarantees the right to freedom of movement for workers.³⁵ This provision allows EU citizens to enter and move freely about other Member States in order to accept offers of employment or while looking for employment during a reasonable amount of time.³⁶ Member States cannot discriminate on the basis of nationality between their own nationals and the nationals of other Member States,³⁷ and must grant the right to residency in their territory to qualifying EU citizens. The benefits conferred by Article 39 are implicitly limited to nationals of EU Member States.³⁸ Article 40 of the EC Treaty further gives the European Council the power to issue directives and regulations in order to effectuate freedom of movement for workers; such legislation has both vertical and horizontal direct effect.³⁹ The correlative right to establishment in another

35. EC Treaty, *supra* note 9, art. 39. The European Union's basic structure is established through a series of foundational treaties. The three core treaties are the ECSC Treaty, the Euratom Treaty, and the EEC. Each subsequent treaty is then incorporated into the text of the original establishing treaty in the form of amendments. The Single European Act amended the EEC Treaty in 1985. Single European Act, 1987 O.J. (L169). In 1993, the Treaty of Maastricht changed the name of the EEC to the European Community (EC), and included a separate Treaty on European Union, which represented political, rather than economic, integration. In 1999, the Treaty of Amsterdam renumbered most of the provisions of the EC Treaty and the TEU. Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. (C340) 1 [hereinafter Treaty of Amsterdam]. The Treaty of Nice is the latest treaty, ratified in 2003. Treaty of Nice Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, 2001 O.J. (C80) 1 [hereinafter Treaty of Nice]. All references to the EC Treaty in this paper are to the most current version of the EC, which includes the new Article numbers assigned by the Treaty of Amsterdam. *See generally* BERMANN ET AL., *supra* note 6, at 3-27; *Treaty of Nice*, EU Commission website, available at http://europa.eu.int/comm/nice_treaty/index_en.htm#.

36. EC Treaty, *supra* note 9, art. 39(3); FRIEDL WEISS & FRANK WOOLDRIDGE, *FREE MOVEMENT OF PERSONS WITHIN THE EUROPEAN COMMUNITY* 49 (2002).

37. EC Treaty, *supra* note 9, art. 39(2).

38. Though the EC Treaty makes no specific mention made of nationals of non-Member States, later legislation has clarified that nationals of non-Member States are excluded. WEISS & WOOLDRIDGE, *supra* note 36, at 41, 169. However, some specific agreements have been concluded between the EU and other countries which may grant some free movement rights to nationals of those states. *See* Melchior Wathelet, *The Case Law of the European Court of Justice and Nationals of Non-European Community Member States*, 20 FORDHAM INT'L. L.J. 603 (1997). For example, treaties of this sort have been passed with Iceland, Norway, Liechtenstein, Switzerland, Turkey, Morocco, Tunisia, and Russia. WEISS & WOOLDRIDGE, *supra* note 36, at 219; BERMANN ET AL., *supra* note 6, at 577.

39. WEISS & WOOLDRIDGE, *supra* note 36, at 43. Regulations are equivalent to national legislation and take effect immediately, while directives are non-self-executing and require individual Member States to pass implementing legislation. EC Treaty, *supra* note 9, art. 249. Vertical direct effect allows workers to challenge in court actions of Member State governments alleged to restrict freedom of movement or violate the non-discrimination principle. BERMANN ET AL., *supra* note 6, at 589; *see, e.g.*, Case C-379/87, *Groener v. Minister for Education*, 1989 E.C.R. 3967 (*reprinted in* BERMANN ET AL., *supra* note 6, at 586) (Dutch national unsuccessfully challenged Irish law requiring all teachers in Ireland to be proficient Irish). Horizontal direct effect allows workers to challenge private companies in the same manner. BERMANN ET AL., *supra* note 6, at 589; *see, e.g.*, Case C-281/98, *Angonese v. Cassa di Risparmio di Bolzano*, 2000 E.C.R. I-4139 (*reprinted in* BERMANN ET AL., *supra* note 6, at 589) (holding that an Italian bank had to accept a diploma from a German university certifying proficiency in Italian on the same basis that it would accept a diploma from an Ital-

Member State as a “self-employed” person or to “set up and manage undertakings, in particular companies or firms,”⁴⁰ and to provide professional, industrial, and commercial services across internal borders⁴¹ further supplements freedom of movement for workers.

Regulation 1612/68 is the main piece of legislation implementing the rights of Article 39.⁴² Part I, Title I grants to Member State nationals “the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State.”⁴³ Unfortunately, neither instrument attempts to specify what types of activity an EU national must perform to be considered a worker. The definition of a worker has instead largely been elaborated through the jurisprudence of the ECJ. Thus in *Lawrie-Blum v. Land Baden-Württemberg*, the ECJ noted that “worker” must have a community meaning; national courts cannot decide for themselves what a worker is.⁴⁴ The Court further held that the “term ‘worker’ covers any person performing for remuneration work the nature of which is not determined by himself for and under the control of another,” which effectively excludes anyone who is self-employed from the scope of Article 39 or Regulation 1612/68.⁴⁵ In *Levin v. Staatssecretaris van Justitie*, the ECJ held that the right to freedom of movement also applied to part-time workers as long as their employment involved “the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary.”⁴⁶

Regulation 1612/68 provides additional guarantees that complement and facilitate the exercise of free movement by workers. Part I, Title II reinforces the EC Treaty’s prohibition on national discrimination by providing that a worker from another Member State may not be “treated differently from national workers. . . in respect of any conditions of employment and work.”⁴⁷ Subsequent decisions by the ECJ have elaborated upon the right to non-discrimination⁴⁸ and held that Member States cannot accomplish by indirect or covert discrimination that which would be impermissible through direct discrimination.⁴⁹ Member

ian university certifying proficiency in Italian).

40. EC Treaty, *supra* note 9, art. 43.

41. *Id.* arts. 49-50.

42. Council Regulation 1612/68 of 15 October 1968 on Freedom of Movement for Workers Within the Community, 1968(II) O.J. SPEC. ED. 475.

43. Regulation 1612/18 art. 1; *see also* WEISS & WOOLDRIDGE, *supra* note 36, at 46.

44. Case 66/85, *Lawrie-Blum v. Land Baden-Württemberg*, 1969 E.C.R. 363, ¶ 16.

45. *Id.* ¶ 12; *see also* WEISS & WOOLDRIDGE, *supra* note 36, at 47.

46. Case 53/81, *Levin v. Staatssecretaris van Justitie*, 1982 E.C.R. 1035, ¶ 17.

47. Regulation 1612/68 art. 7(1).

48. *See, e.g.*, Case 15/69, *Wurtembergische Milchverwertung-Sudmilch AG v. Salvatore Ugliola*, [1969] ECR 363 (holding that an EU national employed in another Member State is entitled to have his military service in his home state taken into account by his employer in calculating his seniority on the same basis as if he had performed the military service in the state where he was employed).

49. *See, e.g.*, Case C-350/96, *Clean Car Auto Service v. Landeshauptmann Von Wien*, 1998 E.C.R. I-2521, ¶ 27 (*reprinted in* BERMANN ET AL., *supra* note 6, at 584) (“The court has consistently held that the rules of equal treatment prohibit not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria,

States are also forbidden from discriminating against nationals of other EU states in terms of “social and tax advantages,”⁵⁰ “access to training in vocational schools,”⁵¹ “membership of trade unions,”⁵² and housing.⁵³

Finally, Part I, Title III grants to the family members of migrant workers the right to move and live with the worker in another Member State.⁵⁴ The worker’s spouse and children under the age of 21 also have the right to work in that Member State, even if they are not EU-nationals.⁵⁵ Additionally, the worker’s children have the right to be admitted to the Member State’s “general education, apprenticeship, and vocational training courses under the same conditions as nationals of that State.”⁵⁶ The ECJ has also held that family members’ dependence on social assistance cannot impinge on their right to reside in another Member State.⁵⁷ Title III sprang from the realization of the regulation’s drafters that few workers would be willing to leave their families behind, and thus the absence of the right to free movement of family members would become a significant obstacle to attaining true freedom of movement.⁵⁸ The Council further strengthened Title III with the passage of Directive 68/360, which officially abolished all restrictions on the freedom of movement and residence for workers and their families, provided standardized rules for all Member States for the issuance of residence permits, and limited to passports and identity cards the documents Member States could demand workers and their families produce to

achieve in practice the same result.”). Any national measure which uses residence as the grounds for distinguishing amongst EU nationals is “inherently suspect.” John Handoll, *The Equal Treatment of Migrant Workers*, in *THE FREE MOVEMENT OF WORKERS WITHIN THE EUROPEAN UNION* 27, 32 (Niamh Hyland ed., 1999). National rules may only derogate from the principle of nondiscrimination if they satisfy the requirements of “necessity, proportionality and non-discrimination.” *Id.* at 35. Note however that though both direct and indirect discrimination are prohibited, indirect discrimination may be permissible if it is justified on objective grounds (e.g. where national and migrant workers are simply not similarly situated). WEISS & WOOLDRIDGE, *supra* note 36, at 59.

50. Regulation 1612/68 art. 7(2). The term “social and tax advantages” has been interpreted extremely broadly by the ECJ to include all grants which would facilitate mobility in society for the recipients. Social advantages have been held to include state assistance in paying for funerals and a transportation fare reduction for large families. Handoll, *supra* note 29, at 41-42; BERMANN ET AL., *supra* note 6, at 599 (citing Case 32/75, *Cristini v. SNCF Francais*, 1975 E.C.R. 1085).

51. Regulation 1612/68 art. 7(3); *see also* Case 293/83, *Gravier v. City of Liège*, 1985 E.C.R. 593. The *Gravier* des held that the Academie Royale des Beaux-Arts in Belgium could not require a French student to pay an enrollment that was not assessed upon Belgium nationals. The Court noted that “[a]ccess to vocational training is in particular likely to promote free movement of persons throughout the Community, by enabling them to obtain a qualification in the Member State where they intend to work and by enabling them to complete their training and develop their particular talents in the Member State whose vocational training programmes include the special subject desired.” *Id.* ¶ 24.

52. Regulation 1612/68 art. 8(1).

53. *Id.* art. 9.

54. *Id.* art. 10(1). This article includes the worker’s spouse, children who are under 21 or dependents and other “dependent relatives in the ascending line of the worker and his spouse.”

55. *Id.* art. 11.

56. *Id.* art. 12.

57. A.P. van der Mei, *Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law*, 19 ARIZ. J. INT’L & COMP. L. 803, 838 (2002) (citing *Centre Public d’Aide Sociale de Courcelles v. Lebon*, 316/85, 1987 E.C.R. 2811).

58. Van der Mei, *supra* note 57, at 836.

enter the territory of the state.⁵⁹

The law in this area is not yet settled and continues to develop. For example, the ECJ has held that the Netherlands cannot deny benefits to the unmarried companion of a migrant worker if such benefits are extended to Dutch nationals⁶⁰, but it is still not clear if, in the case of divorce, the worker's former spouse could continue to reside in the Member State in which he had lived with the worker.⁶¹

There are two significant exceptions to freedom of movement for workers. First, Article 39(c) of the EC Treaty allows Member States to limit freedom of movement on the basis of "public policy, public security or public health." These grounds are codified in Directive 64/221,⁶² which places important limitations on when these exceptions can be invoked.⁶³ For example, limitations placed on freedom of movement for reasons of public policy or public security must "be based exclusively on the personal conduct of the individual concerned."⁶⁴ Furthermore, the ECJ has held that the public policy exception must be interpreted narrowly and given a community meaning, although Member States do have some discretion, as circumstances and national policy vary from state to state.⁶⁵ On the other hand, Member States are afforded much less deference in invoking the public health exception. Only diseases listed in the Annex to the Directive may permissibly serve as grounds for derogations for public health,⁶⁶ which includes diseases listed by the World Health Organization as subject to quarantine.⁶⁷ In addition, affected EU nationals receive "a number of procedural safeguards" to ensure no such individual is unlawfully excluded from the territory of another Member State through the incorrect application of one of these exceptions.⁶⁸ These include access to information in a manner each individual can understand about grounds for deportation or denial of a residency permit, as well as the right to an appeal.⁶⁹ Finally, derogations on these exceptions can only apply to a total ban on residence, as opposed to a restriction on movement to one part of a Member State,⁷⁰ and cannot be invoked solely for

59. Council Directive 68/360 of 15 October 1968 on the Abolition of Restrictions on Movement and Residence Within the Community for Workers of Member States and their Families, O.J. (L 257) 13.

60. Case 59/85, *Netherlands v. Reed*, 1986 E.C.R. 1283.

61. WEISS & WOOLDRIDGE, *supra* note 36, at 52.

62. Council Directive 64/221 of 25 February 1964 on the Co-ordination of Special Measures Concerning the Movement and Residence of Foreign Nationals which are Justified on Grounds of Public Policy, Public Security or Public Health, 1963-1964 O.J. SPEC. ED. 117.

63. BERMANN ET AL., *supra* note 6, at 603.

64. Directive 64/221 art. 3.

65. Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337 (holding that a Dutch national who worked for the Church of Scientology could be excluded from the UK due to the UK's determination that Scientology was contrary to the public good) (discussed in WEISS & WOOLDRIDGE, *supra* note 36, at 146).

66. Directive 64/221 art. 4; Directive 64/221 Annex.

67. WEISS & WOOLDRIDGE, *supra* note 36, at 145.

68. *Id.* at 150-51.

69. Directive 64/221 art. 6-9; WEISS & WOOLDRIDGE, *supra* note 36, at 150.

70. Case 36/75, *Rutili v. Minister for the Interior*, 1975 E.C.R. 1219 (France could not al-

economic purposes.⁷¹

Article 39(4) of the EC Treaty provides the second major exception to freedom of movement for workers, stating that the provisions of Article 39 “shall not apply to employment in the public service.”⁷² In *Commission v. Belgium*, the ECJ held that this provision exempts:

posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the state or of other public authorities. Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the state and reciprocity of rights and duties which form the foundation of the bond of nationality.⁷³

In other words, Member States are free to refuse to hire EU nationals from another Member State for categories of governmental jobs that require an elevated degree of loyalty from the employee to the state. This exception has been interpreted narrowly, and has been held to turn on the nature of the responsibilities involved, and not on whether national legislation or authorities consider the job to be a public service post.⁷⁴ The Commission has determined that jobs in fields like “commercial service, public health services, public educational establishments and civil research” generally will not qualify for this exception, whereas judicial posts, jobs in the upper echelons of civil service, and senior positions in the police, armed services, and the tax authority likely would.⁷⁵ Commentators have suggested that the distinction may lie between jobs that are traditionally blue collar and traditionally white collar.⁷⁶

B. Freedom of Movement for Non-Workers

While freedom of movement for workers is undoubtedly one of the most important aspects of freedom of movement, subsequent EU treaties and legislation supply various additional rights that extend freedom of movement to EU nationals who are not workers. The gradual extension of the right to freedom of movement to non-workers mirrors the EU’s evolution from an economic entity to a political entity. Rather than existing purely to further the completion of the internal market, freedom of movement for persons now serves both as a tool to encourage support for greater EU integration among the European populace and as an expression of a nascent EU consciousness and identity.

The expansion of freedom of movement to non-workers began in 1970 with

low an Italian national into France generally but bar him from entering Alsace-Lorraine specifically because he had participated in riots that took place there) (discussed in WEISS & WOOLDRIDGE, *supra* note 36, at 147).

71. WEISS & WOOLDRIDGE, *supra* note 36, at 144.

72. EC Treaty, *supra* note 9, art. 39(4).

73. Case 149/79, *Commission v. Belgium*, 1980 E.C.R. 3881, ¶ 10.

74. WEISS & WOOLDRIDGE, *supra* note 36, at 47-48.

75. *Id.* at 48; Ricou Heaton, *The European Community After 1992: The Freedom of Movement of People and Its Limitations*, 25 VAND. J. TRANSNAT’L L. 643, 651 (1992).

76. See BERMAN ET AL., *supra* note 6, at 612-13.

the passage of Regulation 1251/70, which permits EU nationals who work in the territory of another Member State to remain permanently along with their families in that state after retiring, suffering an injury that results in “a permanent incapacity to work,” or having worked and resided in the state continuously for three years.⁷⁷ In 1990, Directive 90/365 granted rights of residence in other EU Member States to retirees who are covered by health insurance and who have sufficient resources “to avoid becoming a burden on the social security system of the host Member State.”⁷⁸ Simultaneously, Directive 90/365, also known as “the playboy directive” because it chiefly benefits the rich,⁷⁹ extended the right of residence to any Member State national who did not already enjoy it, subject to the same financial limitations as Directive 90/365.⁸⁰ A few years later, Directive 93/96 recognized a right of residence for students, their spouses, and their dependent children, provided that the student is “enrolled in a recognized education establishment,” and covered by health insurance.⁸¹ When combined, these pieces of legislation theoretically allow all EU nationals to travel freely throughout the EU. In practice, however, only those who are able to find work, enroll in an educational program, or have sufficient resources to support themselves can truly take advantage of the right to live in another Member State as codified in these Regulations and Directives.

Another important component of the right to free movement was supplied by the Schengen Agreements, which established a system coordinating the border policies of signatories that developed alongside but separately from the EU free movement regime. Belgium, France, Germany, Luxembourg, and the Netherlands signed the first Schengen Agreement on June 14, 1985, which was later supplemented by the Schengen Implementation Agreement in 1990.⁸² The effect of the Agreements is to abolish all controls at internal frontiers, allowing Europeans to move from Member State to Member State without passing through customs or so much as presenting a passport. Instead, occasional spot checks are the only tool used to enforce the borders.⁸³ The Schengen Agreements were not formally part of EU law at the time of their signing, but were later incorporated

77. Commission Regulation 1251/70 of 29 June 1970 on the Right of Workers to Remain in the Territory of a Member State after Having Been Employed in that State, O.J. (L 142) 24.

78. Council Directive 90/365 of 28 June 1990 on the Right of Residence for Employees and Self-Employed Persons who have Ceased their Occupational Activity, art. 1, O.J. (L 180) 28.

79. Heaton, *supra* note 75, at 653.

80. Council Directive 90/364 of 28 June 1990 on the Right of Residence, art. 1, O.J. (L 180) 26.

81. Council Directive 93/96 of 29 October 1993 on the Right of Residence for Students, art. 1, O.J. (L 317) 59. Art. 2 restricts the right of residence “to the duration of the course of studies in question.”

82. Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders and the Convention Applying the Agreement, June 14, 1985 (Agreement), June 19, 1990 (Convention), 30 I.L.M. 68 (1991) [hereinafter Schengen Agreements]; see WEISS & WOOLDRIDGE, *supra* note 36, at 35, CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* 437 (2004).

83. BERMANN ET AL., *supra* note 6, at 645-48 (citing Case 321/87, *Commission v. Belgium*, 1989 E.C.R. 997 (holding that Member States could not conduct systematic border checks except to verify that the individual held a Member State passport or national identity card)).

into the EU treaty system by the Treaty of Amsterdam in 1999.⁸⁴ Today all EU states besides the UK and Ireland participate in the Schengen system⁸⁵ and all new Member States are bound by its provisions.⁸⁶

In recognition of the security risks of eliminating border checks, the Schengen Agreements counterbalance ease of movement within the Union with stringent external border controls and increased cooperation between police, drug enforcement officials, and judicial officials responsible for extradition.⁸⁷ Pursuant to Article 96 of the Schengen Agreements, Schengen states established the Schengen Information System (SIS), a computerized database of persons alleged to pose a threat to security, safety, or public order.⁸⁸ Anyone listed in the SIS will be refused entry to all Schengen states.⁸⁹ When a new Member State accedes and becomes responsible for controlling the new EU external border, it must therefore intensify the rigorosity of its border checks and upgrade its computer system to one capable of handling SIS.⁹⁰

The Schengen Agreements also provide for a common asylum policy among Member States.⁹¹ Under the safe third country principle, refugees may only apply for asylum in one Member State, generally the one that issued a visa or the country in which the refugee first arrived. Once asylum applicants have submitted an asylum application in one Member State, they are not permitted a second bite at the apple in another Member State if their application is denied.⁹²

84. The Treaty of Amsterdam added a new Title to the EC Treaty. Title IV establishes common policies for asylum, immigration, visas and external border controls. Treaty of Amsterdam arts. 61-69; see WEISS & WOOLDRIDGE, *supra* note 36, at 27. Some commentators have suggested that the incorporation of Schengen into the EC treaty system has led to "considerable complexity, and to a partial fragmentation of the legal order of the EU," as not all EU members participate in Schengen. WEISS & WOOLDRIDGE, *supra* note 36, at 38; see also BARNARD, *supra* note 82, at 438.

85. The UK and Ireland have also opted out of Title IV of the Treaty of Amsterdam. Treaty of Amsterdam art. 69, Protocols B3 and B4. In practice, however, they have both chosen to take advantage of the Protocol right to opt in and cooperate on police and judicial matters. WEISS & WOOLDRIDGE, *supra* note 36, at 37. Denmark participates in Schengen, but has also received an exemption from Title IV. Treaty of Amsterdam Protocol B5; European Union website, *The Schengen acquis and its Integration into the Union*, June 15, 2005, <http://www.europa.eu.int/scadplus/leg/en/lvb/l33020.htm>.

86. *The Schengen acquis and its Integration into the Union*, <http://www.europa.eu.int/scadplus/leg/en/lvb/l33020.htm>.

87. WEISS & WOOLDRIDGE, *supra* note 36, at 35. For an argument that Schengen is more concerned with legitimating strong external borders than promoting internal freedom of movement, see Heaton, *supra* note 75, at 657.

88. Schengen Agreement art. 96. BARNARD, *supra* note 82, at 444.

89. WEISS & WOOLDRIDGE, *supra* note 36, at 35.

90. Randall Hansen, *Asylum Policy in the European Union*, 14 GEO. IMMIGR. L.J. 779, 788 (2000); Phuong, *supra* note 32, at 646.

91. The Schengen Agreements' provisions on asylum were later supplemented by the Dublin Convention of 1990. See Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, 1997 O.J. (C254) 1, 30 I.L.M. 425 [Dublin Convention]; see also Hansen, *supra* note 86.

92. James C. Hathaway, *Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration*, 26 CORNELL INT'L L.J. 719, 725 (1993). Many commentators have argued that the EU's safe third country policy violates international law. The assumption behind the policy is that the refusal of asylum in one Member States alleviates the responsibility of other Member States to conduct a full-fledged evaluation of an applicant's claim, despite the fact

In theory, then, Schengen is a dual system: while EU nationals can easily travel from Member State to Member States, Europe as a whole is tightly sealed off from the rest of the world, making it more difficult for both legitimate and illegitimate persons and goods to move between the EU and third countries.⁹³

The Maastricht Treaty painted the finishing touches on the portrait of freedom of movement in the EU in 1993. Maastricht's most important implication for the right of free movement lay in five articles it contributed to the EC Treaty. Article 17 establishes and confers upon all Member State nationals "Citizenship of the Union," providing that all citizens "shall enjoy the rights conferred by this Treaty."⁹⁴ Article 18 provides that all EU citizens "shall have the right to move and reside freely within the territory of the Member States," subject to restrictions that may later be laid down in legislation.⁹⁵ Articles 19-21 give EU citizens the right to vote and be candidates in municipal and EU Parliament elections when resident in other Member States;⁹⁶ the right to receive diplomatic protection while in a third country by the authorities of any other Member State on the same terms as that state's own nationals;⁹⁷ and the right to petition the European Parliament, the Ombudsman, the Council, the Commission, the Court of Justice, and the Court of Auditors in any EU language.⁹⁸

With the establishment of EU citizenship, the compartmentalization of freedom of movement into various categories of persons was abolished and

that the treatment the asylum applicant receives may not be consistent across other states. Hathaway, *supra* note 92, at 725-26. Nor is there a right to appeal to a centralized court. Heaton, *supra* note 75, at 665. There is thus a significant danger that genuine refugees may be wrongfully denied asylum in one country, only to find the doors to all of EU Member States closed to them in consequence. Sabine Weidlich, *First Instance Asylum Proceedings in Europe: Do Bona Fide Refugees Find Protection?*, 14 GEO. IMMIGR. L.J. 643, 652 (2000). Harmonization of immigration laws is thus used as excuse to deny asylum and staunch refugee flows. Hathaway, *supra* note 92, at 719; *see also* Gabriela I. Coman, *European Union Policy on Asylum and Its Inherent Human Rights Violations*, 64 BROOK. L. REV. 1217, 1229-30 (1998); Gretchen Borchelt, *The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law and a Violation of International Human Rights Standards*, 33 COLUM. HUM. RTS. L. REV. 473 (2002).

93. For this reason, the EU is occasionally referred to as "Fortress Europe." *See, e.g.*, Phuong, *supra* note 32. This is not to suggest that the illegal trafficking of goods or persons into and out of the EU does not exist; its borders are no more airtight than that of any country. In fact, in October of 2005 the Commission officially recognized the seriousness of the problem of human trafficking in setting out an official plan to fight such trafficking within the EU. European Commission, *Memo/05/381, Fighting Trafficking in Human Beings—An Integrated Approach and Proposals for an Action Plan*, Oct. 19 2005, available at <http://www.euractiv.com/Article?tcaturi=tcu:29-146082-16&type=News>.

94. EC Treaty, *supra* note 9, art. 17.

95. *Id.* art. 18.

96. *Id.* art. 19.

97. *Id.* art. 20.

98. *Id.* art. 21. The rights conferred by EU citizenship do not place any corresponding duties on citizens and have not been frequently invoked by the ECJ. WEISS & WOOLDRIDGE, *supra* note 36, at 168. *But see* Case C-184/99, *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, 2001 E.C.R. I-6193 (holding that Member States cannot withhold social assistance from a lawfully resident EU citizen who is a national of another Member State if nationals of the host Member State would be eligible for social assistance under the same conditions) (cited in van der Mei, *supra* note 57, at 847).

freedom of movement made generally available to all nationals of Member States. The symbolic and psychological importance of the link between freedom of movement and citizenship should not be underestimated. The concept of citizenship reflects a politically or culturally-based bond, often deeply felt, between a political entity and an individual, and between individuals who share common citizenship. It can be a powerful force encouraging loyalty and a sense of belonging among those who enjoy its benefits, while the state itself promises to protect and benefit the citizens.⁹⁹ Significantly, free movement is placed at the core of the definition of EU citizenship; part of the essence of being a citizen is therefore the ability to travel amongst Member States.¹⁰⁰ Free movement is re-configured, not as a convenience, benefit or mere economic advantage, but as a “fundamental right of the Union citizen,” as important as the right to vote or to receive diplomatic protection.¹⁰¹ Like voting, it is conceived as a site of direct individual participation in the process of building Europe and being European. Ordinary Europeans will experience the impact of increased EU political integration in their daily lives through freedom of movement. It allows traveling Europeans to come into extended contact with other Europeans and European cultures, which promotes greater cross-cultural understanding and identification. It gives EU nationals a reason to feel loyal to the Union and invested in the success of greater integration, functioning as a tool to develop and encourage the perception of a collective European consciousness. In this sense, the free movement of persons is perhaps the most important of the four freedoms, symbolically speaking, to the development of the conception of a unified Europe. Freedom of movement has thus become an indispensable part of the rhetoric of EU expansion as well as an essential component in the ongoing project of further political integration through the creation of a common European identity. Transitional measures, with their calculated denial of freedom of movement to CEEC citizens, therefore exist in fundamental tension with the exalted place of free movement in the concept of European identity.

99. See Note, *The Functionality of Citizenship*, 110 HARV. L. R. 1814, 1815 (1997) (“Citizenship in a liberal state embodies two relationships. A vertical relationship runs between citizen and state, connecting the group of humans who can exact the highest protection from the state and who owe it the most onerous duties. A horizontal relationship connects citizens themselves, developing a community of people who share loyalties, civil allegiance, and national character.”); see also Michael A. Becker, *Managing Diversity in the European Union: Inclusive European Citizenship and Third-Country Nationals*, 7 YALE HUM. RTS. & DEV. L.J. 132, 140-45 (arguing that European citizenship consists of three distinct types of citizenships with their own ideological approach: liberal citizenship with a legal-participatory approach, communitarian citizenship with an identity-based approach, and constructive citizenship with a focus on engagement and uncertainty).

100. See generally ELLEN BRINCH JØRGENSEN, *UNION CITIZENS—FREE MOVEMENT AND NON-DISCRIMINATION* (1996).

101. PIERRE GARRONE, *LA LIBRE CIRCULATION DES PERSONNES: LIBERTÉ DU MOVEMENT, ÉGALITÉ, LIBERTÉ ÉCONOMIQUE* 44 (1993): “*un droit fondamental du citoyen de l’Union*” (author’s translation).

III.

THE MAY 2004 EXPANSION OF THE EU

A. *The Process of Accession to the EU*

Since its creation, the European Union has grown enormously, not just in terms of expansion from economic to political integration, but in terms of its very size. Other nations eager to reap the benefits of increased European solidarity and integration soon joined the six countries that made up the original European Coal and Steel Community. The expansion of May 2004 was the latest in a series of expansions since the founding of the Union. While the May 2004 expansion occurred through the same process as the expansions that came before it, the unique history of the CEECs made their accession quite different from the previous accessions of Western European nations.

The design of the EU allows it to absorb new members through a process called accession. Formally acceding to the EU is a complicated matter. To become members, candidate states must adopt all previously existing EU rules and regulations, a body of law known as the *acquis communautaire*.¹⁰² The principle that candidates must accept the *acquis* to join the EU was formalized in the Maastricht Treaty as a “stated community objective.”¹⁰³ In practice, the *acquis* requirement means that the EU will not negotiate with new members over existing legislation to which they may object; joining the EU is a take-it-or-leave-it offer. Thus, acceding countries may not “question or substantially modify the institutional structure, scope, policies or rules of . . . the Union.”¹⁰⁴

The *acquis* consists of the foundational treaties; the “institutional structure” under them; EU legislation and acts; international agreements between the EU and third parties; legislation and acts passed in connection with accession negotiations; the “political objective” of the treaties; certain core principles of EU law including the direct effect of certain treaty provisions and legislation, the superiority of EU law to conflicting laws in individual Member States, and the “uniform interpretation” of EU law; and other miscellaneous principles that have been added to the *acquis* by different EU institutions throughout the years.¹⁰⁵ As of the May 2004 enlargement, the *acquis* contained over 80,000 pages, divided into 31 chapters, which new members must accept.¹⁰⁶ Given the prodigious amount of law covered in this definition, it is no easy task to bring the existing legal framework in a candidate country into accordance with EU requirements, a process known as harmonization. Furthermore, the Council must unanimously approve the steps the candidate countries will make to harmonize

102. MORE UNITY AND MORE DIVERSITY, *supra* note 34, at 5.

103. Flaherty & Lally-Green, *supra* note 6, at 952.

104. *Id.* at 951.

105. Roger J. Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 FORDHAM INT'L L.J. 1092, 1143-44 (1995).

106. Peter Katz, *The Treaty of Nice and European Union Enlargement: The Political, Economic, and Social Consequences of Ratifying the Treaty of Nice*, 24 U. PA. J. INT'L ECON. L. 225, 236 (2003); Phuong, *supra* note 32, at 644; MORE UNITY AND MORE DIVERSITY, *supra* note 34, at 9.

their laws chapter by chapter before accession negotiations can be closed.¹⁰⁷ Since the law of the EU remains in constant flux, accession represents a kind of “moving target” that is quite difficult to hit.¹⁰⁸

In addition to accepting and implementing the *acquis*, candidate countries must meet three foundational criteria, known as the “Copenhagen Criteria,” set out in the Presidency Conclusions at the Copenhagen European Council in June of 1993.¹⁰⁹ In order to be eligible to accede, would-be Member States must have: (1) “stable institutions guaranteeing democracy, the rule of law, human rights and the protection of minorities;” (2) “a functioning market economy that can cope with competitive pressures and market forces within the Union;” and (3) “the ability to take on the obligations of membership, including support to the aims of the Union. The new members must have a public administration capable of applying and managing EU laws in practise.”¹¹⁰ In sum, candidate states must “recreate themselves in the EU’s image.”¹¹¹

Since its founding, the EU has experienced four successful waves of enlargement.¹¹² First to accede in 1972 were Denmark, Ireland, and the United Kingdom (UK). Greece came next, acceding to the Union in 1979, and was shortly followed by Portugal and Spain in 1985. Finally, Austria, Finland, and Sweden became official EU Member States in 1994.¹¹³ Each wave of accession brought a significant increase in population to the EU; the first wave augmented its population by 50%, the second and third waves combined contributed an additional 30%, and the fourth wave added another 25%.¹¹⁴

There are several things to note in comparing this history to the May 2004 expansion. First, the May 2004 expansion was by no means the EU’s first ambitious attempt to significantly add to the EU’s population and geographic area. However, no previous wave had attempted to integrate ten countries, with ten different languages and ten different cultures, at one time. Furthermore, historical and economic differences had figured less prominently in previous expansions. While states like Portugal and Greece were also poor countries with different traditions, they still had a great deal in common historically and culturally with other EU Member States. However, the vast majority of the May 2004 acceding countries developed under Communism, and do not have the same tradition of stable democratic institutions and capitalist infrastructure common to certain Western European nations to ease their transition into EU markets and political organizations. Finally, both Eastern and Western Europe have their own shared sense of collective identity and commonality. The Iron Curtain divided

107. Katz, *supra* note 106, at 236.

108. Helen E. Hartnell, *Subregional Coalescence in European Regional Integration*, 16 WIS. INT’L. L.J. 115, 166 (1997).

109. Katz, *supra* note 106, at 230.

110. MORE UNITY AND MORE DIVERSITY, *supra* note 34, at 9.

111. Hartnell, *supra* note 108, at 127.

112. Puder, *supra* note 11, at 59.

113. *Id.*

114. Goebel, *supra* note 105, at 1095.

Europe for decades and reordered the loyalties and bonds between (even bordering) nations. Given that most CEECs shared decades under the domination of the Soviet culture, language, politics, and economics, while Western Europe was free of such influence, it is also possible that Western European nations feel a common bond of history and culture with each other to the exclusion of Eastern European nations, while Eastern European nations feel that same bond with other Eastern European nations, but not with Western Europe. It seems likely that, at the time of accession, a vestige of that ideological and cultural partition could still manifest itself through an intangible sense of difference and mutual exclusion. Thus, the May 2004 expansion differed dramatically from the enlargements that had come before it, and would present special challenges to its architects.

In recognition of the difficulties likely to be confronted with the May 2004 expansion, the EU made extensive preparations to assist the CEECs in implementing the *acquis* and satisfying the Copenhagen Criteria. Since 1989, the EU has spent approximately € 3 billion per year on a series of programs to aid the development of the CEEC candidates.¹¹⁵ The Phare program funds projects to foster development of and investment in infrastructure, as well as projects ensuring that new Member States have the administrative structures in place to “meet the rights and obligations of membership.”¹¹⁶ Phare’s official objectives include “agriculture sector restructuring, improvement of access to Western markets, investment promotion, environmental protection and professional training.”¹¹⁷ Two additional programs were subsequently added to Phare: ISPA, which also supports the development of infrastructure, and Sapard, which aids the modernization of agriculture in candidate countries.¹¹⁸ Finally, in 1998, the EU began to employ a process called “twinning,” in which EU Member States sent their experts to a candidate country to act as an “advisor and mentor to . . . local officials.”¹¹⁹ Twinning’s ultimate goal is to enable applicants to successfully develop administrations modeled after those of current EU members.¹²⁰

Between 1991 and 1996, the EU also entered into a series of association agreements, known as “Europe Agreements,” with all 8 candidate CEECs, as well as Romania and Bulgaria.¹²¹ The Europe Agreements established bilateral

115. A separate program allocated € 95 million to Cyprus and Malta for the period of 2000-2004. MORE UNITY AND MORE DIVERSITY, *supra* note 34, at 8.

116. *Id.*

117. Romana Sadurska, *Reshaping Europe—Or ‘How to Keep Poor Cousins in (Their) Home’: A Comment on the Transformation of Europe*, 100 YALE L.J. 2501, 2503 (1991).

118. MORE UNITY AND MORE DIVERSITY, *supra* note 34, at 8.

119. *Id.* at 9.

120. *Id.*

121. Elspeth Guild, *The Europe Agreements: The Right to Establishment in the Central and Eastern European Agreements*, in THE LEGAL FRAMEWORK AND SOCIAL CONSEQUENCES OF FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION 127 (Elspeth Guild ed., 1999). Romania and Bulgaria applied for EU membership along with the other 8 CEEC countries. However, they were deemed not to have met the requirements for membership in time for the May 2004 enlargement; instead they are slated to join at the target date of 2007. MORE UNITY AND MORE DIVERSITY, *supra* note 34, at 5.

relations between the EU and candidate CEECs. They sought to foster political dialogue, expand trade and economic relations, establish a structure through which the EU could provide financial and technical assistance, furnish a framework for the ultimate integration of the CEECs into the European Union, and promote cooperation in cultural matters.¹²² Primarily, however, the target of Europe Agreements was to improve and cultivate the CEECs' new market-based economies by establishing "reciprocal rights and obligations, common action and special procedures."¹²³ For example, a CEEC signatory to a Europe Agreement received favored access to lucrative EU markets and vice versa, with the understanding that eventually relations would move towards complete free trade in industrial goods. Ultimately, these treaties were "designed to lay the foundation for full political and economic integration [of the CEECs] into the EU."¹²⁴

It is important to note, however, that the Europe Agreements did *not* provide for any additional rights of freedom of movement of persons between the CEECs and Member States, largely due to EU fears of a "flood of unemployed workers" that would "augment the problems of chronic high unemployment."¹²⁵ That the EU seemed eager to access CEECs' markets without extending the full benefits of EU membership led to criticism of the Europe Agreements before the completion of the May 2004 accession. According to Roger Goebel, Europe Agreements were little more than "junior, somewhat watered-down, version[s] of the European Economic Area arrangements."¹²⁶ Romana Sadurska, another commentator, argues the Europe Agreements were substitutes for full membership designed to keep CEECs complacent about their non-member status and "at a safe distance," rather representing a true effort to strengthen both the EU and the CEECs.¹²⁷ The achievement of full EU membership for the majority of Europe Agreement signatories has largely mooted such criticisms. However, the underlying suspicion that the EU did not deal fairly with CEEC countries in the years leading up to their accession may have lingered and infected accession negotiations with an element of distrust.

B. Transitional Measures

The concerns EU Member States expressed in the context of the Europe Agreements about the wisdom of allowing free movement between the EU and the CEECs had not abated by the time the May 2004 accession rolled around. In fact, the potential of a massive migration westward was a highly prominent and

122. Guild, *supra* note 121, at 128.

123. Katz, *supra* note 106, at 236; EC Treaty, *supra* note 9, art. 238 (cited in Hartnell, *supra* note 108, at 119-20).

124. Hartnell, *supra* note 108, at 124-27. The CEECs have also organized regional free trade areas amongst themselves. *See id.* at 181-226.

125. Goebel, *supra* note 105, at 1178.

126. *Id.*

127. Sadurska, *supra* note 117, at 2507.

hotly contested issue during accession negotiations.¹²⁸ Member States unabashedly proclaimed their predictions about the potential detrimental effect of the arrival of thousands of would-be CEEC workers in existing EU countries.¹²⁹ However, there was at the same time no doubt about the importance of the right to freedom of movement as a foundational component of the EU itself. Discussion of freedom of movement had long been reverentially couched in the rhetoric of European unity and integration and idealized as a symbol of the goal the EU saw itself as working to obtain.¹³⁰ In light of the worshipful eye the EU had long turned to freedom of movement, it would simply not be possible to admit new members to the Union without permitting them to exercise this fundamental right of European membership and citizenship.

Thus, the accession negotiations produced a compromise: the new Member States, with the exception of Cyprus and Malta, would eventually receive full freedom of movement, but not immediately upon accession. Instead, freedom of movement would be gradually phased in through a series of flexible transitional measures that allowed each EU-15 Member State to determine the proper timeline for its implementation.¹³¹ The transitional measures are identical for all eight new CEEC Member States,¹³² while Malta received the right to apply its own transitional measures¹³³ and Cyprus immediately received full freedom of movement.¹³⁴ For the CEEC countries, the current EU Member States are permitted to continue to apply whatever “national measures” they have already been employing for the first two years following accession.¹³⁵ In other words,

128. ANDRÉ SAPIR ET AL., AN AGENDA FOR A GROWING EUROPE: THE SAPIR REPORT 130 (2004).

129. EU website, *supra* note 34.

130. See *supra* Section I.B.

131. Act Concerning the Conditions of Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the Adjustments to the Treaties on which the European Union is Founded, 2003 O.J. L 236, art. 24. For a thorough and clear outline of the transitional measures permitted under the Treaty of Accession and its implementing legislation, see European Commission, *Freedom of Movement for Persons*, ch. 2, (December 2004), <http://europa.eu.int/comm/enlargement/negotiations/chapters/chap2/index.htm> [hereinafter European Commission Freedom Report]; BYRSKA, *supra* note 2, at 10-11.

132. Act of Accession Annexes V, VI, VIII, IX, X, XII, XIII, XIV.

133. Act of Accession Annex XI. During accession negotiations, Malta voiced its concerns that its tiny labor markets could come under pressure. Thus, for seven years after accession, Malta received the right to suspend freedom of movement for workers if it “undergoes or foresees disturbances on its labour market which could seriously threaten the standard of living or level of employment in a given region or occupation.” *Id.* art. 2. Malta also received the right to “retain its work permit systems for nationals of other Member States” for up to seven years after accession. *Id.* art. 3.

134. Act of Accession, Annex VII; DIRECTORATE-GENERAL ENLARGEMENT, EUROPEAN COMMISSION, FREE MOVEMENT FOR PERSONS—A PRACTICAL GUIDE FOR AN ENLARGED EUROPEAN UNION 5, available at http://europa.eu.int/comm/enlargement/negotiations/chapters/chap2/55260_pratica_guide_including_comments.pdf [hereinafter PRACTICAL GUIDE].

135. Act of Accession, Annex V(1), art. 2. Since Annexes V, VI, VIII, IX, X, XII, XIII and XIV are all identical; I have chosen to quote the language from Annex V, which applies to the Czech Republic. However, this is of no import as the language would be identical in all other Annexes besides those applying to Cyprus and Malta.

the old Member States can automatically delay implementation of freedom of movement for workers without any individualized showing that harm is likely to occur from allowing CEEC nationals to work within their borders. Before the end of the initial two year period, the Council must conduct a review in each Member State of “the functioning of the transitional provisions . . . on the basis of a report from the Commission.”¹³⁶ After this review, Member States may continue to apply transitional measures for an additional three years, but they must inform the Commission of such intention; otherwise, full freedom of movement is immediately activated.¹³⁷ The new Member State whose nationals continue to be so restricted may then request an additional review.¹³⁸ Thus, if France restricts the freedom of movement of Czech nationals, the Czech Republic may request that the Council conduct a second review of France. At the end of this five year period, the Member State applying restrictions may continue to apply them for an additional two years, but only “in case of serious disturbances of its labor market or threat thereof and after notifying the Commission.”¹³⁹ Thus, while it is anticipated that all transitional measures will end within five years, in extreme circumstances they could extend for up to seven years.¹⁴⁰ Because of the division of the seven year period into blocks of years, these transitional arrangements are often referred to as “2+3+2” arrangements.¹⁴¹

In addition to the 2+3+2 measures, old Member States also received certain other concessions. If an old Member State at any time

undergoes or foresees disturbances on its labor market which could seriously threaten the standard of living or level of employment in a given region or occupation, that Member State shall inform the Commission and the other Member States thereof . . . and may request the Commission to state that [freedom of movement for workers] be wholly or partially suspended in order to restore to normal the situation in that region or occupation.¹⁴²

Thus, old Member States retain the ability to suddenly apply restrictive measures despite any earlier decisions not to do so. In addition, Austria and Germany received the right to apply “flanking national measures” with respect to the provision of services within their territory, in recognition of the fact that their geographical location will likely make these states the most desirable destinations for CEEC migrants.¹⁴³ Therefore “[i]n order to address serious disturbances or

136. *Id.*

137. *Id.* art. 3.

138. *Id.* art. 4.

139. *Id.* art. 5.

140. European Commission Freedom Report, *supra* note 131.

141. See Euractiv, *Free Movement of Labour in the EU-25*, Oct. 15 2004, <http://www.euractiv.com/Article?tcmmuri=tcmm:29-129648-16&type=LinksDossier> [hereinafter *Free Movement of Labour in the EU-25*].

142. Act of Accession, Annex V(1), art. 7.

143. European Commission Freedom Report, *supra* note 131. Germany already receives more CEEC migrants than any other EU country. Dariusz Stola, *The Social and Political Context of Migration Between Central Europe and the European Union*, in *THE LEGAL FRAMEWORK AND SOCIAL CONSEQUENCES OF FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION* 139 (Elspeth Guild ed., 1999). At least one independent report has determined that Germany and Austria are

the threat thereof in specific sensitive service sectors on their labour markets, which could arise in certain regions from the transnational provision of services," Germany and Austria will be permitted to restrict the ways in which companies based in new Member States operate within their territory.¹⁴⁴ Notably, they may restrict such companies from sending workers to Germany and Austria to provide certain types of services, including construction and industrial cleaning in Germany, and horticultural, stone-cutting, metal-manufacturing, construction, security, industrial cleaning, home nursing, and social work activities in Austria.¹⁴⁵ The practical effect of the flanking measures is that it will be more difficult for workers from new Member States to obtain employment in Germany and Austria as long as these measures are in effect.¹⁴⁶

All this is not to say that the new CEEC Member States walked away empty-handed from the accession bargaining table, though the value of the concessions they succeeded in winning are, at best, debatable. First, the transitional measures contain what is known as a "standstill clause,"¹⁴⁷ which provides that no Member State can apply measures that "are more restrictive than those prevailing on the date of signature of the Treaty of Accession."¹⁴⁸ Thus Member States must continue to provide the same degree of freedom of movement that obtained before enlargement, including any special agreements passed between a new and old Member State pre-accession. Second, Member States are required to "give preference to workers who are nationals of the Member States over workers who are national of third countries as regards access to their labour market."¹⁴⁹ Third, the family members of CEEC workers already residing with a legal worker in an old Member State as of the date of accession will receive "upon accession, immediate access to the labour market of that Member State" in spite of any transitional measures in place.¹⁵⁰ Fourth, a declaration was attached to the Treaty of Accession obliging old Member States to "endeavour" to grant increased access to labor markets as quickly as possible in order to speed up the integration of the new Member States and shorten the transitional period to the greatest extent possible.¹⁵¹ Finally, all transitional measures, including flanking national measures, are reciprocal—if Italy restricts the movement of Hungarian nationals, then Hungary is free to do the same to Italian nationals.¹⁵²

likely to receive more migration after accession than other Western European Member States. SAPIR, *supra* note 128, at 131.

144. Act of Accession, Annex V(1), art. 13.

145. *Id.* Annex V(1), art. 13; PRACTICAL GUIDE, *supra* note 134, at 4.

146. PRACTICAL GUIDE, *supra* note 134, at 4.

147. European Commission Freedom Report, *supra* note 131.

148. Act of Accession, Annex V(1), art. 14.

149. *Id.*

150. *Id.* art. 8. However, family members who begin residing with such a worker *after* the date of accession will only have access to the labor markets of the old Member State after they have been resident in that state for at least eighteen months or beginning in the third year after accession, whichever is first.

151. European Commission Freedom Report, *supra* note 131.

152. Act of Accession, Annex V(1), art. 10.

Hungary can also restrict the movement of nationals of the other seven CEEC Member States if its nationals are restricted by any old Member State.¹⁵³ The value of this last concession seems especially dubious. New Member States cannot apply transitional measures of their own accord but must wait until old Member States “strike first,” which essentially puts old Member States firmly in control of what type of transitional measures to apply and how long to continue their application. Moreover, it is unlikely to be in the interests of new Member States to ever restrict the free movement of workers from old Member States; as new Member States will probably not receive a flood of workers from the West, the application of such measures would serve no economic purpose and could in fact increase tensions between the affected old Member States and new Member States.

Several additional points about these transitional measures merit mention. First, the application of transitional measures is optional, not mandatory—thus states are free to choose to immediately implement freedom of movement for workers if they wish. In practice, however, this means that the actual level of freedom of movement permitted may vary from Member State to Member State, obliging would-be migrant workers to go about the potentially difficult task of ascertaining what the country in which they desire to live allows them to do.¹⁵⁴ Second, transitional measures only apply to freedom of movement *for workers*.¹⁵⁵ Thus, all EU citizens are immediately free to travel throughout the enlarged EU immediately following accession. A guide published by the European Commission to inform new EU citizens of their free movement rights states that, as of accession and throughout the transitional period, all EU citizens anywhere in the EU are free to: set up a business in another Member State, travel to another Member State, reside in another Member State as a student, pensioner or family member of a worker, deliver services across borders (with the exception of areas affected by flanking measures), receive equal treatment in working conditions, tax and social advantages and coordination of social security when working legally in another Member State, and be free from discrimination on national grounds once admitted as a legal worker in another Member State.¹⁵⁶ The guide further assures readers that the transitional measures have “been put in place to ensure to ensure that migration on a massive and disruptive scale is avoided. [Their] role is not to prevent all movement.”¹⁵⁷ However, given the centrality of the free movement of workers to free movement of persons in general—as most EU citizens could not remain in another country without employment—the role of the transitional measures seems in effect to be to allow Member States to prevent nearly all movement besides weekend jaunts or scholarly pursuits. The effect of transitional measures is to allow only students

153. *Id.* art. 11.

154. PRACTICAL GUIDE, *supra* note 134, at 5.

155. *Id.* at 6.

156. *Id.* at 9.

157. *Id.* at 8.

and the independently wealthy to enjoy full freedom of movement.

Unsurprisingly, the vast majority of EU-15 Member States have chosen to exercise their option to apply protectionist measures to CEEC nationals. Though many Member States had originally expressed the intention not to utilize transitional measures, one by one they succumbed to “the scare” of a flood of CEEC migrants that was “contagious as a virus,” and announced restrictive measures.¹⁵⁸ The result was a “race to the top” to limit migration from new Member States.¹⁵⁹ The UK, Sweden,¹⁶⁰ and Ireland were the only old Member States who declined to enact transitional measures, while Austria, Belgium, Denmark, Finland, France, Germany, Greece, Luxembourg, the Netherlands, Portugal, and Spain all chose to restrict migration for a minimum of two years and Italy decided to retain its current work permit system without employing further restrictions.¹⁶¹ In contrast, of the new Member States, only Poland and Hungary have chosen to apply reciprocal restrictive measures in return, resulting in a two tier system in which nationals of old Member States are immediately free to work throughout the enlarged EU whereas nationals of new Member States must await permission from old Member States to exercise the same right.¹⁶² To add insult to injury, the nations that did immediately grant full free movement rights to CEEC nationals have chosen to restrict CEEC migrants’ access to welfare, in a transparent effort to functionally restrict freedom of movement for the poorest EU citizens.¹⁶³ While these nations are understandably concerned with protecting the viability of their own public assistance programs, the restriction nevertheless has the concomitant effect of preventing much undesirable migration. In addition, many old Member States have been less than forthcoming about the measures they have actually chosen to apply. For instance, as of the date of accession neither Greece nor Luxembourg had publicly specified which restrictions they would employ.¹⁶⁴ The confusion surrounding the actual transitional measures in place further increases the practical difficulty of exercising those rights that are available, particularly for poor and/or uneducated EU citizens—exactly the type of migrants old Member States are eager to avoid. Finally, there

158. BYRSKA, *supra* note 2, at 12.

159. Tito Boeri, *State of the Union: Migration Matters*, WALL ST. J. EUR., Nov. 11, 2004, at A9.

160. Sweden waffled shortly before accession and announced it would impose transitional measures. The Swedish Prime Minister, Goran Persson, stated, “We have to be realistic and understand that if everyone else says transitional arrangements are necessary then we must also be aware of the risks and protect ourselves. We would be naïve if we didn’t see the risks if we were to be the only country welcoming people from east Europe to work for peanuts and giving them access to our social benefits.” David Harrison & Damien McElroy, *‘I Heard Britain is the best Place for us to go now. It Doesn’t Treat Refugees like Animals,’* SUNDAY TELEGRAPH (London), Feb. 15, 2004, at 18. However, in the end Sweden stuck to its original promise and declined to impose transitional measures. *Free Movement of Labour in the EU-25*, *supra* note 141.

161. *Free Movement of Labour in the EU-25*, *supra* note 141; see also Harrison & McElroy, *supra* note 160.

162. BYRSKA, *supra* note 2, at 14; *Free Movement of Labour in the EU-25*, *supra* note 141.

163. Boeri, *supra* note 159.

164. BYRSKA, *supra* note 2, at 14.

is no central judicial mechanism charged with overseeing the fair application of transitional measures. There is no process to determine whether transitional measures are in compliance with the standstill clause, or to challenge the incorrect or unfair application of such measures in individual cases.¹⁶⁵

In practice, then, the transitional measures restrict a great deal more freedom of movement than they appear to in the Treaty of Accession. Member States have clearly demonstrated their reluctance to accept migrants from new CEEC Member States, despite their unambiguous treaty-based obligation to do so. These transitional measures are both misguided and damaging to the effort to forge a new, inclusive, European identity.

IV. ANALYSIS OF TRANSITIONAL MEASURES

A. Transitional Measures Are Not Based on Economic Reality and Are Not Economically Sound

During accession negotiations, old Member States repeatedly aired their concerns that the immediate grant of full freedom of movement to all new Member States would result in a massive influx of CEEC workers who would take needed jobs from current EU citizens.¹⁶⁶ Without considering any counter-arguments, the concerns of the EU-15 states do seem plausible. After all, Western Europe has higher wages and living standards than Central and Eastern Europe, and chronic, high unemployment in Western Europe translates into fierce competition for desirable jobs.¹⁶⁷ It seems at first glance that transitional measures would provide an effective temporary remedy for such problems. However, statistics and history demonstrate that Western European concerns are essentially unfounded, both because so large a migration is unlikely to occur and because the effects of any westward migration would likely be quite different from Western European expectations. Thus, transitional measures are both unnecessary and misguided.

The EU-15 position is based upon popular belief in a wide variety of dire consequences should CEEC migrants be permitted to settle within their borders. A Eurobarometer Poll conducted in March 2003 showed that 62% of EU citizens "rather agree" that many citizens of new Member States would settle in old Member States after enlargement.¹⁶⁸ EU citizens worried that they would lose their jobs because migrants from the east would be willing to accept jobs for less money.¹⁶⁹ As Sadurska stated in 1991

Central and Eastern Europe is a landscape of waste and desolation from which

165. *Id.* at 15.

166. EU website, *supra* note 36; *see infra* Section II.A.

167. Goebel, *supra* note 105, at 1178.

168. Gallup Europe on Behalf of the European Commission, "Eurobarometer" Opinion Poll on Enlargement (2003), http://europa.eu.int/comm/public_opinion/flash/fl140_en.pdf.

169. MORE UNITY AND MORE DIVERSITY, *supra* note 34, at 10.

many may be seeking to escape . . . The problem is that instead of receiving a trickle of academics, students, professionals, and visitors, Western Europe is likely to face hundreds of thousands, even millions, if law and order break down, ready to move West in search of jobs, education, and housing. Such a mass migration would create unprecedented threats to the economic and social stability of the Community.¹⁷⁰

These concerns flourished in light of the ambivalence (and often open hostility) that much of Western Europe has long harbored with regards to immigration in general. Many Europeans believe that immigration increases competition for decent jobs and housing, both already in short supply.¹⁷¹ Citizens of wealthier EU Member States fear that indigents will come to take advantage of higher social welfare benefits, thus lessening the benefits available for that state's nationals.¹⁷² EU citizens also worry that immigration will boost the crime rate,¹⁷³ or that immigrants simply will be unable to assimilate into their state's culture and way of life.¹⁷⁴ Most important of all, Western European nations fear losing their "identity" to immigration, that is, losing a racial, linguistic, religious, and cultural homogeneity that many Europeans perceive to have been historically static and essential to their development and stability.¹⁷⁵ Many EU citizens fear that their society itself will change or erode, that the consensus the EU has built about certain values and norms will be eradicated, or that their culture will be somehow "damaged" by the presence of migrants.¹⁷⁶ While perhaps a white, Christian, Latvian citizen may be perceived as less foreign than, for example, a Muslim refugee from Africa, it cannot be overlooked that Central and Eastern Europe's traditions, history, and cultures are indeed different from those of Western Europe. It is not implausible that EU citizens would view CEEC nationals as a mysterious and threatening Other from which Western European stability must be protected.

In light of Western Europe's insecurities about immigration in general, it is no wonder that many EU citizens reacted violently to the prospect of freedom of movement for CEEC Member States. Here was an enormous pool of potential immigrants, living in nearby countries far poorer than the EU average,¹⁷⁷ subject to sudden removal of all restrictions on their movement. This was a deeply threatening prospect to an EU populace already fearful of much more limited forms of immigration. Nor did it help matters that tabloids in EU Member States played upon these fears; the UK newspaper the Daily Express, for example, fea-

170. Sadurska, *supra* note 117, at 2503.

171. Hathaway, *supra* note 92, at 720.

172. Van der Mei, *supra* note 57, at 829-30.

173. Katrin Bennhold, *Attacks in Spain put Migrants in Spotlight*, INT'L HERALD TRIB., Mar. 30, 2004, at 2.

174. Hathaway, *supra* note 92, at 720.

175. *Id.*

176. Harrison & McElroy, *supra* note 160; see also John Darnton, *As EU Expansion Nears, Apprehension Rises*, INT'L HERALD TRIB., Mar. 1, 2004, at 1.

177. The GDP level of the new Member States ranges from 74% of the EU average in Slovenia to a mere 35% in Latvia. It should be noted that Slovenia's GDP is higher than that of both Portugal and Greece. See MORE UNITY AND MORE DIVERSITY, *supra* note 34, at 4.

tered an article proclaiming that “the Roma gypsies of Eastern Europe are heading to Britain to leech on us.”¹⁷⁸ Some CEEC nationals publicly expressed concern that the Western European media’s presentation of the free movement issue was “ignorant and offensive.”¹⁷⁹ All of these factors created a “one-sided” public debate about migration that focused more on “common prejudices and national sensitivities” than fact.¹⁸⁰

In addition to the debate on migration, Western European nationals also remain deeply divided over the extent to which their countries should continue down the path of greater European integration. Those who favor increased integration are commonly referred to as “Europhiles,” while those in opposition are known as “Eurosceptics.” Eurosceptics commonly cite the dangers of loss of sovereignty and national identity as likely to follow from any further expansion of EU institutions or power.¹⁸¹ In the debate over the migration that could follow CEEC accession, Eurosceptics found a natural alliance with far-right, anti-immigration groups, like the French *Le Front National* of Jean-Marie le Pen, in opposing the possibility of a sudden influx of low-wage workers. Even more liberal groups may fall into the Eurosceptic camp through their desire to prevent depletion of the coffers of old Member States’ generous welfare systems.¹⁸² The presence and rhetoric of these factions naturally influence both the nature of public debate on migration and European enlargement and the policies pursued by old Member States. Thus, when the old Member States sat down at the accession bargaining table, the negotiations were influenced more by domestic political considerations—that is, a desire to please the powerful, growing anti-immigration and Eurosceptic factions back home—than by the actual effect freedom of movement would be likely to have upon immigration. The EU’s prior laudatory rhetoric of the indispensable value of free movement to the project of European integration crumbled in the face of virulent public sentiment. In sum, with no effective counterargument to the “immigration-is-dangerous” viewpoint, “[m]igration realities were too rarely regarded in perspective.”¹⁸³

In reality, it is decidedly unlikely that “millions” of CEEC nationals would choose to migrate westward and flood EU labor markets.¹⁸⁴ It is further unlikely

178. Darnton, *supra* note 176.

179. BYRSKA, *supra* note 2, at 3.

180. *Id.* at 4.

181. Casey Burgess, *An Anglo-Nafta Union: Does It Make Sense?*, 8 L. BUS REV. AM. 685, 691 (2002). See also <http://www.eurosceptic.com>, a British website that advocates greater UK independence from the EU (last visited 3/11/06).

182. Tom Hundley, *Ethnic Divisions Threaten European Unity*, CHI. TRIB., Jan. 15, 2006, at C4.

183. IZABELA KORYŚ, INTERNATIONAL ORGANIZATION FOR MIGRATION, *MIGRATION TRENDS IN SELECTED EU APPLICANT COUNTRIES: VOLUME III—POLAND: DILEMMAS OF A SENDING AND RECEIVING COUNTRY V* (2004), available at: <http://www.iom.int/iomwebsite/Publication/ServletSearchPublication?event=detail&id=3071>. This study was funded by the European Commission as part of a project entitled “Sharing Experience: Migration Trends in Selected Applicant Countries and Lessons Learned from the ‘New Countries of Immigration’ in the EU and Austria.” *Id.* at II.

184. Sadurksa, *supra* note 117, at 2503.

that any unduly large migration would occur at all. Both history and statistical reports support this proposition.

History demonstrates that there have been no mass migrations in Europe, despite chronic wage disparities between various countries.¹⁸⁵ “Although citizens of EU Member States enjoy the right to live and work anywhere within the EU, it is a well known fact that internal migration has not been very significant despite variations in living standards” among EU Member States.¹⁸⁶ Nor did the arguably more drastic political changes following the fall of the Soviet Union produce a large wave of migration westward; in fact, there was a decline of long-term emigration from Central Europe after 1989.¹⁸⁷ Furthermore, the experience of past EU enlargements demonstrated that no large-scale migration occurred,¹⁸⁸ in spite of the fact that some acceding countries were poorer than EU average and similar predictions were made about the possibilities of the devastating effects of a flood of migrants.¹⁸⁹ For example, the EU also invoked 7-year transitional measures limiting freedom of movement when Spain and Portugal acceded; in the absence of any overwhelming migration, the transitional period was subsequently shortened.¹⁹⁰ Strikingly, past accessions have demonstrated that migration tends to *fall*, not rise, after an enlargement.¹⁹¹ Neither accession itself nor transitional periods have historically changed migration trends, small to begin with, at all.¹⁹² In fact, after the accession of Spain and Portugal, migration actually flowed in the opposite direction (that is, from old Member States to the newly acceded Member States).¹⁹³

The main explanation for this phenomenon is that accession to the EU typically spurs economic growth in the new Member State itself. Unrestricted access to the EU Single Market “provide[s] competitive EU firms with greater business opportunities, create[s] jobs, and raise[s] tax revenues for governments to spend

185. Christopher J. Cassise, *The European Union v. the United States Under the NAFTA: A Comparative Analysis of the Free Movement of Persons within the Regions*, 46 SYRACUSE L. REV. 1343, 1376-77 (1996). *But see* Phuong, *supra* note 32, at 648. Phuong states that massive migration from Eastern Germany to Western Germany and Austria helped produce the fall of the Berlin Wall. But this phenomenon can be at least partially explained by the fact that Germany had been once been a single country, and migrants already had linguistic, cultural and personal ties to make migration easier. This type of migration is not exactly on a par with more radical forms of international migration.

186. WEISS & WOOLDRIDGE, *supra* note 36, at 2.

187. Stola, *supra* note 143, at 141. Stola does note, however, that there appeared to be a rise of *short-term* migration following the fall of the Communism. *Id.* at 143.

188. See EU website, *supra* note 36.

189. Matthew Kaminski, Op-Ed., WALL ST. J. EUR., Apr. 30, 2004, at A10.

190. EU website, *supra* note 36; PRACTICAL GUIDE, *supra* note 134, at 4.

191. EU website, *supra* note 36. After the accession of Greece, Spain and Portugal, EU Member States witnessed a reduction in the number of migrant workers arriving from these countries. BERMANN ET AL., *supra* note 6, at 578. Linda Hantrais also concludes that the removal of formal barriers to freedom of movement has not resulted in widespread migrations of families. Linda Hantrais, *What is a Family or Family Life in the European Union?*, in THE LEGAL FRAMEWORK AND SOCIAL CONSEQUENCES OF FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION 19, 29 (Elspeth Guild ed., 1999).

192. BYRSKA, *supra* note 2, at 3.

193. Kaminski, *supra* note 189.

on priority programmes.”¹⁹⁴ This was especially true for Member States with “previously weaker economies,” like Ireland, Spain, Portugal, and Greece.¹⁹⁵ Shortly prior to the May 2004 accession the EU anticipated that accession would have much the same effect for the ten new Member States; the European Commission estimated in November of 2003 that accession to the EU would provide new Member States with “up to one percent extra growth each year. . . during the first ten years of membership.”¹⁹⁶ This means that new EU citizens do not need to migrate or to exercise freedom of movement in order to personally reap the economic benefits of EU membership. Instead, these benefits are available at home in the form of increased business and employment opportunities. Ironically, with more jobs and better pay where they already reside, CEEC nationals may in fact be *less* tempted to migrate westward than they would have been prior to accession.

Though there is no reason to think that the May 2004 enlargement will not follow the same pattern as previous enlargements, it is nevertheless possible “that models of previous enlargements may only be partially reliable.”¹⁹⁷ However, additional evidence specific to the May 2004 enlargement further suggests that the actual number of CEEC nationals who choose to migrate westward will be small. A 2004 study on likely post-accession migration trends conducted by the European Foundation for the Improvement of Living and Working Conditions, an EU-agency based in Dublin, showed that only 1% of CEEC nationals of working age had a “firm intention” of migrating west. This amounts to approximately 220,000 people.¹⁹⁸ The study also concluded that two-thirds of the expected migration is likely to be temporary and “significant return migration” could be expected in the 10 years following enlargement, particularly if EU accession improves CEEC economies.¹⁹⁹ The Commission itself estimates that only about 335,000 people would migrate westward if full free movement were immediately available.²⁰⁰ In addition, the Sapir Report, written by a group of independent experts invited by Commission President Romano Prodi to assess

194. MORE UNITY AND MORE DIVERSITY, *supra* note 34, at 7.

195. *Id.*

196. *Id.*

197. BYRSKA, *supra* note 2, at 3.

198. HUBERT KRIEGER, EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, MIGRATION TRENDS IN AN ENLARGED EUROPE: SUMMARY (2004), <http://www.eurofound.eu.int/publications/files/EF0432EN.pdf> [hereinafter MIGRATION TRENDS REPORT] (cited in EU website, *supra* note 36; BYRSKA, *supra* note 2, at 3; Kaminski, *supra* note 189). The study was based on a series of Eurobarometer surveys carried out in spring of 2002 in the 10 acceding countries, as well as the three candidate countries of Bulgaria, Romania and Turkey. The survey asked participants to indicate if they had a “general inclination” to migrate, a “‘basic’ intention to migrate” or a “‘firm intention’ to migrate.” 1% of survey participants responded that they possessed a firm intention to migrate over the next five years, while 4.5% indicated a general inclination to migrate. Thus, while as many as 4.5% could theoretically migrate, a number this high is “relatively unrealistic.” The actual number of migrants is far more likely to track the 1% who expressed a firm intention to migration rather than the higher percentages who indicated only a general inclination to migrate. MIGRATION TRENDS REPORT, at 2.

199. MIGRATION TRENDS REPORT, *supra* note 198, at 5, 67.

200. European Commission Freedom Report, *supra* note 131.

various EU policies and propose strategies for future growth and stability, surveyed multiple studies conducted about the number of migrants likely to move, and also concluded the number was likely to be small in comparison to the size of the EU working population. Based upon the results from the studies surveyed, the Sapir Report concludes that for the first decade following the May 2004 enlargement, the number of actual migrants would vary from 1.5 to 4 million, which represents either 2–4.5% of the total population in the new Member States, or about 0.4–1.2% of the total EU population.²⁰¹ To put these figures into perspective, the EU currently accepts 1.5 million immigrants from non-EU countries *each year*.²⁰²

In addition, simplistic accounts of poor CEEC nationals eager to move west and sap the resources of EU Member States tend to presume that formal, legal barriers to migration alone prevent would-be migrants from moving. These accounts typically neglect to mention that a number of intangible, soft barriers prevent people from simply packing up and settling in another nation. Migration depends not only on employment opportunities and wage differentials, but also on multiple social and cultural factors.²⁰³ Migrants face “social isolation caused by the language barrier, loneliness resulting from separation from one’s family and cultural roots or loss of personal contacts and connections established in one’s own country.”²⁰⁴ The appeal of higher wages may fade in light of the prospect of higher living expenses in wealthier Western European states and the necessity of negotiating “[a]dministrative ‘red tape,’” like securing a visa or understanding the host Member State’s pension system.²⁰⁵ Another factor mitigating against migration and specific to migrants from Central and Eastern Europe is that CEEC culture is marked by a particular attachment to land; many CEEC nationals will therefore be especially reluctant to part with property that has belonged to their family for many generations.²⁰⁶ Finally, migrants may simply not want to face the racism and xenophobia that could await them.²⁰⁷ In sum, the decision to migrate to another country is difficult and does not entirely depend upon the existence or absence of formal barriers to movement. The sheer volume of illegal migration throughout the world lends ample support to this proposition.²⁰⁸ It may be then that the difficulty involved in migrating to a new

201. SAPIR, *supra* note 128, at 131. The Sapir Report also suggested that most of the CEEC nationals who would be attracted to moving westward had already done so prior to accession. *Id.* at 131.

202. Kaminski, *supra* note 189.

203. SAPIR, *supra* note 128, at 131.

204. BYRSKA, *supra* note 2, at 3.

205. *Id.* at 4.

206. *Id.*

207. Handoll, *supra* note 29, at 37.

208. A theory exists that international migration will be at about the same level no matter how restrictive the immigration laws in place. The only difference is whether the migration is deemed legal or illegal. See KORYŚ, *supra* note 183, at IV (“[T]he interior dynamics of migration . . . will always take precedence [over state policies]. The difference is only in the degree of legality within which the economic activities of the migrants (usually labour) will happen.”); see also Boeri, *supra* note 159. Boeri points out that “illegal migration grows when restrictions placed on legal mi-

country simply outweighs the potential economic incentives for a great number of the migrants that old Member State factions assume are so eager to stream westward.²⁰⁹

Not only is popular Western European sentiment likely mistaken about the number of CEEC nationals likely to migrate, but it is also mistaken about the value of any such potential immigration. Rather than regarding immigration with trepidation and hostility, an economically rational Western Europe should actually welcome the arrival of new workers. Ironically, old Member States actually *need* immigration and the labor it brings in order to keep their economies afloat.²¹⁰ This is true for two reasons.

First, the EU birth rate is falling drastically. A report on migration published by the European Commission in 2002 showed that the crude birth rate has nearly halved since 1960.²¹¹ A separate 2004 Commission report on EU population statistics found that the birth rate in old Member States was insufficient not only for growth, but even to replace population lost through death.²¹² In fact, without international immigration, the populations of some countries, including Germany, Greece, Italy, and Sweden, would actually be in decline.²¹³ Furthermore, the population of the EU is aging as citizens live longer. By 2020, 27% of the population of the old Member States is expected to be over 64 years of age, and thus retired.²¹⁴ These two factors add up to a severe shortage of labor, since there are simply not enough new workers to replace those that have retired or died. Experts are already projecting that “existing and future labour supplies within the EU will not be sufficient to meet labour market needs, at least in the

gration are too tight.” Thus, in the US, legal migration is 25% higher than in the EU while illegal migration is 25% lower, because “the U.S. has more realistic migration restrictions.” This also means that the US receives more skilled migrants than Europe. *Id.*

209. See BYRSKA, *supra* note 2, at 3. “Such ‘profit and loss calculation multiplied by the burden of obstacles faced by citizens of the new Member States is likely to be enough of an incentive to stay at home.’”

210. Craig Smith, *In Enlarged EU, A Need for Immigration*, INT’L HERALD TRIB., May 3, 2004, at 2.

211. In 1960, the EU birth rate was 20 births per one thousand inhabitants. In 2000, the rate was 11 per one thousand inhabitants. EUROSTAT, EUROPEAN COMMISSION, EUROPEAN SOCIAL STATISTICS: MIGRATION 9 (2003), available at http://epp.eurostat.cec.eu.int/portal/page?_pageid=1073,1135281,1073_1135295&_dad=portal&_schema=PORTAL&p_product_code=KS-BP-02-006 [hereinafter EUROSTAT MIGRATION STATISTICS]. The data for this report are collected in an annual questionnaire collectively administered by Eurostat (the EU statistics bureau), the United Nations Economic Commission for Europe, the United Nations Statistical Division, the International Labour Organisation, and the Council of Europe. *Id.* at 7. The report tracks migration data in old Member States and Switzerland, and provides some data for CEEC countries. See also BYRSKA, *supra* note 2, at 17.

212. EUROSTAT, EUROPEAN COMMISSION, POPULATION STATISTICS—DATA 1960-2003 73 (2004), available at http://epp.eurostat.cec.eu.int/portal/page?_pageid=1073,1135281,1073_1135295&_dad=portal&_schema=PORTAL&p_product_code=KS-BP-04-001.

213. EUROSTAT MIGRATION STATISTICS, *supra* note 211, at 10.

214. INTERNATIONAL ORGANIZATION FOR MIGRATION, WORLD MIGRATION 2003: MANAGING MIGRATION—CHALLENGES AND RESPONSES FOR PEOPLE ON THE MOVE 263 (2003), available at <http://www.iom.int/iomwebsite/Publication/ServletSearchPublication?event=detail&id=2111> [hereinafter IOM REPORT].

short-term.”²¹⁵ Scientists project that the EU-15 will need half a million immigrants to fill labor shortages between 2005 and 2010.²¹⁶ In addition, old Member States have hefty pension and social security systems that need continuous funding through the wages and taxing of workers, particularly in light of the expected increase in retirees as the population continues to age.²¹⁷ Thus, Western Europe needs immigration to fill a shortfall of labor that already exists and to boost economies sure to flag without an influx of young workers.²¹⁸

Second, old Member States are in need of cheap labor to fill low-paying jobs that many Western Europeans consider beneath them to accept.²¹⁹ In Spain, for example, Spanish nationals are reluctant to take low-paying jobs in fields like construction or tourism, despite the fact that these industries have recently spurred a great deal of economic growth and need workers to fill available positions.²²⁰ In such cases, unskilled migrants would not “take jobs away” from deserving nationals, but would in fact fill shortages in sectors desperate for labor that current EU nationals are unwilling to provide. If migrants and nationals do not compete for the same jobs, then, logically, nationals should not feel threatened by the arrival of workers to cook their food, clean their bathrooms, and construct their homes. In fact, studies have shown that immigration has actually raised total levels of employment in some EU countries,²²¹ and that “economic migration has generally played a positive role in economic development.”²²² EU-15 nationals can expect, therefore, to see benefits arising from migration due to the general boost the added labor will provide to the national economy.

The economic evidence against transitional measures is thus quite substantial. The summary of the report of the European Foundation for the Improvement of Living and Working Conditions states flatly that “[t]he overall volume of expected inwards migration after enlargement . . . is much less than predicted by some politicians and in the public debate. Most of the ‘old’ countries of the EU will be hardly affected.”²²³ If, then, a massive flood of workers is unlikely, and if those workers that do come perform valuable services that keep old Member State economies growing, social welfare systems stable, and Western EU citizens comfortable, then there is no economic justification whatsoever for the imposition of transitional measures. Economic common sense is a tough sell,

215. IOM REPORT, *supra* note 214, at 263.

216. BYRSKA, *supra* note 2, at 17.

217. *Id.* at 17; Smith, *supra* note 210.

218. See Jamie Smyth, *Workers Unlikely to Overrun State*, IRISH TIMES, Apr. 30, 2004, at 3.

219. Heaton, *supra* note 75, at 670.

220. Bennhold, *supra* note 173.

221. *See id.*

222. IOM REPORT, *supra* note 214, at 263.

223. MIGRATION TRENDS REPORT, *supra* note 198, at 5, 67. The report similarly concluded that negative effects on the labor market would be concentrated in certain regions and specific sectors of the economy, and that any detrimental effects on the housing market would be lessened by the likelihood of a high proportion of young, single migrants who would put less pressure on the housing market than would larger families. *Id.* at 5.

however, to those Western Europeans who regard immigration in light of high unemployment rates and the perceived slipping away of their culture. What EU-15 nationals must “understand is that they [a]re getting more out of immigrants than vice versa.”²²⁴ Even the Sapir Report concluded that there is no economic need for transitional measures.²²⁵ In light of both history and the statistical evidence compiled by the EU itself and various independent experts, it seems clear that the transitional measures are based on little more the desire of the politicians negotiating the conditions of accession to pander to xenophobic and Euro-sceptic domestic constituencies. While transitional measures may serve an intangible purpose by reassuring Western Europeans about the perceived dangers to their culture by the pace at which integration is proceeding, they are not based on any empirically verifiable economic need to prevent migration and thus serve no economic purpose.

B. Transitional Measures Take the Perspective of Old Member States at the Expense of New Member States

As noted in Section III.A, the pre-accession debate over free movement for workers and the need for transitional measures focused almost exclusively on old Member States’ fears of an influx of cheap CEEC labor. But more was missing from the discussion than simple refutations of Western European points. The enlargement negotiations also failed to take into account the ways in which the new right to freedom of movement would affect new Member States in particular.²²⁶ The introduction of freedom of movement is a radical change for new Member States for a variety of reasons, yet old Member States failed to consider the set of issues unique to the situation of the CEEC countries. Rather, EU “expansion rhetoric all too often appeals to the fears of the residents of current EU members while side-lining the concerns of their new neighbours.”²²⁷ Rather than concentrating exclusively on ways to protect themselves from threats unlikely to materialize, the old Member States should have devoted more attention to aiding new Member States in the potentially difficult transition to compliance with EU policies and successful implementation of freedom of movement.

One of the most important changes that accession to the EU brings is that CEEC Member States now represent the easternmost border of the EU. This is important for two reasons.

First, accession will have a serious effect on the local economy in eastern borderland areas. The relaxation of controls at new internal EU borders necessarily means that controls at the new external borders must become more strin-

224. Bennhold *supra* note 173 (quoting Susana Garcia-Cervero, an economist for Deutsche Bank in London).

225. SAPIR, *supra* note 128, at 131.

226. PIOTR KAZMIERKIEWICZ, TURNING THREATS INTO OPPORTUNITIES: IMPACT OF THE EXPANSION OF SCHENGEN *ACQUIS* ON THE NEW BORDLERANDS 18 (2003).

227. *Id.* at 18.

gent. In many of these eastern areas, such as between the border of Poland and the Ukraine, there exists a significant "shadow economy" of illegal migration and seasonal work that has provided significant economic benefits to poor communities.²²⁸ Stringent EU border policies have rendered these types of economic activities much more difficult to carry on post-accession, to the detriment of residents in borderland areas who are dependent on cross-border trade. Affected residents are mostly "small-scale entrepreneurs who pose little threat to the labour or goods markets of the Union," but who cannot continue in their line of work once accession effectively eliminates their market.²²⁹ Some experts have recommended that the EU introduce "compensatory measures" to provide aid to areas whose economies are in danger of suffering a downturn as a result of accession, but thus far the EU has not chosen to heed such calls.²³⁰ Moreover, certain ethnic minorities are spread across bordering states; when one of these states accedes to the EU, it suddenly becomes a great deal more difficult for families and friends to visit one another. For example, there is a village inhabited by ethnic Hungarians located on the border between Slovakia and the Ukraine. Overnight, Slovakia became an EU Member State that guards a newly strict EU external border. Hungarian families living on the Ukrainian side of the border are now obliged "not only to apply for a visa, but also to travel 300 km to the closest authorized border crossing point, each time they want to visit their relatives living across the road."²³¹ As of the date of accession, no special EU legislation had been passed to address the special concerns of local border traffic at new external borders.²³² A barrier has thus been erected between the EU and its new neighbors to the east, hardly a move calculated to win popular goodwill among affected populations.²³³ Such problems are arguably inevitable in the case of accession, but this does not alleviate the responsibility of old Member States to take steps to address and alleviate the complications likely to arise at the new borders.

The second result of the fact that new Member States now control the EU's eastern border is that new Member States will now be in charge of policing the westward flow of goods and persons, both legal and illegal, into the EU. Article 35 of the Act of Accession provides that the EU will supply € 900M to assist new Member States in upgrading their administrative and technical capabilities at border-crossing sites.²³⁴ However, the resources needed for actual border controls only tell part of the story. With accession to the EU, many CEEC

228. *Id.* at 19.

229. *Id.*

230. *Id.* at 59-60. For example, new Member States need assistance to improve "basic infrastructure," reduce "corruption in the ranks of the border staff," and provide "reliable travel documents" to show the benefits of legal movement. *Id.* at 60.

231. BYRSKA, *supra* note 2, at 7.

232. *Id.* Prior to accession, the Commission did propose a regulation to provide special visas for local border traffic. Despite new Member States' ardent efforts to get an agreement in place prior to accession, no text could be agreed on prior to accession.

233. *Id.* at 8.

234. *Id.* at 5.

Member States will become, for the first time, not only sources of immigration but a pathway by which immigrants seek to gain access to desirable Western European states as well as a permanent destination for immigrants.²³⁵ In addition, due to the safe third country policy, CEEC countries will have the sole responsibility for processing the asylum applications for refugees who arrive in the EU through its eastern borders. This group will include a high number of migrants arriving from countries located even deeper in Eastern Europe, like Russia or the Ukraine.²³⁶ This allows Western European states to shift the asylum burden eastward, to countries that have no experience in and often are not adequately equipped to effectively process massive numbers of immigrants.²³⁷ It is entirely possible that genuine refugees will not be identified and granted asylum in states with little experience in processing claims. This could result in a smaller number of refugees being allowed into the EU altogether, since a refugee whose application was denied in Lithuania will not be permitted to file a second application in Sweden.²³⁸ This is a convenient result for Western European states eager to limit the funds spent on asylum processing and reluctant to allow foreigners to settle within their borders.²³⁹ It has also been suggested that old Member States are seeking to “establish a filter or buffer zone between them and the countries of emigration.”²⁴⁰ New Member States will require assistance, both in terms of funds and technical know-how, in order to properly meet this new challenge and provide sufficient levels of protection to genuine refugees. Such assistance has not been forthcoming from old Member States.²⁴¹

In addition to ignoring the new challenges of guarding the easternmost border of the EU, old Member States also failed to acknowledge yet another potential side effect of the implementation of freedom of movement for workers specific to new Member States. CEEC countries are in danger of experiencing a “brain drain” in which a large number of young, highly educated CEEC nationals move west to look for higher-paying jobs.²⁴² This type of migration would not place a burden on old Member States, but would instead negatively impact much-needed development in new Member States, who would have trouble bringing their economies in line with those of Western Europe without adequate numbers of skilled workers.²⁴³ The study on migration trends conducted by the

235. KORYŚ, *supra* note 183, at III.

236. Phuong, *supra* note 32, at 641.

237. *Id.* at 650. In fact, 15 years ago none of the CEECs had any laws on asylum or immigration at all, since there was no immigration whatsoever under the Soviet regime. *Id.* at 644.

238. *See supra* Section I.B.

239. For an excellent discussion of this issue, see Phuong, *supra* note 32.

240. *Id.* at 663 (quoting S. Lavenex, *Asylum, Immigration, and Central Europe: Extending Schengen Eastwards*, 3 EUR. FOR. AFF. REV. 275, 290 (1998)).

241. *See generally* KAZMIERKIEWICZ, *supra* note 226.

242. BYRSKA, *supra* note 2, at 3; EU website, *supra* note 36.

243. Oana Lungescu, *EU Newcomers 'Risk Brian Drain'*, BBC NEWS, Feb. 27, 2004, <http://news.bbc.co.uk/1/hi/world/europe/3492668.stm>. The summary of the Migration Trends Report similarly concluded that “[t]he receiving countries of the EU can expect a high quality labour supply of young, qualified and mainly unmarried people, which should improve its short-term economic and its long-term socio-economic base through an improved demographic structure. This would

European Foundation for the Improvement in Living and Working Conditions found that the new Member States could lose 3-5% of nationals who have completed third-level education, as well as over 10% of their students. Between 2 and 3% of new Member State university graduates and students have expressed a firm intention to migrate west.²⁴⁴ CEEC doctors and nurses may also be drawn westward by the prospect of higher salaries, leaving shortages of health care workers in their own countries.²⁴⁵ Some Western European countries, including Germany and France, have even begun actively recruiting science students and researchers from Eastern European countries.²⁴⁶ Despite the danger that CEEC countries will lose their best and brightest young talent, no legislation has been passed or policy promulgated at the EU-wide level to address the needs of new Member States in this regard. Moreover, it is difficult to see how old Member States stand to gain anything by supporting the imposition of measures designed to protect against brain drain, as their economies will be the primary beneficiaries of such labor flow.

In sum, accession negotiations failed to take into account the specific challenges of asylum, the borderlands economy, and brain drain confronting new Member States. Instead, the negotiations and resulting transitional measures were unduly preoccupied with the (largely imaginary) labor threats facing old Member States, a highly ironic result given the relative economic positions of Western and Central/Eastern Europe. It would have made for a far fairer and more equal partnership if accession negotiations and transitional measures had taken into account the unique perspective of new Member States, whose fragile economies are in far greater need of protection than the more robust Western European economies. The EU should reverse course and implement measures to help new Member States successfully negotiate the difficulties of accession they now face.

C. Transitional Measures are Incompatible with EU Free Movement Rhetoric

Transitional measures, with their xenophobic rationale and disproportionate focus on the needs of old rather than new Member States, are incompatible with the official EU rhetoric of freedom of movement and expansion. EU-15 states profess a deep commitment both to furthering European integration through freedom of movement and to welcoming new Member States to the Union, but the refusal of old Member States to act in accordance with their expansive and lofty pronouncements of rights and unity calls into question their dedication to these ideals.

seem to offer more opportunities than risks for the old EU Member States.” *MIGRATION TRENDS REPORT*, *supra* note 198, at 5.

244. *MIGRATION TRENDS REPORT*, *supra* note 198, at 3.

245. Lungescu, *supra* note 243.

246. Andrew Scott, *Brain Wars in Europe: EU Countries Compete for Scientists from new Member States*, *THE SCIENTIST*, Mar. 15, 2004, available at <http://biomedcentral.com/new/200403160/02>.

Freedom of movement has long been declared a goal of fundamental importance to EU integration.²⁴⁷ For example, the guide to free movement after enlargement published by the Commission begins by positing that freedom of movement for persons is “one of the most important expressions of our European citizenship.”²⁴⁸ Freedom of movement is considered a fundamental right of EU nationals, enshrined in the EC Treaty as one of four freedoms that serve as the building blocks of a unified internal market and as a tool to advance political integration.²⁴⁹ On a more conceptual level, freedom of movement is necessary to create a feeling of true unity among EU nationals because it brings them into contact with each other, facilitates cross-cultural discussion and interaction, and allows individuals to participate in a Union-wide activity in a deeply personal way. Transitional measures are incompatible with the historical and conceptual importance of freedom of movement in the EU system. Because a lack of freedom of movement for workers will prevent many new EU citizens from fully participating in and enjoying the free movement rights that are available, the transitional measures belie the EU’s purported commitment to free movement and integration. Furthermore, the poorest and most disadvantaged citizens of the new Member States will bear the brunt of this exclusion, since they will be least able to take the opportunity to travel or study in other EU Member States. The refusal of old Member States to honor their purported commitment to freedom of movement is inconsistent with its exalted status in EU ideology.

The symbolic ceremonies and grandiloquent language employed by EU leaders surrounding the May 2004 accession are little more than bombastic puffery if the EU refuses to follow through on its message of welcome by actually permitting CEEC nationals to work in their countries and exercise their rights as EU citizens on terms equal to EU-15 nationals. Romano Prodi’s declaration that Europeans “are no longer kept apart by phony ideological barriers” seems especially ironic in that the lack of full freedom of movement of persons for new Member States is certainly a barrier between Member States, whether termed “ideological” or not.²⁵⁰ The lack of free movement for workers functionally prevents new EU citizens from moving from one country to another, despite their clear right to do so under EU treaties and legislation. Xenophobic exclusion of new EU citizens is no way to welcome them to the Union, nor is it a prudent way to usher in a new area of transnational cooperation and integration, as it risks creating resentment amongst new EU citizens. Messages of unity and welcome will fall flat if not accompanied by simultaneous action designed to achieve these ideals. Transitional measures and the rationale behind them *create* barriers rather than eliminate them. They are incompatible with the public image of unity the EU wishes to present.

247. See *supra* Section I.B.

248. PRACTICAL GUIDE, *supra* note 134, at 3.

249. EC Treaty, *supra* note 9, art. 3(c).

250. *Welcome to a New Europe*, *supra* note 4.

To resort to an old adage, the EU's actions speak louder than its words. Transitional measures are inconsistent with the exalted rhetoric in which EU leaders couch their discussion of both enlargement and freedom of movement. The EU's refusal to act in accordance with the values it professes may lead citizens of new Member States to question the strength of its dedication to these values.

D. Transitional Measures Prevent the Creation of a Common European Identity

More than preventing the actual displacement of many CEEC nationals, transitional measures will almost surely have a serious psychological effect upon new EU citizens. Before the development of free movement in the EU, "Europe had a culture of passports, visas, and import licenses."²⁵¹ The dismantling of borders and historical enmities contributed to a sense of European unity, a sense of sameness rather than difference. The ability to travel easily and work in other EU Member States without facing national discrimination helped to further engender a culture of equality. The nascence of European citizenship had a similar effect, and was explicitly linked to freedom of movement of persons by the Maastricht Treaty.²⁵² Transitional measures act to exclude nationals of new Member States from participating in these symbolic rites of membership.

Accession to the EU is especially symbolic in the case of CEEC states because of their long isolation from Western Europe during the Cold War. Their acceptance into the EU represents both their return to the European community and the success of the democratic and economic reforms they have undertaken in relatively short order.²⁵³ "For a majority of new EU citizens only the abolition of internal borders will be a true symbol of belonging to the Union."²⁵⁴ Similarly, new Member States will not feel that they have been accorded full membership rights if they are treated like "second-class state[s]" or junior members.²⁵⁵ However, the imposition of transitional measures indicates that the EU is not yet ready to fully acknowledge the progress made by the CEECS and accept them on equal terms. The EU also runs the risk "of creating first and second class EU citizenship," where Western European citizens may remain and work where they please, while CEEC citizens face limitations based on distrust, discrimination, and xenophobia.²⁵⁶

In short, the psychological barriers erected by transitional measures will impede the development of a common European identity. Transitional measures will undermine the development of a true loyalty towards the EU on the part of CEEC nationals who feel excluded and unwelcome. They foreclose the partici-

251. Guy Pevtchin, *The E.C.—An Example of Breaking Down the Barriers of Sovereignty—Implications for Canada and The United States*, 24 CAN.-U.S. L.J. 89, 90 (1998).

252. Maastricht Treaty art. 18.

253. Phuong, *supra* note 32, at 641.

254. BYRSKA, *supra* note 2, at 5.

255. Darnton, *supra* note 176.

256. BYRSKA, *supra* note 2, at 8.

pation of CEEC Member States in important expressions of EU identity and citizenship through freedom of movement by telling CEEC nationals that they are not free to interact with Western European nationals on an equal basis, and that the Union is not as interested in protecting their rights and interests as it is in protecting the rights and interests of old Member States. Transitional measures promulgate a culture of distrust and closure rather than interdependence and opening. They do not represent a good-faith effort to embark on a partnership based on respect and equality; rather they seem aimed at preserving Western Europeans' historic political dominance and economic superiority. Transitional measures will impede EU efforts to build a strong, cohesive union with citizens loyal to its ideals and united in a common sense of identity.

V. CONCLUSION

This paper has sought to call into the question the wisdom of imposing transitional measures that limit the ability of CEEC nationals to exercise freedom of movement after the May 2004 accession. Because freedom of movement, particularly for workers, is so fundamental a component of EU citizenship and identity, transitional measures should not be imposed unless there is substantial economic justification for doing so. Pre-accession evidence does not justify the imposition of transitional measures; the post-accession evidence that is available thus far seems to point to an identical conclusion. As predicted prior to accession, initial reports indicate that there has been no massive flow of workers westward.²⁵⁷ The European Citizen Action Service released a report in August of 2005 that found no massive influx of labor had occurred. For example, in England, new CEEC nationals amounted to just 0.4% of the total working population, five to ten times less than pre-accession forecasts had predicted.²⁵⁸ Moreover, the report demonstrates that the limited migration that did occur did not increase the unemployment rate of old Member State nationals, because "the host economies had the capacity to absorb the new labour force."²⁵⁹ In addition, the European Commission released a report in February 2006 finding that "[d]espite fears expressed on the occasion of successive enlargements free movement of workers has not led to disruption of national labor markets."²⁶⁰

257. Preliminary evidence suggests that "[t]here has been no massive flow of workers to the West." *Fears of Brain Drain from Eastern Europe Haven't Been Borne*, TORONTO STAR, Mar. 11, 2005 (quoting Dariusz Milczarek, director of the Center for Europe at Warsaw University).

258. Julianna Traser, European Citizen Action Service, *Report on the Free Movement of Works in EU-25: Who's Afraid of EU Enlargement?* 11 (2005), available at http://www.ecas.org/file_uploads/786.pdf [hereinafter *Who's Afraid of EU Enlargement?*].

259. *Id.* at 29.

260. European Commission, *Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004-30 April 2006)* 15, available at http://europa.eu.int/comm/employment_social/news/2006/feb/report_en.pdf. Nor can transitional measures be credited with limiting migration. Sweden and the United Kingdom, the two countries which chose not to impose temporary restrictions on mobility, experienced "comparable if not lower" migration than into other old Member States. *Id.* at 9. Growth in migration rates in all Old

The Commission also found that the employment rate of nationals of many old Member States, including Austria, France, the Netherlands, Spain, and the United Kingdom, actually *increased* after enlargement, and that the skills brought to these countries by workers from new Member States complemented rather than substituted for skills of old Member State nationals.²⁶¹ Finally, the Commission noted the detrimental effects of continuing transitional measures, including “a proliferation of undocumented work, bogus ‘self-employed’ work, and fictitious service provision” in order to circumvent migration restrictions, and called upon old Member States to “not only take due account of the statistical evidence but also to address a positive message to their citizens as to the prospects of free movement across the European Union” when considering whether to extend transitional measures.²⁶²

Much of the Western European public, however, remains unconvinced. In 2005, voters in France and the Netherlands rejected the proposed European Constitution by wide margins in public referenda, in part because of fears of a flood of unwanted laborers.²⁶³ In France, Eurosceptics rallied behind the symbol of the “Polish plumber,” who would settle in and leave French plumbers unemployed.²⁶⁴ At the same time, the riots that took place in low-income French suburbs in November of 2005 demonstrated the anger that many immigrants feel over the perceived racism and lack of opportunity they have encountered.²⁶⁵ It is clear that the debate over migration taps into European nations’ deeper ambivalence about their evolution from a number of separate, homogenous peoples into multicultural, multiethnic societies.²⁶⁶ Immigration remains a crucially di-

Member States remained stable from the two years immediately preceding enlargement. *Id.*

261. *Id.* at 11-12. The Commission’s report also cited evidence contradicting many of the fears expressed by old Member States prior to accession, including statistics confirming that CEEC migrants had not “caused any surge in welfare expenditure” in old Member States and may have had “positive effects on labour markets [in old Member States] by relieving labour shortages in certain areas.” *Id.* at 5, 13. In addition, the Commission noted that enlargement had brought positive economic growth to new Member States, brightening prospects for CEEC nationals and “suggest[ing] that there is no reason to expect increased pressure to move outside [CEEC] countries.” *Id.* at 10.

262. *Id.* at 5, 15.

263. Craig Whitlock, *French Voters Reject European Constitution*, WASH. POST, May 30 2005; Marlise Simons, *Dutch Voters Solidly Reject New European Constitution*, N.Y. TIMES, June 2, 2005. Despite periodic calls to revive the Constitution, there does not seem to be much hope that it will ever be ratified in its current form. David Rennie, *EU Constitution is Dead, Says Dutch Minister*, DAILY TELEGRAPH, Jan. 12, 2006.

264. Lauren Frost, *‘Polish Plumber’ Becomes Symbol of French EU Fears*, CHI. SUN TIMES, May 24, 2005. ECAS’s recent report noted that “[a]ttempts to point out the marginal nature of post-enlargement labour flows, or the fact that France did not become the primary destination of migrants remained futile while the counter-argument of the ‘Polish plumber’ convinced the public.” *Who’s Afraid of EU Enlargement?*, *supra* note 259, at 17.

265. Mark Landler & Craig S. Smith, *French Officials Try to Ease Fear as Crisis Swells*, N.Y. TIMES, Nov. 8 2005. In fact, most rioters were of North African ancestry, and many had been born in France. Nevertheless, the anger felt by the rioters and the French government’s official response to the unrest demonstrates the tension that exists between the French elite and segments of the population popularly perceived as “non-French” or “Other.”

266. Tom Hundley, *Ethnic Divisions Threaten European Unity*, CHI. TRIB., Jan. 16, 2006, at C4.

visive issue in national politics and elections in Western European nations.²⁶⁷ The fears and reactions that surfaced regarding the May 2004 accession will continue to inform public debate over the extent of future European integration and enlargement. Romania and Bulgaria are set to join the EU on January 1, 2007,²⁶⁸ and the EU has also taken the especially controversial step of opening accession negotiations with Turkey.²⁶⁹

Despite persistent tensions between old Member State nationals and migrants, there may be hope yet for the free movement aspirations of CEEC nationals. With the approach of April 30, 2006, the end of the first two-year period and the deadline for old Member States to decide whether to renew transitional measures for an additional three years, already some old Member States, including Spain, Finland, Portugal, and Greece, are considering easing or lifting labor restrictions altogether.²⁷⁰ Other old Member States should follow their lead and end to transitional measures as soon as possible.²⁷¹ Furthermore, old Member States “should not be allowed to extend their restrictions further than issues of access to their labor market.”²⁷²

In contrast, the EU should take affirmative action to aid new Member States to further improve their ability to properly handle asylum claims; reduce the risk of brain drain by creating incentives for scientists, students, and doctors to continue working in CEEC states; and provide programs and financial assistance to borderland regions that may be suffering a post-accession economic downturn. Rather than spending time, energy, and money erecting new barriers

267. See, e.g., *Immigration on Election Agenda After Rabbitte Taps Into Politics of Fear*, THE SUNDAY INDEPENDENT, Jan. 22, 2006.

268. *Supra* note 126. It is possible, however, that the accession of Bulgaria and Romania will be postponed until 2008. The Commission will review the countries' success in implementing democratic and economic reforms in April or May of 2006, at which point it will recommend postponement of accession should it find either country to be “manifestly unprepared.” Commission Press Release IP/05/1334, *Bulgaria and Romania Move Closer to Accession Goal*, Oct. 25, 2005, available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1344&format=HTML&aged=0&language=EN&guiLanguage=en>. Already Eurosceptic factions in certain Western European nations, including France and the Netherlands, have expressed uneasiness about the progress that still needs to be made before Bulgaria and Romania will be permitted to accede. Mark Underman, *Public Opinion Could Delay EU entry of Romania and Bulgaria*, EU OBSERVER, Feb. 16, 2006, <http://euobserver.com/9/20926>.

269. Elaine Scolino, *Turkey Advances In Its Bid to Join European Union*, N.Y. TIMES, Oct. 7, 2004. The issue of Turkey's accession is particularly contentious because Turkey is large, poor and overwhelmingly Muslim. Many old Member State nationals perceive the cultural differences between Turkey and Western European to be much greater than those between Western and Eastern Europe, and worry that Turkey does not share the same liberal, democratic values. Already Member States are discussing the possibility of permanent restrictions on the free movement of Turkish citizens should Turkey's candidacy prove successful. See *id.* For a thorough analysis of the issues surrounding Turkey's potential accession to the EU, as well as Turkey's value to the West as a strategic link to the Middle East, see Patrick R. Hugg, *The Republic of Turkey in Europe: Reconsidering the Luxembourg Exclusion*, 23 FORDHAM INT'L L.J. 606 (2000).

270. *Member States Ponder Lifting Labour Market Restrictions*, EURACTIV, Jan 28, 2006, <http://www.euractiv.com/Article?tcaturi=tcu:29-151867-16&type=News>.

271. Byrska recommends that old Member States end transitional measures before the conclusion of the first 2 year period. BYRSKA, *supra* note 2, at 17.

272. *Id.* at 19.

between Western and Eastern Europe, the EU should redirect resources towards integration initiatives, public information campaigns to inform all EU citizens of their rights, and programs that combat racism and xenophobia while promoting greater cross-cultural acceptance and respect.²⁷³ This will allow new Member States and their citizens to feel welcome and equal to those already part of the EU, and will promote the creation of a common European identity. As Zdenek Skromach, the Labor Minister for the Czech Republic has stated, “[t]he real interest in working abroad is not large . . . [i]t is rather a question of the feeling that people are denied some rights.”²⁷⁴ The persistence of first and second classes of citizenship serves to increase divisiveness, resentment, and a sense of inequality between old and new Member States. Only by allowing full freedom of movement to all its citizens, regardless of national origin, will the EU be able to sow the seeds of loyalty and harmony necessary to continue on the path towards greater strength, unity and cohesion.

273. See IOM REPORT, *supra* note 214, at 264; KORYŚ, *supra* note 183, at VI; BYRSKA, *supra* note 2, at 18.

274. *Member States Ponder Lifting Labour Market Restrictions*, EURACTIV, Jan 28, 2006, <http://www.euractiv.com/Article?tcmuri=tcm:29-151867-16&type=News>.