

# *Theoretical Inquiries in Law*

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*Volume 8, Number 2*

*July 2007*

*Article 5*

WHY CITIZENSHIP?

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## Why European Citizenship? Normative Approaches to Supranational Union

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# Why European Citizenship? Normative Approaches to Supranational Union

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*European citizenship is a nested membership in a multilevel polity that operates at member state and union levels. A normative theory of supranational citizenship will necessarily be informed by the EU as the only present case and will be addressed to the EU in most of its prescriptions, but should still develop a model sufficiently general to potentially apply to other regional unions as well. The Article first describes three basic characteristics of such a polity — democratic representation at the supranational level, internal freedom of movement between member states, and regional limits to external geographic expansion — and argues that a multiplication of such regional unions would contribute to a more just and peaceful international order. Building on this modification of Kant's model for a global confederation of republics, the contribution explores three alternative approaches for strengthening democratic citizenship in the European Union: a statist approach that aims at transforming the EU into a federal state, a unionist approach whose goal is to strengthen union citizenship vis-à-vis member state nationality, and a pluralist one that specifies citizenship norms for each level and balances them with each other on the basis of the current state of federal integration. These approaches are then compared with regard to their implications for three policy questions: (1) general status differences and inequality of rights amongst EU citizens living in their country of nationality,*

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\* Special thanks to Janos Kis, Central European University Budapest, and Gerd Valchars, Institute for European Integration Research, Austrian Academy of Sciences, for useful comments on a draft version of this text.

*EU citizens residing in other member states, third-country nationals, and EU citizens residing outside the territory of the Union; (2) voting rights in European, national, and local elections; and (3) access to Union citizenship and to member state nationality.*

## INTRODUCTION

For a long time, conceptions of citizenship have been dominated and impoverished by the nation-state paradigm. On a horizontal dimension, this paradigm does not recognize multiple membership across states and requires that individuals be citizens of one and one state only; on a vertical dimension, unitary conceptions of external and internal sovereignty block the formation of nested polities in which individuals are simultaneously citizens of substate, state-based, and suprastate political communities. In the 1990s, theories of citizenship were thoroughly pluralized. The late Iris Young pioneered the idea of differentiating citizenship in response to social oppression by adding group rights to equal individual citizenship.<sup>1</sup> Researchers studying migration have argued that migration generates overlapping membership in independent states.<sup>2</sup> Other authors have argued that devolution and political autonomy for national and indigenous minorities has created nested citizenship in plurinational democracies.<sup>3</sup>

Supranational citizenship is a specific type of a vertically-nested structure of membership. This phenomenon is currently confined to Europe, where it has attracted keen interest since the official introduction of a citizenship of the European Union in the 1992 Maastricht Treaty.<sup>4</sup> The broad literature on European citizenship can be subdivided into a skeptical stream, dominated by lawyers who explore the implications and limitations of this status within the framework of the European Treaties, and a visionary stream that interprets it as the harbinger of a postnational constellation. What seems to be missing

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1 Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 *ETHICS* 250 (1989).

2 See, e.g., RAINER BAUBÖCK, *TRANSNATIONAL CITIZENSHIP: MEMBERSHIP AND RIGHTS IN INTERNATIONAL MIGRATION* 19 (1994); Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOBAL LEGAL STUD.* 447, 453-87 (2000).

3 See, e.g., WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* (1995); MICHAEL KEATING, *PLURINATIONAL DEMOCRACY: STATELESS NATIONS IN A POST-SOVEREIGNTY ERA* (2001); JAMES TULLY & ALAIN G. GAGNON, *MULTINATIONAL DEMOCRACIES* (2003).

4 Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1 [hereinafter TEU].

so far is a normative theory of supranational citizenship that would form the counterpart to already existing theories of differentiated, transnational, and plurinational citizenship. In contrast with descriptive and explanatory accounts of the growing disjunctures between national sovereignty and citizenship, a normative one raises the question of how liberal democracies *ought* to respond to claims of distinct memberships that do not fit into a nation-state framework. In order to answer this question, it is not sufficient to specify how general liberal principles, such as equality and liberty, apply to the determination of membership and rights in a democratic polity. We must also specify different types of polities and how they relate to each other. The theory starts, thus, from constellations of nested and overlapping polities, which it accepts as facts, and considers then how citizenship should be distributed among individuals and across polities in order to satisfy liberal democratic norms and aspirations.

A normative theory of supranational citizenship will inevitably be informed by the EU as the only available model, and it will also be addressed to the EU in most of its prescriptions. Yet it could potentially also apply to other regional unions<sup>5</sup> of states and may even suggest that states should be willing to form such unions. In its application to the EU, the theory needs to specify an appropriate conception of a European identity and thus will ask which rules should determine the acquisition and loss of European citizenship as a legal status, what should be the rights and obligations attached to this status, and how it relates to citizenship at state and substate levels. Answers to these questions that we find in present legal arrangements and political discourses will be subjected to normative scrutiny in light of principles that apply to citizenship more generally. Such principles will, however, also be modified by taking into account the specific context of a supranational polity that is composed of independent states but is not itself such a state.

## I. THE EU AS A REGIONAL FEDERATION

German political scientist Dietrich Thränhardt recently suggested that "[i]n an ideal world of Kantian republics citizenship in one or the other state would be rather irrelevant, similar to the membership in the states, Länder or cantons in federal countries."<sup>6</sup> This is certainly true in the sense that, in our non-ideal

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<sup>5</sup> Throughout the Article, "union" is not capitalized when referring to general features of supranational unions and capitalized when referring to the EU.

<sup>6</sup> Dietrich Thränhardt, *Multiple Citizenship and Naturalization: An Evaluation of German and Dutch Policies*, in OF STATES, RIGHTS AND SOCIAL CLOSURE:

world, a large part of the instrumental value of citizenship for individuals results from disparities of wealth and political stability amongst states and from the fact that the only generally acknowledged right of immigration is that of citizens to be (re)admitted to their state of nationality. I assume that, in the ideal world that Thränhardt has in mind, these two features of the present state system would be overcome. Individuals would no longer be forced to emigrate because of conditions of poverty, persecution, or lack of basic security, and states would keep their borders open for emigration and immigration flows except when immigration actually threatens to overwhelm the local population or to otherwise undermine the stability of basic institutions. These assumptions go beyond Kant's principles for perpetual peace, which do not require redistributing wealth across international borders or opening them for long-term immigration.<sup>7</sup>

The European Union can be seen as the closest approximation of this ideal world on a geographically limited scale. All its members are "republics" in the Kantian sense of representative constitutional democracies. Although there are considerable disparities of wealth between member states, these have not operated as push factors for massive intra-European migration flows. Most importantly for the topic of this Article, the EU Treaties<sup>8</sup> oblige states not merely to admit the nationals of other member states without visa requirements, but to allow them also to take up residence and employment, as well as to bring in their close family members (including those who are not citizens of the EU).

The EU is a federal polity in the broad sense of the term, which refers to federal states as well as confederations. Every federal system can be described along three dimensions: a vertical dimension, a horizontal one, and a binary distinction between inside and outside. Each dimension involves relations between citizens and governments as well as between different governments. The vertical dimension refers to the relations between citizens and polities at different levels that are nested within each other, for example, to the relations between German citizens and governments at the levels of the *Land*, the federal state, and the Union. The horizontal dimension refers, first, to relations amongst different polities at the same level, e.g., amongst

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GOVERNING MIGRATION AND CITIZENSHIP (Saime Ozcurumez & Oliver Schmidtke eds., forthcoming 2007).

7 IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, in KANT: POLITICAL WRITINGS 93 (H.S. Reiss ed., H.B. Nisbet trans., Cambridge Univ. Press 2d ed. 1991) (1795).

8 Consolidated Versions of the Treaty Establishing European Community and of the Treaty on European Union, 2002 O.J. (C 325) 5.

the German *Länder* or amongst the member states of the Union, and, second, to the status, rights, and obligations that polities nested within a federation grant to each others' citizens. The external dimension, finally, refers to the relations amongst polities inside and outside the federation as well as to the relation of governments within the federation to individuals who are not citizens of any internal polity. This dimension raises questions about the coordination of foreign policy, about the admission of new polities into the federation, and about territorial admission, legal status, and access to citizenship for non-members.

For further discussion of this three-pronged structure, I will select those core features of each of the three dimensions that I consider to be crucial for generating political legitimacy in a supranational federation of independent states. I will leave aside many important questions, such as the scope of social solidarity across member states or the extent of foreign policy coordination, partly for reasons of space, but also because I think that these issues depend so strongly on contingent political commitments to deeper federal integration that little can be said about them in a mode of normative prescription. What I am then looking for are normative requirements for constructing citizenship in a supranational federation that could generate sufficient political legitimacy within this type of polity.

#### **A. Supranational Democracy**

The EU is a federal polity, but not a federal state. It is composed of independent member states and has a common structure of political authority for joint decision-making. But it is also not a mere alliance of states or an international organization with a limited purpose and exclusively intergovernmental procedures for decision-making. It has its own parliament and court, and although the scope of legislation that can be adopted or adjudicated is strictly limited by the EU Treaties, such legislation has direct effect and supremacy over national laws.

The European Union consists only of states with democratic constitutions, but its decision-making mechanisms have been accused of not meeting the same standards of democratic accountability that it requires of its members: "Imagine for a moment what would happen if the European Union applied for membership in the European Union. Its application would be flatly rejected. Why? Because the European Union doesn't live up to its own criteria of democracy."<sup>9</sup> In order to achieve democratic legitimacy for its supranational

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<sup>9</sup> Ulrich Beck, *Understanding the Real Europe*, DISSENT MAG., Summer 2003, at 32.

legislation the EU has developed a dual-track system that involves, on the one hand, a directly elected European Parliament<sup>10</sup> and, on the other hand, indirect representation of citizens through their national governments in the European Council and the Councils of Ministers. Within this system of legislative power-sharing, the weight of the Parliament has increased over time but the European Council is still clearly dominant. The EU's equivalent for the executive is the European Commission, whose members are not elected but appointed by national governments and whose main power is its monopoly on drafting EU legislation.

This division of power would, indeed, be hard to accept within a democratic state. Yet those who promote an intergovernmental interpretation of the Union have defended it as entirely adequate and serving its purpose.<sup>11</sup> I want to suggest here that a general normative theory of supranational democracy is not the framework within which this dispute can be resolved. Such a theory will require that there be some direct representation of union citizens in legislation that applies at a union-wide level, but it need not come up with a formula for distributing power between the two legislative chambers and the parliaments of the constituent units. Federal constitutions differ strongly in this respect. And even if we could define a general condition for democratic federal states (e.g., that the overall power of the federal chamber should not be greater than that of the popular one), we could not simply apply the same criteria to a supranational federation that is not itself a federal state. Arguments for a fundamental reform depend on a theory and vision of the EU's *telos*, its future evolution towards a more deeply integrated federation, but they cannot plausibly claim that the present arrangement violates basic democratic norms (and is therefore fundamentally illegitimate).

## B. Area of Free Movement

While supranational democracy does not entail specific powers for a supranational legislature, there are certain minimum standards that apply to citizenship in all kinds of polities. Among these is the idea that citizens enjoy not only a right of free movement within the boundaries of the polity, but must also not be treated as second-class citizens when they exercise this right.

These principles form the very core of European Union citizenship. All

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<sup>10</sup> Direct elections to the EP have been held since 1979.

<sup>11</sup> Andrew Moravcsik, *In Defence of the Democratic Deficit: Reassessing Legitimacy in the European Union*, 40 J. COMMON MARKET STUD. 603 (2002).

citizens of the Union enjoy rights to enter and settle in other member states. Those countries that are also members of the 1985 Schengen Agreement have abandoned border controls amongst themselves.<sup>12</sup> Union citizens also have the general right of free access to employment in other member states. This right has, however, been temporarily suspended in some member states for the citizens of countries that have recently joined the EU.<sup>13</sup> This restriction has introduced a temporary form of second-class citizenship within the Union that is hard to reconcile with the basic commitment to free movement and non-discrimination on grounds of nationality. Temporary second-class citizenship may still be acceptable if the only politically feasible choice is between postponing full membership for candidate countries and a transition period after accession. The burden of proof should, however, be on those countries introducing restrictions, that open access to employment for the new EU citizens would substantially increase unemployment or depress wages in their domestic labor markets. I am not convinced that the restrictions adopted in the 2004 accession round have met either of these criteria.

On the one hand, free movement within the territory of a state is recognized as a universal human right and not a specific right of citizenship.<sup>14</sup> On the other hand, there is no such right to free movement between fully sovereign states even if they are members of an international organization or alliance. Contrasting the EU with these alternative models, we could suggest that supranational polities support a specific norm of free internal movement for the citizens of the member states, but not necessarily for those of third countries.

This right of free movement forms a second nucleus of supranational citizenship alongside the representation of union citizens in supranational

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12 Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, Sept. 22, 2000, 2000 O.J. (L 239) 1. Currently, all EU member states aside from Ireland and the United Kingdom have signed the agreement. Outside the European Union, Norway, Iceland, and Switzerland have also signed the agreement. The agreement is, however, not yet implemented in the twelve states that have joined the EU since May 2004 and in Switzerland.

13 In 2004, Ireland, Sweden, and the United Kingdom opened their labor markets to citizens of the new member states. In 2006, the majority of the fifteen pre-2004 member states lifted most restrictions, while Austria, Denmark, and Germany decided to retain them.

14 See Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 13(1), U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights, art. 12(1), Dec. 16, 1966, 999 U.N.T.S. 171.



legislation discussed in Section I.A. While the latter operates on a vertical dimension between the individual citizen and the institutions of the union, the former might be seen as a matter of horizontal reciprocity between states that grant this right to each others' citizens. The emergence of a common citizenship that transcends reciprocity between states becomes manifest once these two sets of rights are combined, i.e., when citizens residing in other member states can both cast their votes in elections for the union parliament by absentee ballot in their country of origin as well as vote in their country of residence and for that country's candidates.<sup>15</sup>

Which are the normative principles that apply to the horizontal dimension of supranational citizenship? Freedom of movement in the whole territory of a union can be weakly grounded in the mutual commitments of the member states that agree to build a supranational union. Liberal political theory can, however, support a much stronger universal norm, which is not recognized in current international law, namely, that free movement between states may only be restricted for the sake of preserving liberal democratic institutions and internal redistributive schemes that promote domestic social justice.<sup>16</sup> In a supranational union of stable liberal democracies where existing disparities of wealth and of social security systems amongst states are limited and where there are supranational policy instruments to further reduce such disparities, there is, in this liberal view, no longer any justification for constraining internal free movement, although immigration from outside the union may still be restricted. While reciprocal commitments would generate mobility rights only for union citizens, the broader liberal view would apply also to third-country citizens with long-term residence inside the union.

Freedom of movement alone would be of limited value without an additional principle of equality and non-discrimination that protects the rights of those who make use of their freedom to move. Since all states and citizens of a supranational union are subject to common political authorities, member states must not treat citizens of other member states as foreign nationals. Instead, they must treat them as citizens of the union. The list of rights entailed in union citizenship that can be exercised in another member state is, however, open-ended and will grow with a passage from union towards federal statehood.

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15 Consolidated Version of the Treaty Establishing the European Community, art. 19, 2002 O.J. (C 325) 33 [hereinafter TEC].

16 For a defense of this view see, for example, BRUCE A. ACKERMAN, SOCIAL JUSTICE IN A LIBERAL STATE 69-106 (1980); BAUBÖCK, *supra* note 2, at 321-32.

### C. External Boundaries

The third element that characterizes a supranational polity is its external borders. While supranational democracy and free movement are *prescriptive* norms, the legitimacy of external boundaries implies two kinds of *permissible* decisions: to limit the accession of states that want to join the union and to limit the admission of immigrants from outside the union.

Unlike the United Nations, the EU is a regional union, membership in which depends on three conditions. First, candidates must meet the 1993 Copenhagen criteria that refer to democratic stability, the rule of law, human rights and protection of minorities, a functioning market economy, and the ability to take on the obligations of membership including adherence to the aims of political, economic, and monetary union.<sup>17</sup> Second, the admission of new member states must be ratified by the present members.<sup>18</sup> Third, since the EU is a regional union, candidates must be European countries. The geographic limits of Europe are disputed and may expand over time, but — unlike Kant's idea of an ever-expanding confederation of free republics — the EU does not aspire to include states like Canada or New Zealand that would be able to satisfy the first set of conditions.

This political, economic, and geographic self-limitation of a regional union turns the external border into an essential element of its collective identity. In this respect, too, a supranational union has some specific features that distinguish it from other political entities. Democratic states need a well-defined territory with stable external borders.<sup>19</sup> A union is more like an empire that can retain continuity in its structure of political authority with expanding or shrinking borders.<sup>20</sup> In another sense a union is, however, more like a democratic state because its citizenship contains an important bundle of equal rights that make distinctions in legal status between citizens of member states less relevant and those between union citizens and third-country nationals more significant.

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17 Conclusions of the Presidency, European Council in Copenhagen (June 21-22, 1993), available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/72921.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf).

18 Consolidated Version of the Treaty on European Union, art. 49, 2002 O.J. (C 325) 5.

19 See Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFF. 31, 49 (1997).

20 On explanations for the stability or instability of state borders, see RIGHT-SIZING THE STATE: THE POLITICS OF MOVING BORDERS (Brendan O'Leary et al. eds., 2001).

The political and economic criteria for membership in the EU and the condition of consent of present members to the admission of new ones can be easily justified as principles, although there will be considerable disagreement about their practical specification. Should the capacity of the Union to integrate new members be added to the criteria adopted by the 1993 Copenhagen European Council, as some states have suggested with a view towards blocking the accession of Turkey?<sup>21</sup> Is it legitimate to include minority protection when the Union has no competence in this area and does not monitor present member states for compliance? How should consensus on new admissions be operationalized? Is it defensible that each current member state has veto power over any new admission? These are complex and controversial issues that I cannot address here.

The third condition of membership in a union, geographic self-limitation, seems harder to defend from a Kantian perspective, for which the promotion of world peace and the spread of democratic government (through incentives to join rather than through external intervention) is the core reason for forming a union of states. In contrast with Kant's vision of a single union that includes all republics, we could, however, imagine a pluralistic world order that consists not only of states but also of several regional unions of states that are more closely integrated amongst each other. Such unions would have more powerful tools to secure democracy, the rule of law, and human rights within their geographic regions than any international organization could, or should, ever have on a global scale. Within such unions, the internal pooling of sovereignty would reduce the danger of an excessive accumulation of powers by any particular state — which is one reason why the U.S. and Russia are unlikely to promote the formation of supranational unions with their respective neighbors. And the external plurality of several such unions would provide similar checks and balances against the dangers of asymmetric international dominance by a single state or bloc of states. The formation of regionally limited unions can, therefore, be justified as not merely compatible with Kantian aims, but maybe even as a more promising path towards realizing these goals.

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21 The Conclusions of the Copenhagen Council had mentioned the EU's integration capacity merely as "an important consideration." Conclusions of the Presidency, *supra* note 17, at 13. In June 2006, the European Council adopted the slightly stronger formula that "the pace of enlargement must take the Union's absorption capacity into account," without, however, turning this into a formal criterion for accession. See Presidency Conclusions, Brussels European Council (June 15-16, 2006), available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/90111.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/90111.pdf).

Overall, the current principles regulating accession to the European Union appear thus to be defensible as long the Union remains reasonably open for enlargement within its geographic region and as long as promises of future accession options are kept.<sup>22</sup>

The citizenship aspect of external union boundaries also raises some specific challenges. *Prima facie*, one may think that, in this regard, a supranational union should simply act like any democratic state that limits immigration and distinguishes between the rights of temporary or newly arrived migrants, those of permanent resident foreign nationals, and those who have acquired the citizenship of the host country. Within a union, however, there is a further distinction between citizens of other member states and third-country nationals. It is obvious that the latter will not have the same right as the former to enter the union from outside. But it is less clear whether rights of free movement across internal borders and of secure residence or access to employment granted to union citizens can be legitimately withheld from long-term resident immigrants without union citizenship. Entrenching such differences could be seen as problematic discrimination amongst immigrants of different national origin.<sup>23</sup> There is thus a potential conflict between, on the one hand, the principle of horizontal reciprocity between member states that refrain from treating each others' citizens as foreign nationals, and, on the other hand, a principle of non-discrimination amongst immigrants of different origins.

This conflict can be mitigated through a temporal gradation of rights. The logic of free internal movement as the core privilege of union citizens implies a strong distinction between union citizens and third-country nationals with regard to criteria for initial admission and access to settlement and employment in the union. However, with the passing of time after immigration, the gap between third-country nationals and union citizens must be closed. The rights of settled immigrants in the receiving country are derived from residence and should no longer depend on their

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22 This latter condition is relevant for assessing Turkey's claim to membership, since Turkey has been promised accession status for much longer than other current candidate states and since the present Turkish government has acted on the basis of this promise when carrying out far-reaching reforms.

23 The European Court of Human Rights has, however, maintained that preferential treatment of EU citizens in other member states does not violate the prohibition of discrimination in article 14 of the European Convention on Human Rights, since such distinction is "based on an objective and reasonable justification, given that the Member States of the European Union form a special legal order, which has . . . established its own citizenship." *C. v. Belgium*, 1996-III Eur. Ct. H.R., para. 38.

citizenship of origin. Denizens with third-country citizenship should, therefore, have the same claims of access to citizenship rights and citizenship status as residents who are citizens of another member state. The latter may, however, retain specific rights vis-à-vis the union that depend on formal membership status, such as voting rights in elections to a union parliament.

## II. THREE APPROACHES TO CITIZENSHIP IN EUROPE

The ideal-typical model of a supranational polity that I have outlined is normatively defensible because it satisfies general criteria for democratic legitimacy, and it is normatively attractive because it helps to internally stabilize liberal democratic regimes and because its emulation by other regional unions is likely to lead to a more peaceful and pluralistic global order. It is therefore supported by deontological as well as teleological considerations. The model's core features of supranational democracy, freedom of movement, and external boundaries distinguish it from international organizations, on the one hand, and from federal states, on the other. Yet the model is also not fixed at some specific point between these two alternative types of political entities. The norms that I have sketched so far allow for broad variation over time and potentially also across space between different supranational unions.

One way to reduce this relative normative indeterminacy is to look to the past. In democratic states, the political implications of universal normative principles can be specified through historic experiences and constitutional traditions that serve as reference points for shared understandings between political adversaries or between distinct communities within the polity. In a supranational polity-in-the-making, such as the EU, we may also refer to the original treaties, to the intentions of the founding generation, and to the historical conflicts that have been overcome by forming the union. Yet these sources for shared understanding are not strong enough to generate authoritative interpretations of the *telos* of this polity. "Originalist interpretations" of democratic constitutions are always controversial since even the wisest founders could never have foreseen novel challenges faced by subsequent generations. They provide even less guidance in a supranational polity whose constitution has been constantly evolving through new intergovernmental treaties.

Instead of examining the particular origins of a supranational union we could study a broader variety of federal systems that share some family resemblances with this type of polity and from whose experience we may

derive general insights about the architecture of federal citizenship. For example, the EU Constitutional Convention that met in 2002 and 2003 has been most frequently compared to the Philadelphia Convention of 1787. However, comparing the EU with the U.S. is rather unhelpful since there is clearly no political will or capacity to engage in a similar enterprise of nation-building on a European scale. More promising candidates are Canada, Belgium, or India, which share with the EU a plurality of official languages and of territorially-entrenched national identities and therefore face similar problems of accommodating distinct polities within a larger federation.<sup>24</sup>

Yet even these comparisons are of limited value, not merely because these multinational federations are independent states rather than supranational unions, but also because their arrangements of power-sharing have been shaped by histories of struggle between dominant and subordinate nation-building projects. The EU is fundamentally different in this respect. Its historic precondition is the abandoning of any nation-building project on a European scale. It has emerged from a voluntary coming-together<sup>25</sup> of states that refrain from imposing their national identities on each other.<sup>26</sup> The most useful comparison is, therefore, with those early federations that can be similarly interpreted as a coming-together of polities that agree on a limited transfer of sovereignty to a federal government and in which no dominant nation-building project divides the population into majorities and minorities. In a recently published important treatise, Christoph Schönberger explored this approach by comparing EU citizenship with the evolution of federal citizenship in pre-Civil War America, in Switzerland since the 1848 constitution, and in Germany from the German Bund to the Weimar Republic.<sup>27</sup> The many parallels Schönberger found between the early stages of these federal polities and the construction of citizenship in the EU are

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24 For a comparison of the EU with power-sharing in multinational federations, see Brendan O'Leary, *An Iron Law of Nationalism and Federation? A (Neo-Diceyan) Theory of the Necessity of a Federal Staatsvolk, and of Consociational Rescue*, 7 *NATIONS & NATIONALISM* 273 (2001).

25 Stepan distinguishes between coming-together, putting-together, and holding together federations. See Alfred C. Stepan, *Federalism and Democracy: Beyond the U.S. Model*, 10 *J. DEMOCRACY* 19 (1999).

26 See Rainer Bauböck, *The Shape of a New Species: Citizenship and Territorial Borders in the EU Polity*, in *THE STATE OF EUROPE: TRANSFORMATIONS OF STATEHOOD FROM A EUROPEAN PERSPECTIVE* 170 (Sonja Puntischer Riekmann et al. eds., 2004).

27 CHRISTOPH SCHÖNBERGER, *UNIONSBÜRGER: EUROPAS FÖDERALES BÜRGERRECHT IN VERGLEICHENDER SICHT* (2005).

highly instructive. Such a historical comparison is nevertheless limited in two ways. First, we cannot deduce any general law of federal evolution or any prognosis for the future of the EU from the fact that each of these polities has over time moved from confederation towards consolidated statehood.<sup>28</sup> Second, historic examples from a period in which democratic norms of equal citizenship were far from being fully developed cannot tell us much about the normative requirements of citizenship in a contemporary European context. Although these earlier cases may elucidate the *structure* of federal citizenship, they are not sufficient to elaborate its normative *content*.

Neither reconstructing the paths of constitutional evolution in the EU nor general lessons from comparative studies of federalism can therefore fully settle the questions of how citizenship in a supranational union ought to be allocated to individuals and which rights and duties it should entail. This opens a wide space for legitimate democratic competition between alternative conceptions of citizenship. In actual political discourse, positions on these questions are rarely articulated as consistent programmatic views, and they do not correlate in a straightforward way with ideological stances of political parties. The task of political theory is thus to reassemble disparate views into coherent perspectives that can be presented as alternative models for the future of citizenship in Europe.

This is what I will try to do in the rest of this Article. I will run through a checklist of three citizenship questions and will discuss three sets of answers, each of which is internally coherent and emerges from a specific underlying concern. The three questions refer to how the European federal polity creates unequal statuses of citizenship, allocates voting rights, and regulates the acquisition and loss of citizenship. I identify the three sets of answers in a shorthand manner as "statist," "unionist," and "pluralist" approaches.

*The statist approach* regards the Union as a federal state-in-the-making and opts for a citizenship model that would reflect the principles applied within contemporary federal democracies. This approach has only few advocates and would entail a quite radical departure from the path the European Union follows to this day. Although it would be unwise to exclude the possibility of the EU's future transformation into a federal state, e.g., after a new major war involving several European states, this scenario is currently

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28 As Schönberger points out, when drawing historic parallels to understand the multilevel structure and the current ambiguities of citizenship in the EU, earlier processes of federalization should not be interpreted from the perspective of their results, i.e., of present consolidated federal states. *Id.* at 517.

rather farfetched. Under present conditions, a statist approach to citizenship would violate the explicit and implicit commitments on which the Union has been built. I therefore introduce this perspective mainly to highlight the contrast with the other two approaches, both of which substantially depart from the construction of citizenship in a federal state.

*The unionist approach* aims primarily at strengthening citizenship of the Union by making it more important for its individual bearers and more inclusionary for the Union's residents. It differs from a federal state model in that it seeks to emancipate Union citizenship from member-state citizenship rather than integrate the latter into the former. A unionist approach of this kind has many advocates amongst pro-European and pro-immigrant groups in civil society but remains rather marginal in European politics.

*The pluralist approach* represents a less demanding view in the sense that it includes no general commitment to strengthening citizenship of the Union vis-à-vis the member states. Instead, it seeks to apply general norms of democratic legitimacy at both levels and to balance these concerns where they appear to conflict with each other. The label pluralist emphasizes, on the one hand, the autonomous value of both levels of vertically-nested citizenship and, on the other hand, respect for the horizontal plurality and autonomy of member-state citizenship.<sup>29</sup> It is meant to apply to the EU in its current state of federal integration. At the same time, the pluralist approach that I will describe and defend is still *reformist* in seeking to overcome normative deficits of the present arrangement and *integrative* in promoting a more consistent conception of multilevel citizenship compared with the status-quo.

All three approaches share, accordingly, a commitment to Union citizenship and are opposed to nationalist or strictly intergovernmental perspectives that advocate dismantling the Union or reducing it to an international alliance of sovereign states.

The three approaches can be easily ranked in terms of political feasibility. Under present conditions, the statist approach is plainly utopian, the unionist one somewhat less so, and the pluralist one apparently more realistic although still too ambitious to have any chance of adoption in the short-run. Yet my

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<sup>29</sup> A pluralist approach to EU citizenship has been defended by JOSEPH H.H. WEILER, *To Be a European Citizen: Eros and Civilisation*, in *THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION* 324 (1999). In contrast with the present article, Weiler's several proposals for giving more substance to citizenship in the Union do not include a reform of its basic architecture, i.e., its link with member state nationality and the boundary that separates it from third country nationality.



concern here is neither a prognosis nor a plan for policy change, but a comparison of the three models in normative terms by checking how well they fit with general liberal democratic norms and with the conception of a supranational polity I have outlined in Part I.

### A. European Statuses of Citizenship

In liberal democracies, the bundle of membership-based rights enjoyed by an individual depends basically on two variables: her nationality (in the sense of her legal status of citizenship) and her residence inside or outside the state territory. Membership rights are not only granted to resident nationals, but also to non-resident nationals who live abroad and to long-term resident non-nationals who enjoy denizen status. In the European Union context, we must further distinguish whether citizens of a member state live in that state, in another member state, or outside the Union. Assuming that all EU citizens are also nationals of a member state and vice versa,<sup>30</sup> there are four relevant status categories that we can identify, as follows: (1) first-country nationals ("FCNs"), i.e., EU citizens residing in their state of nationality; (2) second-country nationals ("SCNs"), i.e., EU citizens residing in another member state; (3) third-country nationals ("TCNs"), i.e., non-EU citizens residing in a member state; and (4) external EU citizens ("EEUCs") residing in third countries.<sup>31</sup>

Most rights of Union citizenship are generated by horizontal reciprocity between member states and are activated only when a citizen of one member state takes up residence in another member state. For FCNs, hence, the only specific aspects of Union citizenship that transcend their rights as resident nationals are their very few vertical rights in relation to bodies of the Union. The most important amongst these is the right to vote in European Parliament elections.<sup>32</sup> A second kind of rights involves accountability and transparency of the Union's administration towards its citizens. These rights are listed in articles 41 (good administration), 42 (access to documents), 43 (access to the Ombudsman) and 44 (right to petition) of the EU Charter of Fundamental Rights.<sup>33</sup> They are granted, however, not only to Union citizens but also to any natural or legal person residing or having its registered office in a member state.

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<sup>30</sup> This assumption will be discussed and modified in *infra* Section II.C.

<sup>31</sup> Strangely enough, only third-country nationals are present in EU legal jargon, while the analogous terms of first- and second-country nationals are hardly ever used.

<sup>32</sup> See SCHÖNBERGER, *supra* note 27, at 488.

<sup>33</sup> Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1.

SCNs are the crucial category for whom Union citizenship makes a real difference. It gives them not merely rights to freely enter and settle in other member states but also access to employment and self-employment and to equal treatment with FCNs in matters of social security and public welfare benefits. Two directives on anti-discrimination policies provide general protection against discrimination in the member states independent of nationality.<sup>34</sup> Employment-related discrimination is defined extensively, while prohibited grounds of discrimination in access to goods and services are limited to racial and ethnic origin. However, only SCNs are protected with regard to discrimination on grounds of nationality. Furthermore, SCNs enjoy special political rights. They can vote and be elected in their country of current residence in European Parliament elections and in local elections. The rights of SCNs have recently been codified and expanded in a directive that, since April 30, 2006, the member states have been obligated to implement.<sup>35</sup> This directive borrows the strong language previously used by the European Court of Justice: "Union citizenship should be the fundamental status of nationals of Member States when they exercise their right of free movement and residence."<sup>36</sup> By implication, Union citizenship is not a fundamental status for FCNs. This highlights a stark contrast with citizenship in federal states, where the federal level will be the most relevant one in terms of citizenship rights for mobile as well as for sedentary citizens.

In spite of the comprehensive prohibition of discrimination against SCNs, there is no perfect equality of rights between them and FCNs. On the one hand, SCNs' right to entry and residence in another member state for more than three months is still not unconditional (they must have sufficient financial means and health insurance). On the other hand, direct protection of SCNs' rights by EU law that does not apply to FCNs has created the somewhat paradoxical situation where EU migrants may be privileged vis-à-vis EU citizens residing in their home states.

The ECJ has generally interpreted the rights of SCNs as corollaries of free movement. They protect SCNs from disadvantages suffered by other immigrants. Yet they may also be regarded as a matter of horizontal equality amongst citizens of the Union independent of their nationality. These two interpretations lead to different outcomes. If the rights of SCNs are meant to facilitate freedom of movement, then they need not be completely equal to

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34 Council Directive 2000/43, 2000 O.J. (L 180) 22 (EC); Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC).

35 Council Directive 2004/58, 2004 O.J. (L 299) 35 (EC).

36 See Case C-184/99, Rudy Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve, 2001 E.C.R. I-6193, para. 31.

the rights of FCNs, who do not make use of this liberty. The result is a dual deviation from full equality. On the one hand, SCNs' right to reunification with TCN family members is, in several countries, currently more extensive than corresponding rights of FCNs. On the other hand, the most important right that SCNs do not enjoy under Union legislation is the franchise in regional and national elections and referenda. This double discrepancy highlights a major divergence between the EU and all contemporary federal states.

How would the three approaches to citizenship in Europe respond to inequality of rights between FCNs and SCNs? A statist perspective would abolish both discrepancies by establishing the primacy of Union citizenship. Under this view, Union legislation should be expanded to regulate also the citizenship rights FCNs enjoy in their country of nationality. By contrast, a unionist perspective could accept privileging Union citizens as a vehicle for promoting mobility between member states and would leave it to the national governments to close the gap by enhancing their resident citizens' rights. For this approach, it would be much more important to strengthen Union citizenship by extending to SCNs the remaining privileges of FCNs with regard to unconditional residence rights and domestic political representation.

A pluralist approach that balances democratic legitimacy within member states with commitments towards the Union would come up with a different assessment from the preceding two views. On the one hand, similar to the statist perspective and unlike the unionist one, it would regard discrimination of FCNs as unacceptable. On the other hand, similar to the unionist approach and unlike the statist one, it would place responsibility for restoring equality on the member states rather than the Union's legislative bodies. From the perspective of a European Court, family reunification rights for SCNs may be seen as derivatives of their free movement rights. But from a domestic perspective, there is no plausible reason why SCNs' interest in family reunification with third-country nationals warrants stronger protection than the same interest of citizens residing in their home states. If European legislation and jurisdiction establish a certain standard of rights for mobile citizens of the Union, then it becomes an imperative task for the domestic parliaments and courts in the member states to ensure that those rights that are not intrinsically linked to free movement are extended to all resident citizens. The member-state governments might object that doing so would constrain their domestic sovereignty in determining their own citizens' rights. Yet the EU is not a foreign government that imposes the rights of SCNs as an external standard. All member states have been fully

represented in European legislation establishing these rights, and they can therefore be held responsible for eliminating "reverse discrimination" of FCNs.

A pluralist would have fewer objections against maintaining special political rights for citizens residing in their member states. As Schönberger's analysis of early federal systems shows, there is no general norm of full equality in this respect.<sup>37</sup> Freedom of movement and non-discrimination with regard to civil and social rights are the foundations of common citizenship in a federation. Whether citizens of a union moving into other member states should also enjoy immediate and full access to political participation rights in the latter depends on how deeply the federation is integrated politically and on how the rights of internal migrants within the union compare to those of migrants from third countries. Conversely, granting full political citizenship to SCNs would also accelerate the process of further political integration. This is the main reason why statist and unionists advocate such an extension of SCN rights in the EU. For a pluralist, such a move is not normatively required and would have to be supported by broad political consensus in the member states. In other words, while a supranational federation cannot treat SCNs as foreigners when it comes to immigration control, it may still treat them as immigrants with regard to access to member state citizenship and voting rights.

The next question then is how the legal status and rights of TCNs should be regulated within the EU. Until the 1997 Treaty of Amsterdam<sup>38</sup> and the 1999 Tampere European Council,<sup>39</sup> this was almost exclusively a matter of national legislation by member states. Since then, the Council has adopted a directive on family reunification and one on the legal status of long-term resident TCNs.<sup>40</sup> Both directives were substantially watered down compared to the initial Commission drafts. The long-term resident directive is, however, still significant since it creates a new status of EU denizenship. After five years of residence in one member state and after passing integration tests that may be required by member states, TCNs can move to another member state and take up employment there without being subject to regulations applying to newly

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<sup>37</sup> SCHÖNBERGER, *supra* note 27, at 433-43.

<sup>38</sup> Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1.

<sup>39</sup> Presidency Conclusions, Tampere European Council (Oct. 15-16, 1999), *available at* [http://europa.eu.int/council/off/conclu/oct99/oct99\\_en.htm](http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm).

<sup>40</sup> Council Directive 2003/86, 2003 O.J. (L 251) 12 (EC); Council Directive 2003/109, 2004 O.J. (L 16) 44 (EC).

arriving TCNs. In two of its communications, the Commission proposed a more comprehensive status of "civic citizenship," which would also include local voting rights.<sup>41</sup> This idea was, however, not adopted by the Council and seems to have been largely abandoned.

How would the status of TCNs in the EU be evaluated from the three perspectives of European citizenship? The statist approach would be strongly in favor of transferring legislation on foreign nationals' legal status from the member states to the Union but need not endorse an ideal of equality between federal citizens and TCNs. From a unionist standpoint, as will be argued in the next Section, the most important task would be to deprive member states of their control over access to Union citizenship. Both perspectives would evaluate the rights of TCNs primarily with a view toward strengthening European integration. They could, for example, endorse the extension of mobility rights across internal Union borders to TCNs, since this would contribute to consolidating the Union as an area of free movement.

From a pluralist perspective, however, it would be equally important to promote the integration of TCNs in the member states in which they settle. In this domestic context, the rights of SCNs provide a yardstick for the claims of immigrants from outside the Union. Although the model of supranational federation that I have sketched in Part I calls for a differentiation of status and rights, it cannot support arbitrary distinctions. As I have argued there, the purpose of creating an area of free movement justifies initial, but not permanent, differences between SCNs and TCNs. The pluralist approach would therefore strongly endorse the objective adopted by the Tampere Council of October 1999, from which the Council has since retreated:

The legal status of third-country nationals should be approximated to that of Member States' nationals. A person who has resided in a Member State for a period of time to be determined and who holds a

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<sup>41</sup> *Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy*, COM (2000) 757 final (Nov. 22, 2000); *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Immigration, Integration and Employment*, COM (2003) 336 final (June 3, 2003); see also Rainer Bauböck, *Civic Citizenship — A New Concept for the New Europe*, in *MANAGING INTEGRATION: THE EUROPEAN UNION'S RESPONSIBILITIES TOWARDS IMMIGRANTS* 122 (Rita Süßmuth & Werner Weidenfeld eds., 2005).

long-term resident permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens.<sup>42</sup>

With regard to rights of free movement, employment, protection against discrimination, family reunification, and access to social welfare, *approximation* should really mean *equality* of rights for FCNs, SCNs, and long-term resident TCNs.

The fourth category of persons is EU citizens residing outside the EU territory (EEUCs). They enjoy a special right to subsidiary diplomatic and consular protection from other member states if their state of nationality is unable to provide such protection.<sup>43</sup> Otherwise the main added benefit they receive from Union citizenship is that they have the right to be (re)admitted not only into their country of nationality, but also into any other member state. This entry ticket into a large regional labor market and wealthy welfare states dramatically increases the instrumental value of Union citizenship for those EEUCs born outside the Union who have inherited Union citizenship *jure sanguinis*. It also provides a major incentive for TCNs living outside EU territory to acquire the citizenship of a member state. This regime creates unfair advantages for certain immigrants based on ancestry and unfair burdens for those member states that have to admit EEUCs created by other member states' nationality laws. One response to this problem might be to constrain the rights of EEUCs to being admitted into other EU states. But this would be a serious breach of a fundamental principle of federal citizenship. The alternative answer is to regulate the acquisition and loss of EU citizenship, which will be discussed in Section II.C below.

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42 Presidency Conclusions, *supra* note 39, para. 21.

43 TEC, *supra* note 15, art. 20.

**Table 1: Inequalities Between Three Citizenship Statuses in Europe**

Unequal Rights	Status Quo	Statist	Unionist	Pluralist
FCNs vs. SCNs	FCN discrimination	illegitimate; Union must abolish	legitimate if derived from free movement	illegitimate; member states must abolish
	FCN privileges	illegitimate; same rights for SCNs	problematic; expand rights for SCNs	legitimate; depending on depth of integration
SCNs vs. TCNs	partial approximation	uniform EU denizenship for TCNs, different from SCN rights	automatic EU citizenship for TCNs	general equality except for EP voting rights

### B. Voting Rights in the EU Polity

Political participation is the core of democratic citizenship. In a supranational union, the allocation of voting rights across the various levels of government and among the various categories of citizens raises a number of challenges and serves as an indicator for the degree of political integration. I will first discuss the problem of multiple voting and representation under current EU rules and then consider the bigger question of whether the present regime should be changed fundamentally so that SCNs can cast their votes in their countries of residence not merely in local and EP elections, but also in national ones.

There is a substantial and growing number of SCNs who are multiple citizens of several member states. Dual citizens who enjoy absentee voting rights in their external country of citizenship can vote in two national elections. In the standard case, dual voting does not violate the democratic core principle of one person one vote, since votes cast by the same person in two fully independent countries will be counted only once in each election.<sup>44</sup>

<sup>44</sup> Other objections against dual voting are more contextual. David Martin, for example, claims that migrants should only vote in their country of residence since this would promote their integration and focus their democratic participation on legislation by which they will also be affected. See David A. Martin, *New Rules on Dual*

Matters are different in a supranational union, however, where there is a real possibility that some citizens will be counted twice in the democratic system of representation at the union level.

In the EU, this possibility exists even for singular citizens who can cast their vote in European Parliament elections either for candidates running in their country of residence or by absentee ballot in their country of origin. A single European electoral register would be necessary to make sure that they do not vote twice. Currently, there are only provisions for exchange of information between member states. While there are doubts that this effectively rules out double voting, the principle that each EU citizen should have only one vote in EP elections is undisputed.<sup>45</sup>

The normatively more interesting problem is indirect representation of citizens in the European Council and the Councils of Ministers. Since dual member-state citizens are able to vote in several national elections, they can be represented twice through different national governments in the Union's most important legislative bodies. Ignoring this problem because the number of such dual votes is insignificant would not be the right attitude to take. Electoral rights are the very core of citizenship, and we would not tolerate the possibility of multiple voting for a certain group of citizens in domestic elections even if the group were very small.

From a statist perspective, the answer is to do away with multiple

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*Nationality for a Democratizing Globe: Between Rejection and Embrace*, 14 GEO. IMMIGR. L.J. 26 (1999). This argument has to be assessed against the reality of transnational ties that link the interests of migrants to several states. See Rainer Bauböck, *Expansive Citizenship: Voting Beyond Territory and Membership*, 38 POL. SCI. & POL. 683 (2005).

45 Council Directive 93/109, Laying Down Detailed Arrangements for the Exercise of the Right to Vote and Stand as a Candidate in Elections to the European Parliament for Citizens of the Union Residing in a Member State of Which They Are Not Nationals, arts. 4, 13, 1993 O.J. (L 329) 34 (EC). Another deficit of harmonization in EP elections concerns voting rights of EEUCs. According to a 2004 report, only seven of the fifteen pre-2004 member states grant their nationals living outside the EU voting rights in EP elections, although thirteen of these countries allow them to vote in national elections. The Europeans Around the World, Democratic Rights of European Expatriates (Jan. 2004), <http://www.viw.be/PDF/ettw%20voting%20rights.pdf>. Assessing voting rights for expatriates is a complex normative question. Enfranchising those who have inherited EU citizenship *jure sanguinis* is certainly overinclusive, while excluding temporary absentees would exclude persons who will be affected by EU legislation. However widely the circle of extraterritorial inclusion is drawn, my point here is that it ought to be drawn the same way in all member states as far as European elections are concerned.



citizenship altogether by making both the acquisition and loss of citizenship in a member state an automatic consequence of a shift in residence. From the unionist approach, too, dual voting and representation would jeopardize the integrity of Union citizenship. It could, however, offer a less radical solution than the one suggested by a statist approach. Within the Union, external citizenship with respect to another member state could become dormant, so that it does not confer any absentee voting rights. For the sake of consistency, this principle should also apply to European Parliament elections, where SCNs could then only vote in their country of residence. This solution would make SCNs aware that Union citizenship is not merely an extension of rights granted to them by their country of origin.

In contrast, for a pluralist approach, the assessment of dual voting depends on the mode of democratic representation and degree of federal integration. In the intergovernmental decision-making of the European Council, each government represents all citizens of its member state. Although dual citizens may have opportunities to participate in the elections of two member-state governments, they will still be represented only as singular citizens by each state, just as they would in an international organization. Imagine, however, that the Council were transformed into a second chamber of the European Parliament whose members are directly elected in national elections. In this kind of institution, dual citizens could vote for delegates that represent their particular interests (which would be perfectly legitimate) and they could vote for such delegates twice in two different countries (which would be clearly illegitimate). Finally, if the European Union were to introduce European plebiscites or other forms of direct democracy, then citizens who can vote in two countries would have twice as much impact on the outcome as other voters. In a supranational polity, the regulation of multiple voting need, therefore, not be uniform and could vary across different types of elections.

All three approaches would support SCNs' being allowed to vote for candidates in their country of residence in European elections. The unionist and statist perspectives would, however, advocate the same right in national elections as well.<sup>46</sup> If SCNs could vote in all elections, this would greatly enhance the political value of Union citizenship and would make SCNs much more significant as an electorate to the political parties. Fully enfranchising SCNs seems, however, a huge step towards a federal state model, in which citizens who move to another part of the country acquire the franchise in provincial elections immediately or shortly after taking up residence.

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<sup>46</sup> See Heather Lardy, *The Political Rights of Union Citizenship*, 2 EUR. PUB. L. 611, 612-13 (1996).

What is at stake here is not the question of whether non-citizens should have voting rights. Although this is rather exceptional in national elections, there are several European and non-European examples of an alien franchise in national elections based either on length of residence or on specific agreements between the countries concerned. Commonwealth and Irish citizens enjoy general voting rights in the UK; Brazilian citizens have voting rights in Portuguese elections; New Zealand, Chile, Malawi, and Uruguay even allow all foreign nationals residing in the country for a certain amount of time to cast their votes in national elections.<sup>47</sup> Fully disconnecting the national franchise from citizenship status is an interesting democratic experiment,<sup>48</sup> but cannot be normatively required if immigrants have access to the vote through relatively easy naturalization.<sup>49</sup> The question here is not whether EU member states can legitimately decide to extend voting rights in these ways, but whether the Union itself should establish these rights in all member states as a privilege of Union citizenship. From a statist perspective, the answer is obviously positive, and it can be supported by evidence that residence-based voting in constituent entity elections was a key component of political integration even at the early stages of federal integration in the U.S., Germany and Switzerland.<sup>50</sup>

In a forthcoming book, Jo Shaw proposes an alternative option that could be pursued in the absence of broad political consensus for enriching Union citizenship through SCN voting rights. Similar to the United Kingdom and Ireland or Brazil and Portugal, a subgroup of EU states that want to promote deeper political integration could extend national voting rights to each other's external citizens on a basis of reciprocity and outside current European Community law, but with a view to eventually attracting all other states into this agreement. If former colonial ties are sufficient to

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47 See Bauböck, *supra* note 44.

48 However, even in New Zealand, which has the most inclusive franchise for non-citizen residents, the right to stand as a candidate in national elections is reserved for citizens.

49 Access to citizenship should also be seen as normatively prior to enfranchising non-citizens. On this view, granting non-citizens the franchise cannot compensate for their exclusion from full membership status. In Estonia, local voting rights for non-citizen residents were introduced in 1996 partly in order to mitigate the effects (and European critiques) of high barriers for naturalization imposed on ethnic Russian minorities.

50 SCHÖNBERGER, *supra* note 27, at 438-43.

justify extended voting rights, why should ongoing ties that emerge from cooperation within a supranational union not suffice as well?<sup>51</sup>

A pluralist approach would raise two objections to all of the proposals mentioned so far. First, it is implausible to claim that membership in the Union necessarily opens up the boundaries of the state-based *demos* in such a way that all Union citizens have to be included automatically as residents without having to naturalize. This is a feature of federal states that need not apply to supranational unions. In the latter, SCNs are neither foreign nationals subject to immigration control nor co-nationals with a claim to immediate citizenship, but, rather, a group of immigrants with special mobility rights and often strong transnational ties to their countries of origin. Their political integration can hardly be presupposed as an automatic consequence of taking up residence. Second, granting exclusive national voting rights to SCNs but not to TCNs would greatly widen the citizenship gap between the two categories of denizens.<sup>52</sup> A pluralist perspective would thus suggest that member states should be free to unilaterally extend domestic voting rights to all long-term residents independent of nationality, but should not be required to do so under Union legislation. Democratic inclusion could instead be achieved through common standards for the acquisition and loss of citizenship that will be discussed in the next Section. This would create roughly equal opportunities throughout the Union for full political participation of SCNs and TCNs without turning them automatically into voting members of the polity where they reside.

What about local voting rights? Article 8(b) of the Maastricht Treaty<sup>53</sup> introduced a right for SCNs to vote in local elections in their municipality of residence. Twelve of the present twenty-five member states have, however, adopted a more far-reaching local franchise for all long-term resident foreign nationals.<sup>54</sup> From a statist perspective, this matter may be decided either way. In a federal state, it is essential that citizens of the federation can vote in all elections. A local franchise for non-citizens may be supported by general democratic

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51 JO SHAW, TRANSFORMING CITIZENSHIP? THE EUROPEAN UNION, ELECTORAL RIGHTS AND THE RESTRUCTURING OF EUROPEAN POLITICAL SPACE ch. 7 (forthcoming 2007).

52 Shaw's proposal for multilateral reciprocity would add another difference between SCNs with and without national voting rights. Yet, since this is meant to be an expanding agreement that will be open to all member states, such a temporary distinction would be easier to justify.

53 Now article 19(1) of the TEC, *supra* note 15.

54 See Harald Waldrauch, Electoral Rights for Foreign Nationals: A Comparative Overview, Paper Presented at the Workshop on Citizens, Non-citizens and Voting Rights in Europe, Edinburgh (June 2005) (on file with author).

norms but is not important for federal cohesion. In a more centralized federation, this matter will be settled by a federal constitution (as in Germany and Austria), whereas a more decentralized one can leave it to the constituent polities to introduce a local franchise if they so wish (as in Switzerland or the U.S.).

From a unionist perspective, requiring all member states to extend local voting rights to SCNs may be defended as a corollary of their right to free movement. Moving to another member state should not result in the disadvantage of losing one's right to participate politically where one resides.<sup>55</sup> Since third-country nationals have no similar right to free movement, they can also not claim the corresponding political participation rights. Yet it is rather farfetched to regard the absence of local voting rights as a disincentive for moving to another member state. And if this were a matter of principle, then the argument would have to be extended to national elections as well.

From a pluralist perspective, such justifications for the present arrangement disregard the most important questions. The first concerns the proper vertical relations between a supranational union and self-governing municipalities. The second raises the matter of who should be included from the perspective of the local polity itself. The answer to the first question is that municipalities are not members of a federation in the same way as its constituent polities are. It makes sense to attach voting rights in European Parliament elections to citizenship in the Union. And it would make sense to extend voting rights in national elections to SCNs if the EU were to transform itself from a supranational union into a federal state. But even under this scenario, municipalities would not become constituent units of either the federation or of its member states. Local citizenship should thus be determined according to criteria that apply at the local level instead of being derived from either Union citizenship or member-state nationality.<sup>56</sup> The answer to the second question is that local self-government is a matter that concerns all long-term residents in the municipality in the same way. There is no justification for giving special representation rights to a recently arrived SCN, while excluding TCNs who have not yet had an opportunity to naturalize. Local voting rights should instead be fully disconnected from state-based and Union-based citizenship.<sup>57</sup> Since nearly

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55 SCHÖNBERGER, *supra* note 27, at 442.

56 Rainer Bauböck, *Reinventing Urban Citizenship*, 7 CITIZENSHIP STUD. 139 (2003).

57 Taking this idea seriously would even entail diminishing current local voting rights of SCNs by imposing on them the same (reasonably short) residence requirements that apply to the local franchise for TCNs. Such requirements for immigrants are defensible since well-informed voting in municipal elections may require some

half of all EU member states have already adopted a nationality-neutral franchise in local elections, this prescription is not at all utopian.

As its label suggests, a pluralist approach embraces, thus, a pluralistic conception of political communities at local, state, and supranational levels and attempts to determine the boundaries of the respective *demoi* by considering their specific relations to each other. Unionist supranationalism would instead be mainly concerned with strengthening Union citizenship vis-à-vis state-based nationality and could therefore support special voting privileges for Union citizens in local elections.

**Table 2: Voting Rights in the EU Polity**

Elections	Status Quo	Statist	Unionist	Pluralist
EP	single vote in either country of residence or of external nationality	single vote in country of residence only	single vote in country of residence only	single vote in either country of residence or of external nationality
National	no vote for SCNs in country of residence	vote for all SCNs in country of residence	vote for SCNs on basis of reciprocity amongst <i>sub-group</i> of states	vote for all foreign residents as unilateral option
	dual vote for dual nationals of member states with external franchise	no dual nationality between member states; single vote in country of residence only	dormant external nationality for SCNs; single vote in country of residence only	dual vote for dual nationals of member states with external franchise
Local	local vote for SCNs; TCN vote depends on national legislation	indeterminate on TCN vote	TCNs included through direct access to EU citizenship	local vote for all residents independent of their nationality

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more time for migrants from abroad compared to internal migrants within a state who are familiar with the national political system.

### C. Acquisition and Loss of Citizenship Status

The present rules for determining who is a Union citizen are set forth in article 17(1) of the Treaty Establishing the European Community<sup>58</sup>: "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." The first sentence does not fully reflect present realities since several member states have submitted derogations under Declaration No. 2 on Nationality of a Member State in the appendix to the Maastricht Treaty,<sup>59</sup> that some of their overseas citizens are not to be considered as their nationals for Community purposes. These include, amongst others, several categories of British overseas citizens, Dutch citizens from the Netherlands Antilles or Aruba, Danish nationals on the Faroer Islands and Greenland, Finnish nationals on the Åland islands, and German *Aussiedler* or nationals of the former GDR.<sup>60</sup> What all these cases share is that they relate to nationals of member states from territories external to the Union. These exceptions therefore are not evidence of the power of member states to unilaterally exclude some of their citizens from Union citizenship, but rather sustain the connection between the territorial and personal scope of Community law.<sup>61</sup>

The formulation of the first sentence of article 17 does not rule out the converse category of persons who are citizens of the Union but not nationals of a member state. This may explain why the Amsterdam Treaty added the second sentence, which implicitly rejects this possibility.<sup>62</sup> Member states are, thus, the exclusive gatekeepers of EU citizenship. Their rules for acquisition and loss of nationality determine who is a citizen of the Union. The Union also has no competence in matters of nationality law, so that its institutions cannot even attempt to harmonize the rules under which member states allocate Union citizenship.

As I have suggested elsewhere,<sup>63</sup> for the purposes of a normative evaluation

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58 TEC, *supra* note 15.

59 TEU, *supra* note 4.

60 See Gerard-Rene de Groot, *Towards a European Nationality Law*, 8 ELECTRONIC J. COMP. L. (2004), <http://www.ejcl.org/83/art83-4.html>.

61 SCHÖNBERGER, *supra* note 27, at 279. One could imagine contrasting cases that would involve a serious breach of the link between Union and member state citizenship, for example, if a state were to declare that newly naturalized immigrants are not to be considered nationals for Community purposes.

62 As the official translations into other languages clarify, "national citizenship" in this sentence refers to nationality of a member state. This rules out the interpretation that EU citizenship could also complement a third-country nationality.

63 Bauböck, *supra* note 26.

of a supranational citizenship regime, we should distinguish three aspects of the relation between supranational and state-based citizenship. I call these linkage, derivation, and access. Linkage refers to the question of whether all citizens of the union should be citizens of member states and vice versa. When this question is answered in favor of strict linkage, the subsequent question turns to derivation, i.e., the causal direction of the relation: Should acquisition and loss of union citizenship determine who holds the status of member-state citizen or the other way round? If this second question is answered in favor of member-state determination of union citizenship, then the third question is about the conditions under which this citizenship will be determined in the various member states: Should the same rules for acquisition or loss of citizenship apply throughout the union, should there be minimum requirements that constrain member-state sovereignty in this matter, or should member states be fully free to determine who are their nationals and therefore also citizens of the union?

The present EU regime basically asserts strict linkage, bottom-up derivation, and self-determination<sup>64</sup> of member states in regulating access. A statist model of EU citizenship would retain strict linkage, but would reverse the direction of derivation. It would also minimize inequality of access. In some but not all federal states, provincial authorities are in charge of implementing the federal nationality act. This generates regional variations in the conditions for acquisition of citizenship. Such differences are, however, not a peculiar feature of federalism, since they can also be found in unitary states such as France.<sup>65</sup> Switzerland seems to be the only contemporary federal state where federal citizenship is formally derived from citizenship at local and cantonal levels. Yet even there, the federal Citizenship Act prescribes the basic rules to which cantons may add supplementary requirements. As Schönberger's study shows, however, bottom-up derivation has been a common feature of early federations before their eventual transformation into fully-integrated federal states. There is thus no general principle of federalism that requires that citizenship in the federal union must hierarchically precede and dominate constituent unit citizenships. For a supranational union of independent states, it would be even self-contradictory to create a single union nationality from which the citizenship of member states is derived.

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64 In the *Micheletti* case, the ECJ stated, however, that member states' competence to define the conditions of acquisition and loss of nationality "must be exercised with due regard to Community law." Case C-369/90, Mario Vincente Micheletti v. Delegación del Gobierno en Cantabria, 1992 E.C.R. I-4239.

65 Heike Hagedorn, *Einbürgerungspolitik in Deutschland und Frankreich*, 29 LEVIATHAN 36 (2001).

A unionist approach to EU citizenship would take an entirely different route, by questioning the first premise of strict linkage. The Migrants' Forum, a now defunct EU-Quango, and the Antiracist Network for Equality in Europe proposed already in the early 1990s that TCNs be given direct access to Union citizenship after five years of residence without having to naturalize in a member state. The proposal received some support in the European Parliament<sup>66</sup> and the Economic and Social Committee<sup>67</sup> and several academic authors have also endorsed the idea.<sup>68</sup> It would, indeed, help to bypass restrictive legislation in several member states that bar TCNs from access to local voting rights, and it would also give them direct representation in the European Parliament. Union citizenship would thus be partially disconnected from member-state nationality. In contrast with the present possibility of derogation for the purpose of excluding overseas citizens, this scheme would be inclusive and would reduce the control of member states over determining Union citizenship.

With this goal in mind, a unionist approach could advocate a second reform. Union citizenship would remain a derivative of member-state nationality, and states would remain free to regulate access to the latter for third-country nationals, but their self-determination could be constrained with regard to naturalization of SCNs. The Union could either directly harmonize nationality laws in this respect or require that member states introduce facilitated naturalization procedures for SCNs by reducing the residence requirements, waiving naturalization tests, or introducing legal entitlements instead of discretionary naturalization.<sup>69</sup> In combination with the proposal to give TCNs direct access to Union citizenship, such a reform would also guarantee their long-term inclusion as citizens of member states, although only after meeting first the residence requirement for Union citizenship and then the additional residence necessary for facilitated naturalization as SCNs.

A pluralist approach would fully focus on the question of access. If we take

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66 See ANTJE WIENER, "EUROPEAN" CITIZENSHIP PRACTICE: BUILDING INSTITUTIONS OF A NON-STATE 291 (1998).

67 De Groot, *supra* note 60, at 39.

68 E.g., NIKOLAOS KOTALAKIDIS, VON DER NATIONALEN STAATSANGEHÖRIGKEIT ZUR UNIONS-BÜRGERSCHAFT, DIE PERSON UND DAS GEMEINWESEN (2000); Dora Kostakopoulou, *Towards a Theory of Constructive Citizenship in Europe*, 4 J. POL. PHIL. 337 (1996); Veit Michael Bader, *Citizenship of the European Union: Human Rights, Rights of Citizens of the Union and of Member States*, 12 *RATIO JURIS* 153, 171 (1999).

69 Currently, only Austria, Germany, Hungary, and Italy provide for facilitated naturalization of EU citizens.



Union citizenship seriously, then there ought to be common standards for determining access to this status. The sovereignty of member states should, therefore, be constrained, without being fully abandoned by reversing the hierarchy between the two levels. This need for common norms emerges from the shared commitments to supranational democracy and to freedom of movement outlined in Part I. Even if member states create Union citizens under their own laws, they decide thereby also who will be politically represented in the legislative bodies of the Union and who will get access to all other member states of the Union. The Union formed by all states has, therefore, a legitimate interest that none of its members excludes groups with a claim to political representation or includes groups without a genuine link to any of the countries in the Union.

As far as requirements for inclusion are concerned, union citizenship does not add any specific norms to those that apply anyhow within liberal democracies that receive substantial immigration, but it does add political weight to the normative argument. In a supranational union, states look over each other's shoulder and can legitimately exercise political pressure for changes in domestic legislation that they regard as conflicting with their shared commitments.<sup>70</sup> Common provisions with regard to acquisition of member-state and union citizenship should include *jus soli*, entitlements to naturalization rather than discretionary grants, a maximum number of years of residence that may be required for naturalization, and a general toleration of dual nationality amongst individuals with genuine links to two countries. Respecting these common standards would still allow for substantial national variation by way of further facilitating acquisition generally or only for certain categories (e.g., for applicants with specific historic ties to the state).

Member states should also agree on restrictions of access and provisions for mandatory loss that are directly related to solidarity within a supranational union.<sup>71</sup> For example, states should limit the transmission of expatriate citizenship *jure sanguinis* beyond the foreign-born second generation, and they should constrain the naturalization of individuals who reside permanently abroad. Here, again, there are also domestic reasons for not including as full citizens persons lacking effective ties to the polity. In a supranational union, however, there is an even greater concern that member

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<sup>70</sup> Germany has for a long time been criticized for its lack of *jus soli* provisions and its restrictive conditions for naturalization. The 1999 reform that addressed both of these concerns was at least partly inspired by the view that nationality law had to live up to the fact that Germany is Europe's foremost country of immigration.

<sup>71</sup> De Groot, *supra* note 60, at 21-23.

states should not be free to create citizens outside the union's territory who then have the right to settle in any member state.

When it comes to determining the external citizenship boundaries of the EU, member states thus have a vital interest in policy coordination that could be addressed through the open method of coordination, but might eventually lead to establishing regulatory powers for the Union in matters of nationality law. There are two reasons why this has not happened so far. One is the low level of mobility of Union citizens, and the other is the high symbolic value that member states attribute to their self-determination of citizenship.<sup>72</sup> We can safely predict that if and when much greater numbers of migrants with Union citizenship arrive from third countries, the interest in coordinating nationality laws will eventually outweigh the symbolic value of self-determination. Under these conditions, harmonization might also lead to restrictive conditions for naturalization that violate liberal principles of inclusion. However, this possibility of downward-harmonization cannot serve as an objection to promoting common norms in matters of nationality law that reflect the shared commitments of member states to liberal democracy, towards each other, and towards the Union.

Why would this pluralist strategy be preferable to giving TCNs direct access to Union citizenship? A pragmatic answer is that such access could be counterproductive even under the unionist approach. It would certainly narrow the gap between SCNs and TCNs, but it could also further devalue Union citizenship in the eyes of sedentary FCNs, who would then see membership in the Union as a special status for migrants that is irrelevant for their own interests and identities. A more serious concern, however, is that direct access to Union citizenship would remove the pressure to introduce minimum standards for access to national citizenship that can be built up only as long as the linkage remains in place. More generally, from the pluralist perspective, it is still the member states that form the crucial arena for the political integration of TCNs in the European polity. FCNs' citizenship identities are most strongly articulated at the member-state level, and FCNs must therefore learn first to accept immigrants as future citizens at this level. Automatic acquisition of Union citizenship would not only reduce the incentives for states to liberalize their nationality laws but also the incentives for TCNs to naturalize. This effect shows in the low naturalization rates of SCNs. Finally, the proposal would create two classes of European citizens, amongst which FCNs and SCNs would be represented in the main legislative body, i.e., the Council, whereas TCNs would be only represented

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72 SCHÖNBERGER, *supra* note 27, at 286-87.

in the Parliament. This would change only if member states were to grant TCNs residence-based voting rights also in national elections.

As far as the proposal for easier naturalization of SCNs is concerned, this privilege appears dubious from a pluralist approach. Naturalization gives access to citizenship in the member state and the Union. Criteria should promote inclusion and reflect the relative autonomy of each type of polity. From the perspective of the member state, both SCNs and TCNs are immigrants whose opportunities to become full citizens depend on their integration into the political community and promote that integration. Giving SCNs easier access would do little to enhance their generally low naturalization rates, while reinforcing the perception that TCNs are less welcome as future citizens. And from the perspective of the EU as a supranational polity, it is more important to promote easier access to its citizenship for TCNs in all member states than to add yet another privilege to those already enjoyed by Union citizens.

An objection that may be raised against the pluralist approach is that it is inconsistent to advocate residence-based citizenship and voting rights at the local but not the supranational level.<sup>73</sup> Should we not bypass the constraining imperatives of state-based citizenship at both the Union and municipal level through a *jus domicilii* that includes all residents? This argument ignores the specific structure of federal citizenship, which requires strict vertical linkage between memberships.<sup>74</sup> The *demos* of a union is composed of the several *demoi* of the member states. The former cannot include residents that are excluded by the latter. This logic need not apply at the local level. As I have pointed out in Section II.B, modern states are not federations of autonomous municipalities. Local citizenship can thus be derived from residence and disconnected from state-based nationality. Disconnecting a supranational union from its member states in a similar manner would leave the former hanging in very thin air and unable to protect the citizens it has created without its member states' consent.

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73 See Allen Rosas, *Union Citizenship and National Elections*, in A CITIZENS' EUROPE: IN SEARCH OF THE NEW ORDER 162 (Allen Rosas & Esko Antola eds., 1995), quoted in Bader, *supra* note 68, at 173.

74 Bauböck, *supra* note 26, at 174-79; SCHÖNBERGER, *supra* note 27, at 292-99.

**Table 3: The Link Between Union Citizenship and Member State Nationality**

	Status Quo	Statist	Unionist	Pluralist
Linkage	strictly linked	strictly linked	disconnect for TCNs	strictly linked
Derivation	bottom-up	top-down	bottom-up for FCNs and SCNs	bottom-up
Access	self-determination	uniform	easier naturalization for SCNs	common norms for acquisition and loss of citizenship

### CONCLUSION

There is little doubt that the EU is currently in deep crisis. This crisis has three proximate causes: the divergent reactions of European governments to the 2003 Iraq war, the rejection of the draft Constitutional Treaty in the 2005 referenda in France and the Netherlands, and deep disagreements over further enlargement. This crisis has overshadowed the debates of the 1990s over whether a citizenship of the Union could become a vehicle for developing a postnational European identity. In this Article, I have explored a different approach, which starts from the present construction of Union citizenship and evaluates it critically based on the commitments of member states to principles of liberal democracy and to solidarity within the Union. The challenge for this project is that a normative model of supranational citizenship is a moving target. In a supranational union, there are many possible stages and degrees of political integration, and the legitimacy of moving from one to the other will be determined by democratic procedures rather than by normative reasoning. Nevertheless, at each stage, we can ask precise questions about how supranational citizenship ought to be constructed in order to match the commitments upon which the union is built.

This Article has examined three basic aspects of the architecture of citizenship in the Union: the differentiation of citizenship statuses in Europe, the allocation of voting rights to these categories, and the rules for acquisition and loss of citizenship at various levels. The present construction is quite consistent when interpreted in light of the EU's treaty law and its judicial interpretation by the EU's activist court. However, from a liberal egalitarian

perspective, it can be easily shown to be flawed and incoherent. What is less clear is which alternative model would be favored by such a critique.

I have argued here for a pluralist approach, which I have contrasted with two other perspectives that promote the transformation of the Union into a federal state and the strengthening of Union citizenship vis-à-vis member-state nationality respectively. The pluralist approach would not require a radical move beyond the current degree of political integration, but it would take more seriously principles of liberal inclusion, equality, and federal solidarity. Applying these principles to citizenship calls for a series of reforms. Amongst these would be a general equalization of most citizenship rights (including the franchise in local elections) for permanent residents in the Union independent of their nationality and developing common norms for acquisition and loss of citizenship status in the member states. The other two approaches suggest more far-reaching changes, such as giving third-country nationals direct access to EU citizenship or introducing voting rights in national elections for Union citizens living in other member states.

The current political battles are not between these alternative visions of European citizenship, but about the fundamental aspirations of the European integration project itself. This must not obscure the significance of developing an adequate conception of citizenship for a supranational union. Why, then, European citizenship? Because it can provide a model for democratic participation and freedom of movement beyond the borders of states. This should be attractive in a world whose greatest problems cannot be addressed by national governments acting independently of each other.