

Toward European Citizenship

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1. Introduction

In her influential book *The Origins of Totalitarianism*, Hannah Arendt coined, by reference to Kant, the phrase “the right to have rights”¹ to refer to the fundamental right to belong to an organized community. This right is the precondition for being granted any particular set of individual rights at all, and namely rights not only to freedom but also to action and opinion. This constitutes an illuminating approach to the concept of citizenship. First, only the citizen is vested with the privileged status to be a full member of the polity. Second, the citizen alone can act autonomously in the political sense of being his own master. Citizenship, thus, works as a means of both inclusion and exclusion, and only those included are empowered to shape their polity through the democratic process. By the same token, citizenship establishes a bond of affiliation between the polity and the citizens, which fosters social identity. Hence, it is no exaggeration to say that the concept of citizenship epitomizes the modern political ideal of freedom and equality under law.

Given that citizenship is of such paramount importance in the national polity, the introduction of a citizenship of the European Union (EU) within the Treaty on EU in 1992 raised many hopes. Since the late 1980s, the Union was increasingly deemed to suffer from a democratic deficit.² This deficit was often attributed to the lack of a European *demos* sharing a common identity.³ EU citizenship was, therefore, regarded as the perfect means to placate the rampant legitimacy crisis in the EU. At first, however, the catalogue of Union citizenship rights enshrined in Articles 17–21 (after the renumbering at Amsterdam) of the Treaty establishing the European Community was not thought to live up to these expectations. Union citizenship rights’ positive guarantees were at most a reiteration of existing rights of free movement under the restrictive conditions of the common market regime. Grouping those rights under the pompous title of Union citizenship was perceived by some as little more than a misnomer. Notwithstanding this poor start, things began to change in the early 2000s, mainly through the intervention of the European Court of Justice (ECJ). Thanks to the latter’s case-law, both the scope *ratione personae* and the scope *ratione materiae* of Union citizenship rights have gradually been broadened.

This fleshing-out of Union citizenship raises new difficulties, however. As long as Union citizenship did nothing to deserve its name, the only citizenship that

held sway in Europe was national citizenship. Today, the situation has changed.⁴ Union citizenship has acquired a life of its own, and this emancipation has already had and will increasingly have an impact on the future of national citizenship in Europe. While it is true that Union citizenship does not replace national citizenship—and probably because it cannot replace it—it has actually succeeded in transforming it. One might even go so far as to say that from now on national citizenship can only be conceived as a pluralistic form of political membership in Europe: pluralistic in quantitative terms *qua* membership of the many layers of political governance in Europe, but also and most importantly pluralistic in qualitative terms *qua* membership of an inclusive national polity. Thus, the concept of citizenship we are familiar with must be fundamentally reconsidered.

The aim of the present paper is to contribute to such reconsideration in mainly two ways. On the one hand, the current regime of citizenship rights in Europe can be mapped out taking into account recent jurisprudential developments and institutional change. It will be demonstrated that whereas the concept of citizenship was unitary and exclusive in the framework of the national state, it has gradually been rendered pluralistic and permeable in the wake of European integration. On the other hand, propositions shall be made as how to bias this process of transformation in order to approach the theoretical ideal of citizenship under the condition of transnational integration. Logically, both views integrate into an overall picture; jurisprudential developments, and case-law in particular, indicate the specific frictions and tensions arising from implementing another layer of citizenship into the existing system. Keeping those problems in sight is a first step toward improving the novel pattern of citizenship rights as a whole—and this is what the paper is aiming at. Roughly speaking, the question is how to grant maximum freedom and equality under law to the members of increasingly transnational societies. This idea is best captured by the proposed concept of *European citizenship*.⁵

Before going any further, it is worth noting that the authors' approach to the above issues draws on a few methodological pointers. First of all, a full account of citizenship must be *dynamic*, not static. What citizenship means, which aspects it emphasizes, and how it is institutionalized, have always been dependent on time and place.⁶ This is why the idea has proved adaptable to different political settings: from the laws of Solon and the Roman republic to the national state and to the EU. Allowing for change and flexibility is particularly important when it comes to assessing the current situation and, even more so, to forecasting possible future developments. Second, the rights and duties, which the *legal* status of citizenship confers on people, pervade almost all aspects of social life.⁷ Thus, a thorough investigation needs to take a broad *political* and *sociological* view. From this ensues, third, that citizenship is also a *normative* idea. The rights and duties, which citizenship comprises, can be regarded as inherently normative categories. As a consequence, the political structure and the social stratification they entail must be considered on grounds of normative political theory as well.

Accordingly, the present paper combines approaches from various academic disciplines, mainly European law and political philosophy. Basically, it draws on developments in primary and secondary European law.⁸ From there, institutional tendencies can be identified, their impact on the polity and society can be analyzed, and conclusions can be reached for future institutional and legal reform. The paper starts with an account of what citizenship in theory and practice is and should be (section 2). It then turns to a discussion of the current legal regime of EU citizenship and unpacks some of its shortcomings (section 3). Based on this critical assessment, the impact of EU citizenship on national citizenship and on the principle of nationality can then be measured (section 4). Finally, the proposed idea of European citizenship is developed to achieve greater democratic inclusion in Europe (section 5).

2. Citizenship and Democratic Inclusion

2.1 *The Material Scope of Citizenship*

This first chapter aims at providing a deeper insight into the crucial functions and characteristics of the institution of citizenship. In this respect, it should be conceived as a reference point for novel conceptions of citizenship in the post-national era. Broadly speaking, the concept of citizenship involves three dimensions, which one can term formal, substantive, and affective.⁹ The *formal* dimension refers to a legal status that is conferred on individuals by the sovereign power of a political community. By granting this status to certain people but not to everyone, citizenship is always a principle of inclusion as well as of exclusion. It constitutes, in legal terms, the group of people who are full members of the polity—and excludes all others. As a consequence, citizenship is a privileged status. It establishes a special relationship between individuals and their polity, which is characterized by rights and duties.

The *substantive* dimension of citizenship corresponds to the content of the particular bundle of those rights and duties. Accordingly, this aspect can be further subclassified. Thomas H. Marshall's distinction between *civil*, *political*, and *social* rights still provides a valuable analytical grid,¹⁰ although it is now relatively ancient and stems from a specific cultural and political context. Civil rights protect the individual sphere of free agency in a comprehensive Lockean sense. Political rights empower people to elect representatives and to stand as candidates in elections, but also in some cases direct participatory rights; these rights ensue from the principle of popular sovereignty. The most contended category of rights is the third one: social rights. According to Marshall, these should enable, "to live the life of a civilized being according to the standards prevailing in the society."¹¹ Without playing off these categories of rights against each other, it is obvious that the political rights and the right to democratic participation in particular have an exceptional quality. As Habermas puts it, only political autonomy establishes the legal status of the citizen in a reflective way.¹² Only in that particular respect is

citizenship an *active* status; that is, something that comes into existence by way of participating in the process of law giving. This active meaning is the hallmark of citizenship *stricto sensu*. It must be distinguished from a merely *passive* understanding, which simply describes the fact of membership in a polity.¹³ In addition to Marshall's categorization of rights, one should mention that citizenship rights correspond to and are followed by citizenship *duties*. In practice, they range from obeying lawful rules to paying taxes and to defending the country, to name the most prominent examples.¹⁴

The third dimension of citizenship is often referred to as its *affective* or *identity* dimension.¹⁵ Since this aspect cannot be captured in terms of rights, the concept of citizenship transcends the language of legal and political theory. The key to understanding the identity dimension is the socio-psychological concept of recognition. Conferring citizenship rights on people means recognizing them as full members of society. When it comes to the development of a firm and stable identity—be it individual or collective—such mutual recognition of social status and the positive consequences this has for interaction are paramount.¹⁶ Hence, a people's collective identity must be conceived as partly resulting from the institution of citizenship.¹⁷ By the same token, citizenship is not only a legal concept that applies to existing social groups of quasi-primordial nature in order to convert them into a political entity. Rather, citizenship is a concept of social stratification from which the consciousness of belonging together and the differentiation between the “in-group” and the “out-group”¹⁸ largely ensues. The conferral of citizenship rights can thus have a transformative effect on existing socio-political structures. Consequently, the present paper rejects the view that European citizenship and democracy are doomed to fail as long as there is no European *demos* sharing a collective identity. The so-called “no-*demos* thesis”¹⁹ does not cut any ice because group formation and solidarity can also be the result of the political process.²⁰ At any rate, the status of citizenship and the identity of the *demos* are functionally linked through a process of mutual reproduction.²¹

Due to this reciprocity between the legal structure and the identity dimension of a polity, the dialectics of inclusion and exclusion is not only a matter of legal regulation but also a matter of social cohesion. In its most fundamental sense, the idea of citizenship culminates in the right to be a full member of a democratic political entity, rather than in a particular set of rights.²² Indeed, what makes citizenship so valuable a status is its functioning as principle of *democratic inclusion*.

2.2 *The Personal Scope of Citizenship*

Given the potential for political empowerment and social inclusion that comes with citizenship rights, the question of who is entitled to be a citizen and for what reasons is crucial. The traditional criterion according to which the status of citizenship is conferred on people is *nationality*, at least since the emergence of territorialized sovereign states and their progressive democratization.

As a result, and for a long time, the quest for citizenship boiled down to the criterion for “being” or “becoming” a member of a particular nation. In principle, there are only two viable alternatives; this is the distinction between nationality by birth and naturalization or, more broadly, between nonconsensual and consensual means of becoming a national and hence a citizen.²³ Two basic principles determine whether one *is* a member of a nation by birth: *ius sanguinis* and *ius soli*.²⁴ Whether nationality is determined by reference to *ius sanguinis* depends on heritage, which is usually closely associated with a particular culture, language, or ethnicity. On the other hand, *ius soli* couples nationality to the place of birth. The latter has an inclusive momentum whereas the former is rather exclusive.²⁵ Nowadays, most regimes of acquisition of nationality entail elements from both *ius sanguinis* and *ius soli*.²⁶

The problem with *ius sanguinis* and *ius soli* is that they both establish a legal connection between nationality and citizenship, on the one hand, and circumstances of birth on the other. Entitlement to the rights of a citizen is in both cases equally arbitrary and a matter of luck. Besides such involuntary and nonconsensual means of simply being a national by birth, there is the generalized possibility of *becoming* a member of a nation after birth; that is, of receiving nationality by voluntary acts of application and public decision. The minimal requirement for such naturalization is usually the legal and permanent residence in a state for several consecutive years and a certain degree of integration in the host state’s society.²⁷

One of the aims of this paper will be to assess how the traditional principle of nationality is and should be applied in the increasingly post-national structure of the EU. Not surprisingly, the criterion of nationality is deficient in terms of democratic inclusion to the degree that societies become multi- and transnational. This problem can be exposed by considering the relations between national citizens and nonnational residents.

2.3 The Territorial Scope of Citizenship

The chasm between citizens and noncitizens depends not only on the granting of nationality, but also on the status of noncitizens or “others” *vis-à-vis* the privileged group of citizens. This may be measured by asking which rights are conferred on noncitizens legally residing in a state. In principle, the only rights that apply to all those residing on a national territory, and hence to nonnationals and noncitizens as well, are human rights. This bundle of rights usually comprises of civil rights and a modicum of social security. By contrast, political rights, that is, citizenship rights *stricto sensu*, are more restrictive in their personal scope and, in principle, pertain exclusively to the status of citizenship.

So, the cleavage between citizens and noncitizens becomes particularly problematic from the perspective of democratic inclusion. According to the normative ideal of popular sovereignty, the people who are (normatively) affected by laws should also be the authors of those laws and hence be entitled to participate

directly or indirectly in the law-making process.²⁸ This is after all what is meant by the “right of rights” and the argument that human rights protection requires first and foremost granting a right to membership in the political community deciding over those rights.²⁹ Obviously, this condition is insufficiently met as long as political rights pertain to the holding of nationality; all resident nonnationals are excluded from political participation despite these people being potentially equally affected by the laws and regulations of their host state. Needless to say, in circumstances of globalization, increased mobility, and constant migration, the exclusion of nonnationals from the polity they actually live in is ever harder to justify.³⁰

In order to bridge the gap between universal human rights and particularistic citizenship rights, a path to full political membership for nonnational migrants should be cleared.³¹ A viable solution might be to grant citizenship rights not only by reference to nationality but also by reference to long-term *residence*. This may ensure that those people are full members of the democratic polity who are, as a matter of fact, already members of the respective society.³² Later in this work it will be demonstrated that a shift from nationality to residence as a condition for enjoying certain rights of citizens can actually be observed in the context of EU citizenship. Moreover, it will be argued that the denationalization of European citizenship should be taken further to deterritorialization, so as to ensure greater democratic inclusion in Europe.

3. European Union Citizenship Today

3.1 *The Legal Regime*

The legal basis of Union citizenship in European primary law lies since 1992 in Articles 17–22 of the Treaty establishing the European Community. The 2000 Charter of Fundamental Rights of the EU reiterates those rights in Articles 39–46. It brings in a few new rights from the bulk of the EC Treaty, splitting other rights in two and extends the personal scope of most rights except political rights in order to encompass Third Country Nationals (TCNs) residing in the EU. Most recently, the Treaty establishing a Constitution for Europe (TCE), whose future remains highly uncertain, guarantees EU citizenship rights through the constitutionalized Charter in Articles II—99–102 TCE and, in a shorter form, in Article I—10 TCE, without, however, adding anything new to the prior regime.³³

According to Article 17(1) EC, “every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.” This provision has two implications. First, EU citizenship has a *derivative* nature since holding the nationality of a Member State is a prerequisite for acquiring it. Second, EU citizenship has a *complementary* nature as it is not meant to replace national citizenship. According to Article 17(2) EC, citizens of the Union enjoy all those rights which are

guaranteed by the EC Treaty and secondary legislation, and are subject to the respective duties. Thus, the benefits of Union citizenship are not limited to the rights conferred by Articles 18–21 EC, which are not exhaustive.³⁴ EU citizenship is evolutionary and can expand to new rights together with the expansion of the scope of the EC Treaty. In fact, Article 22 EC makes plain that the concept of Union citizenship was explicitly designed to be developed further.³⁵

Articles 18–21 EC mainly restate the most topical rights from the Treaty, with the exception of new political rights protected by Articles 19 and 20 EC. Citizenship rights expressly protected are the right of free movement and residence within the territory of any Member State (Article 18 EC), the right to vote and stand as a candidate in municipal elections and in elections to the European Parliament in the Member State in which the citizen lawfully resides (Article 19 EC), the right to diplomatic and consular protection by any Member State's authorities in third countries (Article 20 EC), and the right to petition to the European Parliament and to apply to the European Ombudsman (Article 21 EC). In sum, citizenship of the Union appears to be quite piecemeal; it does not match lists of national citizenship rights and remains particularly thin in terms of political rights. One may further regret the obvious absence of explicit duties.³⁶

Not surprisingly, the adoption of Articles 17–22 EC has often been deemed as an exercise in window-dressing. The cause of concern lies not only in those rights' content but also in their material and personal scope. If one starts by asking which rights pertain exclusively to the status of citizenship of the Union and hence whether they have a *material scope* of their own, the answer is disappointing. Union citizenship rights only apply within the material and hence mostly economic scope of the Treaty.³⁷ Moreover, these rights are inherently limited by preexisting restrictions in the Treaty.³⁸ Hence, the early concern about the market-oriented nature of EU citizenship.³⁹

To make things worse, the *personal scope* of EU citizenship rights is either too limited or too broad. To start with, the scope of beneficiaries is inherently limited because EU citizens' rights can be exercised and are of specific value only to those citizens who migrate within the EU or have some kind of transnational connection—and these are very few.⁴⁰ But the opposite is also true; other EU citizenship rights, such as those comprised in Article 21 EC,⁴¹ are quasi-universal in their personal scope, thus progressively diluting the inherently exclusive nature of the citizenship status.⁴² The only source of exclusive citizenship rights lies in the relatively thin democratic rights granted by Article 19 EC⁴³ and the right to diplomatic and consular protection of Article 20 EC.

3.2 Recent Jurisprudential Developments

Thanks to the ECJ's active case-law in recent years, Union citizenship has started to develop and hold some of the promises made in 1992.⁴⁴ In particular, the ECJ has constantly developed the social dimension of EU citizenship, thus gradually turning it into a source of rights of its own.⁴⁵ This evolution has taken place

primarily through the combined reading of the Union citizenship right of free movement and residence (Article 18 EC) and the prohibition of discrimination on grounds of nationality (Article 12 EC). Through this connection, the case-law finally expanded EU citizenship by making it the fundamental status from which citizens may directly derive individual rights, while also providing at the same time a more universal scope for the protection against discrimination in EC law.

The first group of cases decided in the late 1990s has extended the scope *ratione materiae* of EU citizenship in extending its rights to noneconomic agents, such as students, unemployed people, and family members of workers. The first decision in this jurisprudential evolution was the ECJ's judgment in *Martinez Sala* in 1998.⁴⁶ In this case, the ECJ allowed Ms Martinez Sala (a Spanish national, former worker but currently unemployed, who was lawfully residing in Germany) access to social benefits in her host Member State even though she was not an economic migrant. In the *Grzelczyk* case in 2001, the ECJ confirmed that the material scope of EU citizenship rights is defined by the very fact of migration and the exercise of the right to move and reside freely in another Member State, independently of an economic activity.⁴⁷ What the ECJ acknowledged then was the direct effect of Article 18 EC. Since 2002, the ECJ has pursued its work of extension of the scope *ratione materiae* of EU citizenship,⁴⁸ and it is this very jurisprudential evolution that gave rise to the Directive 2004/38/EC which recognizes EU citizens' free movement and residence rights in general and codifies the case-law *acquis*.⁴⁹

A second group of decisions points to the progressive extension of the scope *ratione personae* of EU citizenship rights.⁵⁰ This extension started with the *Carpenter* and *Baumbast* cases in 2002, where the ECJ granted EU citizens' TCN family members quasi-citizenship rights.⁵¹ The ECJ has since then pursued its work of extension of EU citizenship rights to non-European family members.⁵²

3.3 *Open Questions*

As a result of this extremely active case-law, EU citizenship is gradually emancipating and turning into a more inclusive form of social and political membership, which is in line with universal human rights guarantees.⁵³ Nonetheless, different questions are still open and remain a source of concern.⁵⁴

With respect to the *material scope* of EU citizenship rights, one may regret, first of all, that, despite their newly acquired direct effect, these rights still have to be invoked together with Article 12 EC's non-discrimination principle; this prevents EU citizenship from becoming the direct source of all rights hoped for in earlier case-law.⁵⁵ Second, EU citizenship rights may be restricted by reference to the justifications accepted in the Treaty (Article 18(1) EC by analogy). Thus, EU citizenship rights are subject to limitations one may accept in relation to fundamental economic freedoms, but not to other social and political rights.⁵⁶ A final concern is that of the social leveling-down in Member States, which may occur in reaction to the increasing number of social benefits attached to EU citizenship and

this despite the scope of the legitimate restrictions to those rights recognized by the ECJ in its recent case-law.⁵⁷

As to EU citizenship rights' *personal scope*, one may mention the following three concerns. First, the transnational element, although it has been partially watered-down through case-law,⁵⁸ is still a necessary condition of application of EU citizenship rights. As a consequence, the problem of reverse discrimination of EU citizens "at home" (i.e., discrimination of nationals in purely national situations by comparison to how nationals of other Member States would be treated in the same country) still persists.⁵⁹ And this, in turn, belies the jurisprudential evolution toward a regime of EU citizenship *qua* fundamental status and basis of all rights in the EU. Second, derivative EU citizenship is, in conformity with international law,⁶⁰ determined by reference to the many rules of conferral and withdrawal of nationality and hence to the rules of citizenship acquisition of particular Member States.⁶¹ There are, in other words, nowadays twenty-five modes of acquiring the nationality of a Member State and hence EU citizenship, which is a source of great inequality and jeopardizes the inclusive nature of EU citizenship.⁶² The third area of concern is the exclusion of long-term resident TCNs from the benefits of EU citizenship. They remain generally deprived of political rights with the exception of those (mostly) municipal voting or participatory rights recognized directly by national law in a few European countries such as the United Kingdom or Belgium. Since European Others may as European citizens take part in municipal and European elections in other Member States, it is difficult to see why non-European Others legally residing in the EU could not benefit from the same rights.⁶³ Of course, progress has been made in Europe as well as on the national level where foreigners are granted more and more rights.⁶⁴ Nevertheless, these rights are still very limited and do not entail political rights despite some important changes in recent decisions.⁶⁵

All the aforementioned shortcomings highlight a similar pattern. With respect to political rights, people living in the European polity are not treated equally. Either some of these rights are materially limited or the way of acquiring those rights leads to undue discriminations. This is a serious cause for concern given the democratic principle of inclusion of all those affected by a decision alluded to previously. Section 5 of the present paper explores how one could achieve greater political equality within the EU.

4. The Fate of National Citizenship

Before exploring those ways, it is necessary to investigate further the relationship and the tension between EU citizenship and national citizenship in Europe. Although, and paradoxically, because EU citizenship is meant to be derivative from and complementary to national citizenship, the granting of its rights and their enforcement are bound to have an impact on both (national) nationality and national citizenship.

4.1 *European Union Citizenship and Nationality*

A primary dimension of the erosion of national citizenship under the pressure of Union citizenship lies at a deep level. It pertains to nationality and its progressive weakening *qua* criterion of national and respectively European citizenship.

Conceptually, one may argue that Union citizenship has led to the decoupling of citizenship from nationality and, as a result, to the gradual erosion of the link between the former and the latter. In principle, indeed, and on the Member States' insistence, Union citizenship does not aim at creating a European nationality of its own and therefore sever the fundamental link between the two. True, the connection between nationality and citizenship is not entirely undermined, since one needs to be a Member State national to become a Union citizen. More importantly, however, Union citizenship generates rights for nationals of a Member State by virtue of their residing in another Member State. In so doing, it creates a new category of European nonnational citizens that weakens the traditional exclusivity of national citizens' rights in each Member State.⁶⁶ Recently, TCNs legally residing in a Member State have also been vested with certain quasi-citizenship rights in that Member State. In sum, although EU citizenship remains in principle derivative and based on a Member State's nationality, it has triggered a shift from *nationality* to *residence* as a criterion for the acquisition of certain national citizenship rights.

In the light of the above sketched evolution, the holding of a particular nationality appears to have become less important in European Member States. Given that a particular nationality is usually the basis for the prerogatives of national citizenship, it is fair to assume that the status of national citizenship will no longer be the exclusive provider of rights it traditionally was.

4.2 *European Union Citizenship and National Citizenship*

Independently of the impact on nationality and hence independently of the grounds on which national citizenship is granted in Member States, Union citizenship is exerting direct pressure on the organization and role of national citizenship itself. The erosion of traditional national citizenship under the influence of EU citizenship may already be observed at two levels at least.

First of all, as regards the *granting* and *withdrawal* of national citizenship, Member States used to be the sole competent authority. Yet in a multilevel political system, there is more than one authority granting rights to national citizens;⁶⁷ citizenship rights in Europe are fragmented materially across different functional layers of political organization over the same territory. Thus, for instance, once national and respectively EU citizenship rights have been granted according to national rules pertaining to the acquisition of nationality, the vested rights cannot be withdrawn on purely national grounds.⁶⁸ As a consequence, national governments no longer hold absolute sovereignty over the rights and duties of their citizens.

Second, Member States also face challenges with respect to the *enforcement* of national citizenship rights. True, the main duty-holders corresponding to Union citizenship rights remain the Member States, and mostly Member States other than those of nationality of the Union citizen.⁶⁹ This affects, however, the role of national authorities in the enforcement of national citizenship rights, as they have to grant to nonnationals the rights previously exclusively granted to national citizens.⁷⁰ Moreover, citizens of the Union see some of their rights as protected by European authorities as well, when those are vested with implementation competences. Last but not least, in an increasing number of cases, national authorities are vested with additional duties toward their own citizens based on the latter's EU citizenship rights. Although this consequence of EU citizenship was long preempted by the lack of prohibition of reverse discrimination in EU law, it is now occurring although in limited instances where a minimal transnational element can be established in a *prima facie* purely national situation.⁷¹

Going back to the three dimensions of citizenship alluded to previously, one may say that although the formal status of citizenship in Europe remains based on nationality, some of the substantive rights can be enjoyed regardless of any particular nationality—provided one is European and residing in a Member State. To the degree that citizens perceive their rights as nationality-independent, they might raise expectations with respect to what European institutions (as opposed to national ones) should provide. Accordingly, it is likely that these changes in substantive terms will, in the long run, also affect the identity dimension of citizenship. If nationals and nonnationals are, to an increasing degree, treated equally, people's loyalty and their feelings of belonging are expected to be less exclusively directed toward the national state. Instead, this is likely to create "an immediate bond of affiliation"⁷² between citizens of Member States and the EU. Union citizens might direct their allegiance toward the Union because they owe some of their basic rights as citizens to the EU, and because the EU might be protecting some of them. Provided that the formation of social identities and the feeling of belonging to a group can, at least in part, be explained in functional terms, then the benefits that people obtain from EU institutions may foster a common European identity.⁷³ More importantly, participation in European and municipal elections could foster feelings of belonging on both the transnational and the subnational level in other Member States than that of one's nationality, and thus further challenge national identity as the primary political identity.

At any event, the long-run impact of these developments would bear on solidarity, stratification, and social cohesion, which would all partially shift away from the traditionally exclusive principles of nationality and national citizenship. This challenge to national identity, though generally welcome, could also have its drawbacks. On the one hand, it may cause a weakening of national solidarity, which, for instance, is still necessary for national social policies to be backed by a majority. This will require Member States to imagine new ways of actively consolidating affective bonds with national and nonnational European citizens, so as to complement European ties in national politics. At the same time, however,

the EU will have to find ways to live up to the institutional expectations raised among European citizens, which is not always the case at present due to the competence allocation system in the EU and the intergovernmental mode of governance that prevails in certain areas of European politics.⁷⁴ On the other hand, one should not underestimate the risk of a revival of nationalism and the backlash of exclusive nationality.⁷⁵ Eventually, the outlined evolution will necessarily raise the question of multiple political allegiances.⁷⁶

5. Toward European Citizenship

5.1 *From European Union Citizenship to European Citizenship*

Despite these radical transformations, the apparent weakening of national citizenship need not be deemed a danger to the rights of citizens themselves. On the contrary, Union citizenship has strengthened the rights of individuals in whichever Member State they reside with nationality-independent rights that apply across Member States' borders in Europe.

In this respect, EU citizenship remedies some of the shortcomings of modern citizenship alluded to before and in particular the exclusionary nature of national citizenships in Europe by opening national polities to one another⁷⁷ and allowing Union citizens to have a voice in decisions that affect them across Europe. To some extent, it even extends those benefits to non-European long-term residents in European Member States. This is primarily the case of TCNs residing inside the EU. One may even argue that this should also be the case for those residing beyond its borders whose interests should be taken into account in European deliberations when they are normatively affected.⁷⁸ Indeed, the tensions present in externalizing democratic rights from the realm of a single polity to a multi-polity are already at play and have been largely resolved within the EU itself with the extension of previously national rights to nonnational European Others. A further externalization and transposition to external relations would, therefore, seem entirely congenial to the EU project.⁷⁹

This goal has not been achieved by supplanting national citizenships and replacing them with an overarching supranational citizenship of the Union, however. Rather, citizenship remains strongly anchored at the national level in Europe albeit in a different way. The change is both quantitative and qualitative. First, citizenship in Europe has become multileveled as European citizens are members of different polities both horizontally across Europe (other Member States) and vertically (European transnational, international, and supranational institutions). Second, national citizenship in and of itself has changed in quality and has been made more inclusive in its scope and mode of functioning. Union citizenship adds a European dimension to each national *demos* and, to a certain extent, alters national citizenship in reconceiving it in a complementary relation to other Member States' citizenships.

This transformation of national citizenship in the EU is best captured by reference to the notion of *European citizenship*. European citizens are not only the citizens of a national state taken individually, but, when they deliberate on issues of European interest, they are citizens of each state *qua* key component of the broader European polity.⁸⁰ On this model, different national *demos*, either located separately at national level or together in different fora at a transnational or supranational level, constitute together a functional European *demos*. For instance, national citizens and their representatives should vote on European issues in national settings as European citizens, with their shared European interests in mind, thus turning national polities into more or less European ones depending on the topics addressed. Similarly, in European institutions, national representatives should deliberate neither as representatives of their national *demos* only nor as those of a single European *demos*, but as representatives of a functional *demos* of *demos*. In a nutshell, the EU is neither a mere (international) Union of democracies nor a (supranational) Union as democracy.⁸¹ It is a Union of peoples, that is, a true *demosi*-cracy. In the light of this conception, citizenship in Europe amounts to more than the sum of its parts.

5.2 A Few Directions for Reform

Despite its conceptually innovative features and constituting an avant-garde experimentation of post-national democratic mechanisms, European citizenship remains in many areas little more than a distant dream. It is crucial, however, in this period of transition and questioning in European integration, to go beyond empty rhetorics. It might be useful therefore to explore ways in which European citizenship may be further decoupled from nationality and eventually deterritorialized so as to encompass all affected interests whether they belong to residents or not.

5.2.1 Denationalizing European Citizenship

A source of concern alluded to previously is that EU citizenship still appears to discriminate unduly between different categories of lawfully resident people. This becomes particularly obvious in view of the limited political rights of TCNs. The source of inequality can be located in the two concurrent principles that, today, serve as additional conditions for the granting of rights of European citizens: on the one hand, the *nationality* of a Member State, and, on the other hand, lawful *residence* within EU territory. As a result, there are basically three categories of lawful residents in each Member State: European nationals, European nonnationals, and non-European nonnationals.

The proposal that national and hence EU citizenship should be based on long-term residence and integration to the host society is the natural conse-

quence of the now largely completed externalization of national citizenship rights to European nonnationals. The next step would come naturally indeed and would be to extend them to non-European nonnationals in each Member State.⁸² In order to grant full membership of the European polity—including democratic participation—to all lawful long-term residents in European Member States, three alternative strategies could be envisaged at this stage.

First of all, European citizenship could be granted at EU level only, on grounds of residence in any Member State, and no longer at national level on grounds of nationality. In this scenario, the Union would, in a “top down” manner, extend European citizenship to all lawful long-term residents in the European territory. Impinging on the core of national sovereignty, this supranational approach to political membership would clearly be rejected by Member States. Apart from this practical obstacle, it would sever the link between national and Union citizenship which is crucial to the multi-level European polity whose primary locus of deliberation remains the national state.

Second, some Union citizenship rights, and especially political ones, but not the whole status of citizenship as such, could be extended to TCNs residing in the EU.⁸³ The recent tendency in case-law and legislation actually seems to take this direction.⁸⁴ The difficulty with this approach, however, is that it risks diluting the idea of political membership and the inherent exclusivity of citizenship,⁸⁵ on the one hand, and to create second-class citizens, on the other.

A third and preferable alternative might be to encourage Member States to promote naturalization at national level on grounds of residence and thus to extend the European political franchise through nationalization.⁸⁶ This presents the advantage of bringing exclusive European citizenship closer to universal human rights guarantees without superimposing a homogeneous socio-legal structure onto the national one. It follows a “bottom to top” approach, which does not betray the multi-centered structure of the European polity and the central importance of national democracy in the European *demoi*-cracy.⁸⁷ In addition, naturalization provides access to political participation on the national level of the host Member State, hence autonomy within that polity that most affects one’s life. The criterion for being a European citizen would still be nationality of a Member State—yet nationality of a different kind. Instead of a historically conditioned nationality based on accidental birthright principles, the community of nationals would also consist of those who are active members of the society. In fact, this new nationality would equate residence.⁸⁸

In theory, this scenario seems perfectly sound. In practice, however, Member States might be reluctant to harmonize naturalization conditions on the basis of residence. One might therefore simply wait until residence gradually imposes itself as the most inclusive and democratic criterion for national citizenship, as this is starting to be the case in certain Northern European countries.⁸⁹ Alternatively, a certain pressure from the EU level might confirm and accelerate this evolution.

5.2.2 Deterritorializing European Citizenship

Looking into the not-too-distant future, the question must nevertheless be posed as to whether citizenship based on residence can truly meet the normative purpose of full political membership. The process of European integration—and consequently the concept of European citizenship—can only be properly understood in the light of *globalization*.⁹⁰

Two concepts have emerged from the debate on globalization that are essential to understanding future expectations of post-national citizenship. First, there is the concept of “glocalization,” which rejects the view that globalization is a process of universalization causing global homogenization. On the contrary, globalization incorporates and even creates local particularities.⁹¹ Second, the term “deterritorialization” describes changes in the nature of social space that transcend the paradigm of territoriality. Relations between people are increasingly trans-territorial or supra-territorial.⁹² The meaning of deterritorialization is well captured in Giddens’ formula of “separation of *space* from *place*,” by which he means that social relations are cultivated irrespective of face-to-face interaction.⁹³ Instead, social spaces are structured according to interests and functional requirements. So are law-making processes in Europe, as they increasingly take place and apply beyond and across borders.

Both tendencies illustrate the fact that purely national regulations are losing not only in effectiveness, but also in legitimacy. There is increasing discrepancy between political decision making, the reach of national rules, and the scope of actual interaction. More precisely, one may mention two deficits. On the one hand, decisions taken within the bounded polity do affect people living outside these boundaries without giving them the opportunity to have a say on those issues. On the other hand, the territorial *demos* cannot control democratic decisions that have an impact on its politics but take place outside their polity. Such discrepancy is inevitable to the extent that the scope of political issues no longer coincides with the polity’s boundary.⁹⁴ To make matters worse, purely functional spaces of interaction cannot be mapped on territory at all; the “geography of problems”⁹⁵ may thus elude any geography of political territories. Adding transnational or supranational layers of territorial democracy is obviously not a viable solution. It further complicates the issue as it gives rise to the problem of many majorities overlapping on the same territory.⁹⁶ Instead of being deterritorialized, the decision-making process becomes overterritorialized.⁹⁷

In response, one could take advantage of the cross-border⁹⁸ concept of European citizenship and of the progressive process of denationalization it epitomizes, in order to take it further to deterritorialization and hence partly make up for the national state’s loss of functionality and legitimacy. First of all, the sociological model of globalization best matches a multilevel concept of citizenship, such as that underlying the emerging European citizenship.⁹⁹ European citizenship not only transforms, but also strengthens national citizenship in increasing the democratic inclusion of the national polity; in including nonnational interests, it also

reinforces the inclusion of national albeit underrepresented interests.¹⁰⁰ Considering deterritorialization, second, the evolution in citizenship theory and practice is less advanced. Substituting residence for nationality as a basis for citizenship rights does justice to increased cross-border mobility; yet it still links rights to a territory. So, the shift from territoriality to functionality present in social interaction has not yet been matched by a shift in the foundations of citizenship. It should come more easily in European Member States than elsewhere, however, since the externalization of national citizenship rights to European nonnationals has already taken place and experiments of functional mutual internalization of interests in various Member States may already be observed.¹⁰¹

Deterritorialization remains a matter of concern, however, with respect to democratic rights of participation, which are the hallmark of citizenship *stricto sensu*. The rights of the market citizen—that is, property rights and possibly social rights—can quite easily be implemented beyond borders. In the case of democratic rights, the structural interdependence between citizens and authorities is more demanding. The reflexive character of democracy requires a sort of reciprocity and continuity that a market regime does not. Rights of political participation institutionalize a feedback loop between the people as subject and the people as sovereign. Popular sovereignty is based on the persistent congruence of these two groups. Whereas the market citizen's belonging to a group is of little importance, democratic reciprocity can only be guaranteed through group membership. This explains why territoriality remains the easiest and clearest criterion of group membership even in the most inclusive European societies. Substituting residence for nationality has improved democratic inclusion while also maintaining the clear boundaries of a group. Yet—as a brainchild of methodological territorialism—residence still suffers from a democratic deficit.

The task ahead is therefore to combine the search for greater political inclusiveness with the incorporation of principles of functional rather than merely territorial inclusion, and hence to develop proposals for the institutionalization of European democracy. Some have already been put forward, of course, including reflexive representation models and the correlative electoral sanctions, but scope precludes addressing them here.¹⁰²

6. Conclusion

A critical assessment of the present regime of EU citizenship reveals that it is not an exclusive status pertaining to a comprehensive catalogue of rights which only Union citizens would enjoy. Citizenship of the Union is a far cry from a fully fledged citizenship as we know it from the democratic national state. Yet, a comparison between EU citizenship and national citizenship would be beside the point since the benefit of EU citizenship ensues from its dynamic interplay with existing national citizenships. Hence, the idea of *European citizenship*, that best reflects the transformative Europeanization of national citizenship in Europe.

Due to this evolutionary transformation, the concept of citizenship known from the modern state is no longer suitable for understanding citizens' rights in the EU. Within this novel constellation, several inroads have been made into the traditional prerogatives of national citizenship. Since the Union grants some rights across Member State borders on grounds of residence rather than nationality, both nationality and national citizenship are expected to change functions in Europe. Given that the national state was for a long time the main guarantor of citizens' rights, the erosion of national citizenship may legitimately generate fears and doubts about the new European polity. It would be wrong, however, to conceive of European citizenship as a single supranational citizenship grouping all national citizens into one single European *demos*. Rather, national citizenship remains the primary democratic membership in the European polity albeit in a transformed way. European citizenship is pluralistic in nature; this pluralism is not only quantitative in terms of many horizontal and vertical levels of interaction, but also qualitative in that each national *demos* has become inclusive of others. As such, the EU is more than a union of democracies working at many levels: It is a *demosi*-cracy in each and every Member State and at all levels of European governance.

The transformative effect of European citizenship has only started, however, and numerous tensions remain between the ideal of democratic inclusion and the exclusive remnants in European citizenship. Thus, the progressive shift from nationality to residence *qua* criterion of European citizenship rights has entrenched undue discriminations between nationals, European nonnationals, and non-European nonnationals in each Member State. In order to fight these problems of political discrimination and social stratification, the proposition was made to facilitate naturalization at the national level on grounds of lawful long-term residence and integration in national society. This would have the advantage of not diluting the multileveled and pluralistic nature of the European polity, while at the same time granting people full political membership of the society they actually live in.

A further difficulty remains, nevertheless. In a globalized world, the community of law-givers and the ones being affected by those laws can no longer be made congruent on a merely territorial basis. Social and legal interaction is increasingly deterritorialized and structured according to functional patterns instead. Thus, residence *qua* criterion of political membership, which clings to methodological territorialism, is partially deficient. In order to remedy this shortcoming, solutions are awaited to gradually ground European citizenship not only on residence, but also on functional criteria of normative affectedness. What has become clear, however, is that the goal of democratic inclusion can only be pursued beyond territoriality through mechanisms of democratic iteration: Current European citizens themselves should be those to allow for such novel patterns of membership. Going back to Arendt, belonging to a group is the precondition for freedom and equality: "We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights."¹⁰³

Notes

- ¹ Hannah Arendt, *The Origins of Totalitarianism* (New York: Schocken Books, 2004 [1951]), 376. See also Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004), 49–69; Dora Kostakopoulou, “Towards a Theory of Constructive Citizenship in Europe,” *The Journal of Political Philosophy* 4 (1996): 337–58, 339; Jeremy Waldron, “Participation: The Right of Rights,” *Proceedings of the Aristotelian Society* 98 (1998): 307–37.
- ² For a discussion of the democratic deficit, see, for example, Dimitris N. Chrysochoou, *Democracy in the European Union* (London: Tauris Academic Studies, 1998).
- ³ See, for example, Ernst-Wolfgang Böckenförde, *Staat, Nation, Europa: Studien zur Staatslehre, Verfassungstheorie und Rechtsphilosophie* (Frankfurt a.M.: Suhrkamp, 1999), 89–94; Dieter Grimm, *Braucht Europa eine Verfassung?* (München: Carl-Friedrich-von-Siemens-Stiftung, 1995); Peter Graf Kielmansegg, “Integration und Demokratie,” in *Europäische Integration*, ed. Markus Jachtenfuchs and Beate Kohler-Koch (Opladen: Leske+Budrich, 1996), 47–71.
- ⁴ Samantha Besson and André Utzinger, “Future Challenges of European Citizenship: Facing a Wide-Open Pandora’s Box,” *European Law Journal* 13, no. 5 (2007): 573–90.
- ⁵ Note that the term “European citizenship” is already commonly used by reference to Union citizenship in different European languages, albeit not in German for reasons pertaining to the ethnocentric nature of citizenship in the German political tradition.
- ⁶ See, for example, Paul B. Clarke, *Citizenship* (London: Pluto, 1994); Derek Heater, *Citizenship: The Civic Ideal in World History, Politics and Education* (Manchester: Manchester University Press, 2004).
- ⁷ See, for example, Ulrich K. Preuss, “Citizenship in the European Union: A Paradigm for Transnational Democracy?” in *Re-Imagining Political Community: Studies in Cosmopolitan Democracy*, ed. Daniele Archibugi, David Held, and Martin Köhler (Stanford, CA: Stanford University Press, 1998), 138–51, esp. 143.
- ⁸ In the present paper, the terms “European law” or “EU law” refer to the law of the Treaties on the European Union, including the law of the European Community. Although in many cases, European law will in fact be EC law, we will refer for reasons of clarity to European or EU law in general. For the same reasons, we will often refer to the European Union to talk of what has now become the Union.
- ⁹ See, for example, Joe Painter, “Multi-level Citizenship, Identity and Regions in Contemporary Europe,” in *Transnational Democracy: Political Spaces and Border Crossings*, ed. James Anderson (London: Routledge, 2002), 93–110, esp. 93–95; David Dunkerley, Lesley Hodgson, Stanislaw Konopacki, Tony Spybey and Andrew Thompson, *Changing Europe: Identities, Nations and Citizens* (London: Routledge, 2002), 10.
- ¹⁰ Thomas H. Marshall, *Citizenship and Social Class* (London: Pluto, 1992 [1950]), 8.
- ¹¹ *Ibid.*
- ¹² Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt a.M.: Suhrkamp, 1992), 104.
- ¹³ See, for example, Sven Murrmann, *Demokratische Staatsbürgerschaft im Wandel: Über unsere Zugehörigkeit zum politischen System in Zeiten pluraler gesellschaftlicher Mitgliedschaften* (Würzburg: Königshausen und Neumann, 2000), 42–47.
- ¹⁴ On citizenship duties, see, for example, Elizabeth Meehan, *Citizenship and the European Community* (London: Sage, 1993), 19–20; Ruth Rubio-Marin, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (Cambridge: Cambridge University Press, 2000), 46.
- ¹⁵ Carens appropriately speaks of a “psychological” dimension of citizenship; see Joseph H. Carens, *Culture, Citizenship and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford: Oxford University Press, 2000), 166–73.
- ¹⁶ See Erik H. Erikson, *Identity: Youth and Crisis* (New York: W.W. Norton, 1968); Erik H. Erikson, *Identity and the Life Cycle* (New York: W.W. Norton, 1980). It is not necessary for our purposes

to distinguish between individual identity and group identity. In fact, the two identities are produced and reproduced within the same process of social interaction. See George H. Mead, *Mind, Self, and Society: From the Standpoint of a Social Behaviorist* (Chicago: The University of Chicago Press, 1934); Hans Joas, "The Emergence of the New: Mead's Theory and Its Contemporary Potential," in *Handbook of Social Theory*, eds. George Ritzer and Barry Smart (London: Sage, 2001), 89–99, esp. 96; Richard Jenkins, *Social Identity* (London: Routledge, 1996); Jürgen Habermas, *Nachmetaphysisches Denken: Philosophische Aufsätze* (Frankfurt a.M.: Suhrkamp, 1988), 191.

- ¹⁷ See, for example, William Bloom, *Personal Identity, National Identity and International Relations* (Cambridge: Cambridge University Press, 1990), 54–75.
- ¹⁸ The terminology of "in-group" and "out-group" is borrowed from William G. Sumner, *Folkways: A Study of Mores, Manners, Customs and Morals* (Mineola, NY: Dover Publications, 2002 [1906]), 12.
- ¹⁹ For a critique see Joseph H.H. Weiler, "Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision," *European Law Journal* 1, no. 3 (1995): 219–58.
- ²⁰ Some authors venture to say that the *demos* only exists within or through the democratic process, and hence the collective consciousness of belonging together to the same political body mainly ensues from citizens' political rights. See, for example, Seyla Benhabib, "Of Guests, Aliens, and Citizens: Rereading Kant's Cosmopolitan Right," in *Pluralism and the Pragmatic Turn: The Transformation of Critical Theory*, eds. William Rehg and James Bohman (Cambridge, MA: MIT Press, 2001), 361–87, esp. 363; Benhabib, *The Rights of Others*, 163–69; Francis Cheneval, "Die EU und der Prozess ihrer Legitimation," in *Legitimationsgrundlagen der Europäischen Union*, ed. Francis Cheneval (Münster: Lit, 2005), 1–26, esp. 14–17.
- ²¹ Samantha Besson, "Deliberative Demoi-cracry in the European Union: Towards the Deterritorialization of Democracy," in *Deliberative Democracy and Its Discontents: National and Post-National Challenges*, ed. Samantha Besson and Jose L. Martí (Aldershot: Ashgate, 2006), 181–214; Justine Lacroix, *L'Europe en procès: quel patriotisme au-delà des nationalismes?* (Paris: Cerf, 2004); Weiler, "Does Europe Need a Constitution?"; André Utzinger, "Mythen oder Institutionen? Zur Bildung kollektiver Identitäten im Postnationalen Europa," in *Legitimationsgrundlagen der Europäischen Union*, ed. Francis Cheneval (Münster: Lit, 2005), 235–51.
- ²² The tradition of social inclusion through the conferral of rights can be traced back to very early forms of citizenship rights in ancient Greece; see, for example, Uwe Wesel, *Geschichte des Rechts: Von den Frühformen bis zur Gegenwart* (München: C.H. Beck, 2001), 119–21. And for Marshall, citizenship, and above all its social element, was intended to break down class barriers; see Clarke, *Citizenship*, 25. As regards the EU, the idea of inclusion and full membership is emphasized, for instance, in: Richard Bellamy, "The 'Right to Have Rights': Citizenship Practice and the Political Constitution of the EU," in *Citizenship and Governance in the European Union*, ed. Richard Bellamy and Alex Warleigh (London: Continuum, 2001), 41–70; Kostakopoulou, "Towards a Theory of Constructive Citizenship in Europe," 347; Jo Shaw, "The Interpretation of European Union Citizenship," *The Modern Law Review* 61, no. 3 (1998): 293–317, esp. 297, 310.
- ²³ See, for example, Ayelet Shachar, "Children of a Lesser State: Sustaining Global Inequality through Citizenship Laws," *Jean Monnet Working Paper* 2 (2003). Please note that we differ in our use of consensual versus non-consensual conceptions of nationality from Hampton who uses this distinction to oppose *ius sanguinis* and *ius soli* (see Jean Hampton, *Political Philosophy* [Boulder: Westview, 1997], 217–53). Although *ius soli* is clearly more consensual than *ius sanguinis*, it is difficult to see how it may be deemed really consensual *per se* in the sense that people do rarely choose their place of birth.
- ²⁴ See, for example, Walter Haller and Alfred Kölz, *Allgemeines Staatsrecht* (Basel: Helbing & Lichtenhahn, 1999), 8; Reinhold Zippelius, *Allgemeine Staatslehre* (München: Beck, 1994), 80.
- ²⁵ A nation based on a *ius soli* understanding of membership is also more likely to find its common roots in basic principles of law and justice and hence to be sensitive to the requirement of so-called

- “constitutional patriotism” (on this notion see Dolf Sternberger, *Verfassungspatriotismus. Schriften Band X* [Frankfurt a.M.: Insel, 1982]).
- ²⁶ A convergence between nationality laws in Europe can be observed. Roughly speaking, *jus soli* systems tend to become more restrictive, while *jus sanguinis* systems have incorporated principles of *jus soli*. See Patrick Weil, “Access to Citizenship: A Comparison of Twenty-Five Nationality Laws,” in *Citizenship Today: Global Perspectives and Practices*, ed. Thomas A. Aleinikoff and Douglas Klusmeyer (Washington, DC: Carnegie Endowment for International Peace, 2001), 17–35; Shachar, “Children of a Lesser State,” 27.
- ²⁷ For a more detailed discussion of particular policies, see, for example, William R. Brubaker, “Citizenship and Naturalization: Policies and Politics,” in *Immigration and the Politics of Citizenship in Europe and North America*, ed. William R. Brubaker (Lanham, MD: University Press of America, 1989), 99–127; Shachar, “Children of a Lesser State,” 17–21; Weil, “Access to Citizenship.”
- ²⁸ See on the principle and criteria of affectedness, Besson, “Deliberative Democracy in the European Union”; Samantha Besson, “*Ubi ius gentium, ibi civitas*—A Republican Account of the International Community,” in *Legal Republicanism and Republican Law*, ed. Samantha Besson and José Luis Martí (Oxford: Oxford University Press, 2008). See most recently on the all-affected principle, Richard Goodin, “Enfranchising All Affected Interests, and Its Alternatives,” *Philosophy & Public Affairs* 35, no. 1 (2007): 40–68; Nancy Fraser, “Die Transnationalisierung der Öffentlichkeit. Legitimität und Effektivität der öffentlichen Meinung in einer postwestfälischen Welt,” in *Anarchie der kommunikativen Freiheit*, ed. Peter Niesen and Benjamin Herborth (Frankfurt: Suhrkamp, 2007), 224–53.
- ²⁹ See, for example, James Bohman, “Nondomination and Transnational Democracy,” in *Republicanism and Political Theory*, ed. Cécile Laborde and John Maynor (London: Basil Blackwell, 2007), 159–216; Bellamy, “The ‘Right to Have Rights’: Citizenship Practice and the Political Constitution of the EU.”
- ³⁰ Inevitably, problems of under-inclusiveness, but also over-inclusiveness, will be growing; see in more detail Shachar, “Children of a Lesser State,” 11–17. See also Joseph Carens, “Membership and Morality: Admission to Citizenship in Liberal Democratic States,” in *Immigration and the Politics of Citizenship in Europe and North America*, ed. William R. Brubaker (Lanham, MD: University Press of America, 1989); Ludvig Beckman, “Citizenship and Voting Rights: Should Resident Aliens Vote?” *Citizenship Studies* 10, no. 2 (2006): 153–65.
- ³¹ Benhabib goes so far as to propose a “human right to membership” (Benhabib, *The Rights of Others*, 129–43). On this gap in the European Union, see Veit Bader, “Citizenship of the European Union. Human Right, Rights of Citizens of the Union and of Member States,” *Ratio Juris* 12 (1999): 153–81.
- ³² In the same vein, Shachar suggests substituting *jus soli* and *jus sanguinis* with a so-called *jus connexionis* (see Shachar, “Children of a Lesser State,” 29).
- ³³ For further reading, see, for example, Stefan Kadelbach, “Union Citizenship,” *Jean Monnet Working Paper* 9 (2003); Dora Kostakopoulou, “Ideas, Norms and European Citizenship: Explaining Institutional Change,” *Modern Law Review* 68, no. 2 (2005): 233–67; James D. Mather, “The Court of Justice and the Union Citizen,” *European Law Journal* 11, no. 6 (2005): 722–43; Norbert Reich, “The Constitutional Relevance of Citizenship and Free Movement in an Enlarged Union,” *European Law Journal* 11, no. 6 (2005): 675–98.
- ³⁴ Roland Bieber, Astrid Epiney and Marcel Haag, *Die Europäische Union: Europarecht und Politik*, 7th edn. (Baden-Baden: Nomos, 2006), 58–59; Kadelbach, “Union Citizenship,” 9, 16.
- ³⁵ Bieber et al., *Die Europäische Union*, 58; Koen Lenaerts and Piet Van Nuffel, *Constitutional Law of the European Union*, 2nd edn. (London: Sweet & Maxwell, 2005), 546.
- ³⁶ On EU citizenship duties, see, for example, Marie-José Garot, “European Citizenship and European Integration,” *Thinking Outside the Box Editorial Series* 9 (2003); Augustin J. Menéndez, “Taxing Europe: Two Cases for a European Power to Tax,” *Arena Working Paper* WP 3 (2003); Norbert Reich, “Union Citizenship—Metaphor or Source of Rights?,” *European Law Journal* 7, 1 (2001):

4–23, esp. 20–23; Reich, “The Constitutional Relevance of Citizenship and Free Movement in an Enlarged Union,” 698; Jo Shaw, “Citizenship of the Union: Towards Post-National Membership,” *Jean Monnet Working Paper* 6 (1997); Joseph H.H. Weiler, *The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999), 354–56.

³⁷ See the joined decisions C-64&65/96, *Land Nordrhein-Westfalen v Uecker and Jacquet v Land Nordrhein-Westfalen*, [1997] ECR I-3171 in which the ECJ emphasized that EU citizenship rights did not extend the scope *ratione materiae* of the EC Treaty and were not vested with direct effect.

³⁸ See Article 18(1) and 17(2) EC.

³⁹ See, for example, Michelle Everson, “The Legacy of the Market Citizen,” in *New Legal Dynamics of European Union*, ed. Jo Shaw and Gillian More (Oxford: Clarendon Press, 1995), 73–90.

⁴⁰ The total number of nonnationals living in the twenty-five Member States in 2004 was around twenty-five millions, which is equivalent to just below 5.5 percent of the total population (see Eurostat, “Non-National Populations in the EU Member States,” *Statistics in Focus: Population and Social Conditions* 8 (2006)). According to the “Second Annual Report on Migration and Integration,” the number of Third Country Nationals residing in the EU was 15.2 million on January 1, 2003 (SEC[2006] 892, 3). As a result, there are roughly ten million Union citizens—or only about 2.2 percent—who actually live in another Member State.

⁴¹ By reference to Articles 194 and 195 EC, all natural and legal persons having lawful residence within the EU enjoy the respective rights.

⁴² See Roy W. Davis, “Citizenship of the Union . . . Rights for All,” *European Law Review* 27, no. 2 (2002): 121–37.

⁴³ The right to vote and stand as a candidate in municipal elections (Article 19[1] EC) was recognized by some Member States long before the introduction of EU citizenship; this was the case in Ireland (1963), Sweden (1976), Denmark (1981), and the Netherlands (1986). This tendency has confirmed itself since 1992.

⁴⁴ On the different phases in the ECJ’s case-law pertaining to EU citizenship, see Kostakopoulou, “Ideas, Norms and European Citizenship.”

⁴⁵ Piet Eeckhout, “The EU Charter of Fundamental Rights and the Federal Question,” *Common Market Law Review* 39, no. 5 (2002): 945–94; Siofra O’Leary, “The Relation between Community Citizenship and Fundamental Rights,” *Common Market Law Review* 32 (1995): 519–54. See also Advocate General Jacobs in the case C-168/91, *Konstantinidis v Stadt Altensteig Standesamt*, [1993] ECR I-1991: “In my opinion, a Community national who goes to another Member State as a worker or self-employed person under Articles 48, 52, or 59 of the Treaty is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that [. . .] he will be treated in accordance with a common code of fundamental values [. . .]. In other words, he is entitled to say ‘*civis europeus sum*’ and to invoke that status in order to oppose any violation of his fundamental rights.”

⁴⁶ Decision C-85/96, *Sala v Freistaat Bayern*, [1998] ECR I-2691.

⁴⁷ Decision C-184/99, *Grzelczyk v Centre Public d’Aide Sociale d’Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193.

⁴⁸ See decisions C-413/01, *Nimmi-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst*, [2003] ECR I-13187; C-138/02, *Collins v Secretary of State for Work and Pensions*, [2004] ECR I-2703; C-456/02, *Trojani v Centre publique d’aide sociale de Bruxelles*, [2004] ECR I-7573; C-209/03, *The Queen (on the application of Dany Bidar) v London Borough of Ealing and Secretary of State for Education and Skills*, [2005] ECR I-2119. The reasoning in *Bidar* has since been confirmed in the decision C-147/03, *Commission of the European Communities v Republic of Austria*, [2005] ECR I-5969.

⁴⁹ Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L 158/77.

- ⁵⁰Reich, “The Constitutional Relevance of Citizenship and Free Movement in an Enlarged Union,” 679 seq.
- ⁵¹Decisions C-413/99, *Baubast v Secretary of State for the Home Department*, [2002] ECR I-7091 and C-60/00, *Carpenter v Secretary of State for the Home Department*, [2002] ECR I-6279. Drawing on *Carpenter*, see also decision C-459/99, *Mouvement contre le racisme, l’antisémitisme et la xénophobie ASBL (MRAX) v Belgian State*, [2002] ECR I-6592. For the relation between EC law and national migration law, see also Advocate General’s Opinion in the decision C-109/01, *Secretary of State for the Home Department v Akrich*, [2003] ECR I-9607.
- ⁵²Decision C-200/02, *Zhu, Chen v Secretary of State for the Home Department*, [2004] ECR I-9925.
- ⁵³See Eeckhout, “The EU Charter of Fundamental Rights and the Federal Question”; Jo Shaw, “The Many Past and Futures of Citizenship in the European Union,” *European Law Review* 22, no. 6 (1997): 554–72; Weiler, *The Constitution of Europe*, chap. 10; Samantha Besson, “The European Union and Human Rights: Towards a New Kind of Post-National Human Rights Institution,” *Human Rights Law Review* 6, no. 2 (2006): 323–60.
- ⁵⁴For more detail see Besson and Utzinger, “Future Challenges of European Citizenship: Facing a Wide-open Pandora’s Box.”
- ⁵⁵See decision C-168/91, *Konstantinidis v Stadt Altensteig Standesamt*, [1993] ECR I-1191. See also Advocate General Jacobs in decision C-224/02, *Pusa v Osuuspankkien Keskinäinen Vakuutusyhtiö*, [2004] ECR I-5763.
- ⁵⁶The difficulty has even increased as the ECJ’s case-law has recently become more generous in granting justification for national limitations to EU citizenship rights than it would have, had these rights been invoked as one of the four fundamental freedoms (see decision C-209/03, *Bidar*). See, for example, Juliane Kokott, “EU citizenship—citoyens sans frontières?,” *European Law Lecture*, Durham European Law Institute (2005); Francis G. Jacobs, “Citizenship of the Union—A Legal Analysis,” *European Law Journal* 13, no. 5 (2007): 591–610.
- ⁵⁷Reich, “The Constitutional Relevance of Citizenship and Free Movement in an Enlarged Union,” 698. Although Directive 2004/38/EC improves the situation in the latter perspective, it does not tackle the problem at its root; see Besson and Utzinger, “Future Challenges of European Citizenship: Facing a Wide-Open Pandora’s Box.”
- ⁵⁸See case C-224/98, *D’Hoop v Office national de l’emploi*, [2002] ECR I-6191; case C-60/00, *Carpenter v Secretary of State for the Home Department*, [2002] ECR I-6279; case C-403/03, *Schempp v Finanzamt München V*, [2005] ECR I-6421.
- ⁵⁹Lenaerts and Van Nuffel, *Constitutional Law of the European Union*, 137.
- ⁶⁰See, for example, International Court of Justice, *Barcelona Traction, Light and Power Company, Limited*, Second Phase, Judgement, ICJ Reports 1970, 3; and *Nottebohm*, Second Phase, Judgement, ICJ Reports 1955, 4.
- ⁶¹See recently the decisions C-200/02, *Zhu, Chen v Secretary of State for the Home Department*, [2004] ECR I-9925 and C-369/90, *Micheletti v Delegacion del Gobierno en Cantabria*, [1992] ECR I-4239. See also Reich, “Union Citizenship—Metaphor or Source of Rights?,” 6.
- ⁶²See, for example, Reich, “The Constitutional Relevance of Citizenship and Free Movement in an Enlarged Union.”
- ⁶³See, for example, Besson, “The European Union and Human Rights.”
- ⁶⁴For instance, Article 41–46 of the Charter of Fundamental Rights, but also Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L 180/22, and, more importantly, Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, [2004] OJ L 16/44, show a clear evolution in favor of the harmonization of long-term residents’ rights in the EU.
- ⁶⁵See, for example, decision C-145/04, *Spain v. United Kingdom*, [2006] ECR I-7917, where the ECJ acknowledges the possibility for the United Kingdom to grant the right to election of the European Parliament to non-European nonnationals residing in Gibraltar as part of the United Kingdom’s *demos*.
- ⁶⁶See Lenaerts and Van Nuffel, *Constitutional Law of the European Union*, 550.

- ⁶⁷ Jean L. Cohen, "Changing Paradigms of Citizenship and the Exclusiveness of the Demos," *International Sociology* 14, no. 3 (1999): 245–68.
- ⁶⁸ See, for example, Decision C-378/97, *Criminal Proceedings v Wijsenbeek*, [1999] ECR I-6207. See Reich, "Union Citizenship—Metaphor or Source of Rights?," 6.
- ⁶⁹ Kadelbach, "Union Citizenship," 15.
- ⁷⁰ See the recent European Court of First Instance's decision granting the right to diplomatic protection to all nonnational residents in a Member State: Decision T-49/04, *Hassan v Council and Commission*, July 12, 2006, unpublished.
- ⁷¹ See Decision C-403/03 *Schempp v Finanzamt München V*, [2005] ECR I-6421.
- ⁷² Preuss, "Citizenship in the European Union," 139.
- ⁷³ See, for example, Bloom, *Personal Identity, National Identity and International Relations*; Utzinger, "Mythen oder Institutionen?," 243–44.
- ⁷⁴ See Miguel Maduro, "The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism," *International Journal of Constitutional Law* 3, no. 2 (2005): 332–56, esp. 339.
- ⁷⁵ See Paul Magnette, "How Can One Be European? Reflections on the Pillars of European Civic Identity," *European Law Journal* 13, no. 5 (2007): 664–79.
- ⁷⁶ See, for example, Wilfried Loth, "Die Mehrschichtigkeit der Identitätsbildung in Europa: Nationale, regionale und europäische Identität im Wandel," in *Europäische Identität: Paradigmen und Methodenfragen*, ed. Ralf Elm (Baden-Baden: Nomos, 2002), 93–109.
- ⁷⁷ See Weiler, *The Constitution of Europe*, 346–48.
- ⁷⁸ See, for example, Samantha Besson, "Deliberative Democracy in the European Union."
- ⁷⁹ See Kalypso Nicolaïdis and Justine Lacroix, "Order and Justice Beyond the Nation-State: Europe's Competing Paradigms," in *Order and Justice in International Relations*, ed. Rosemary Foot, John Gaddis and Andrew Hurrell (Oxford: Oxford University Press, 2003), 125–54, esp. 137.
- ⁸⁰ See Besson, "Deliberative Democracy in the European Union."
- ⁸¹ See Kalypso Nicolaïdis, "We, The Peoples of Europe . . .," *Foreign Affairs* 83, no. 6 (2004): 97–110, and also Besson, "Deliberative Democracy in the European Union."
- ⁸² Besson, "The European Union and Human Rights"; Samantha Besson, "The European Union *qua* Agent of Global Justice," unpublished manuscript (on file with authors); Kalypso Nicolaïdis and Justine Lacroix, "Order and Justice Beyond the Nation-State."
- ⁸³ See Lynn Dobson, "Constituting Which Goods and Whose Rights?," *Federal Trust Online Constitutional Paper* 16 (2003).
- ⁸⁴ This is the case, for instance, of the extension of the scope of application *ratione personae* of some EU citizenship rights guaranteed in the Charter (Articles 41–45), with the exception so far of political rights. This also seems to follow from the recent harmonization of Third Country Nationals' residence rights in the EU (see Directive 2004/38/EC and Directive 2003/109/EC).
- ⁸⁵ See Davis, "Citizenship of the Union . . . Rights for All." See more generally, Beckman, "Citizenship and Voting Rights: Should Resident Aliens Vote?"
- ⁸⁶ See Andreas Follesdal, "Third Country Nationals as Euro Citizens: The Case Defended," *Arena Working Paper* WP 9 (1998).
- ⁸⁷ The centrality of national democratic processes can be exemplified by reference to the recent decisions about the granting of rights of election to the European Parliament at national level: C-145/04, *Spain v United Kingdom*, [2006] ECR I-7917 and C-300/04, *Eman, Sevinger v College van burgemeester en wethouders van den Haag*, [2006] ECR I-8055.
- ⁸⁸ Gareth Davies, "'Any Place I Hang My Hat?' or: Residence is the New Nationality," *European Law Journal* 11, no. 1 (2005): 43–56.
- ⁸⁹ Roughly, as Western Europe states have turned into countries of immigration, naturalization on grounds of long-term residence has been facilitated, yet the regimes still differ widely. See Weil, "Access to Citizenship"; John Handoll, "The status of third-country nationals residing on a long-term basis," in *The Emergence of a European Immigration Policy*, ed. Philippe de Bruycker (Bruxelles: Bruylant, 2003), 273–362.

- ⁹⁰Chris Rumford, *The European Union: A Political Sociology* (Malden, MA: Blackwell, 2002); Gerard Delanty and Chris Rumford, *Rethinking Europe: Social Theory and the Implications of Europeanization* (London: Routledge, 2005), 7–10.
- ⁹¹Roland Robertson, “Glocalization: Time-Space and Homogeneity-Heterogeneity,” in *Global Modernities*, ed. Mike Featherstone, Scott Lash and Roland Robertson (London: Sage, 1995), 25–44; Roland Robertson, “Globalisation Theory 2000+: Major Problematics,” in *Handbook of Social Theory*, ed. George Ritzer and Barry Smart (London: Sage, 2001), 458–71.
- ⁹²David Held, Anthony McGrew, David Goldblatt and Jonathan Perraton, *Global Transformations: Politics, Economics, and Culture* (Stanford, CA: Stanford University Press, 1999), 32; Jan A. Scholte, *Globalization: A Critical Introduction* (Basingstoke: Palgrave Macmillan, 2000), 46.
- ⁹³Anthony Giddens, *The Consequences of Modernity* (Cambridge: Polity, 1990), 18.
- ⁹⁴Daniele Archibugi, “Cosmopolitan Democracy and its Critics: A Review,” *European Journal of International Relations* 10, no. 3 (2004): 437–73, esp. 443–44; David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge: Polity, 1995), 17; Michael Zürn, *Regieren jenseits des Nationalstaates: Globalisierung und Denationalisierung als Chance* (Frankfurt a. M.: Suhrkamp, 1998), 17.
- ⁹⁵Reiner Eichenberger and Bruno S. Frey, “Democratic Governance for a Globalized World,” *Kyklos* 55 (2002): 265–88, esp. 270.
- ⁹⁶Dennis Thompson, “Democratic Theory and Global Society,” *The Journal of Political Philosophy* 7, no. 2 (1999): 111–25.
- ⁹⁷Besson, “Deliberative democracy in the European Union,” 195.
- ⁹⁸On this notion, see Andreas Follesdal, “Citizenship: European and Global,” *Arena Working Paper* WP 22 (2001).
- ⁹⁹The structure of the EU is in fact best described as a multilevel approach to governance; see, for example, Gary Marks, Liesbet Hooghe and Kermit Blank, “European Integration from the 1980s: State-Centric v. Multi-level Governance,” *Journal of Common Market Studies* 34, no. 3 (1996): 341–78; Liesbet Hooghe and Gary Marks, *Multi-level Governance and European Integration* (Lanham, MD: Rowman & Littlefield, 2001).
- ¹⁰⁰See Besson, “Deliberative Democracy in the European Union.”
- ¹⁰¹*Ibid.*
- ¹⁰²*Ibid.* On various proposals and in particular on reflexive representation, see Samantha Besson, “Institutionalizing Global Democracy,” in *Justice, Legitimacy and Public International Law*, ed. Lukas Meyer (Cambridge: Cambridge University Press, 2008 forthcoming); Besson, “*Ubi jus gentium, ibi civitas*.” See also Carol Gould, *Globalizing Democracy and Human Rights* (Cambridge: Cambridge University Press, 2004).
- ¹⁰³Arendt, *The Origins of Totalitarianism*, 382.