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*„Citizenship vs Nationality:  
drawing the fundamental border  
with law and etymology“*

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## **Abstract**

Citizenship and nationality are often used to describe an individual's belonging into a political community. But historically, the concept of citizenship predates the era of nation-states, and legally, there is a fine line between *citizenship* (a domestic legal concept) and *nationality* (an international legal term). This thesis explores the meaning and significance of EU Citizenship, which is an international concept with legal consequences in 28 domestic legal systems. Chapter One uses etymology to develop a historically-grounded theory of citizenship. The thesis develops a visual aid in order to facilitate understanding for the subsequent chapters (hence, 'drawing' in the title). Chapter Two reviews cases and principles regarding the international legal concept of nationality and its relationship to "national citizenships" (thus "citizenship vs nationality" as in case law). Finally, Chapter Three combines history and law to analyze the development of EU Citizenship and place it into a historical legal context. The results show that "Citizenship of the Union" fits a legitimate historical understanding of citizenship, given that it is a legal and political status defined by rights and duties. More specifically, this 'new' citizenship creates a duty on Member States to protect individual rights, which places it in a separate category from its city-state and nation-state predecessors. Among its most crucial and perhaps revolutionary functions is the way it may impact individuals who reside illegally in the territory of Member States, protect individuals from statelessness, and the legal effect that it provides to the Charter of Fundamental Rights of the European Union regardless of Nation-State sovereignty (thereby drawing a 'fundamental' border between citizenship status and Member State nationality). In short, the title "*Citizenship vs Nationality: drawing the fundamental border with law and etymology*" reflects the legal and historical approach used to study the distinction between citizenship and nationality, as well as the distinctive border drawn by EU Citizenship and its protection of all citizens' fundamental European rights.



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## INTRODUCTION

*The term self-sufficient, however, we employ with reference not to oneself alone, living a life of isolation, but also to one's parents and children and wife, and one's friends and fellow citizens in general, since man is by nature a social being.*

- Aristotle, *Nichomachean Ethics*, Book 1, Chapter 7, 1097b<sup>1</sup>

These are the famous words used by Aristotle which have become interpreted as stating that man is a “political animal.” But while reading this quote, it is evident that his understanding of “political” is nothing like what we would imagine today. Instead, his only contention is that men [and women] are by nature social beings inclined to live in a *polis*, a city-state. Further evidence for this can be found by using the complete version of his more-often-cited entry in *Politics* which states “Now it has been said in our first discourses, in which we determined the principles concerning household management and the control of slaves, that man is by nature a political animal; *and so even when men have no need of assistance from each other they none the less desire to live together.*”<sup>2</sup> Thus, the proper way to understand Aristotle is by seeing that man is not truly a ‘political’ being in a modern sense, but rather a *social* one. With this in mind, it becomes clear that the title of Aristotle’s major work *Πολιτικά* (*Politics*) is also not about any ‘power politics’ as we know it but rather about the ‘social affairs’ of the *polis*. The *polis* was the Greek culmination of mankind’s desire to live together in a self-sufficient ‘political/social’ community where the city-state and its citizens were united as one by a common bond.

This thesis is a study on that common bond: *citizenship*.

### Identity: Individual - Community

Citizenship is inherently a status of identity. It identifies a citizen as member of a citizenry, city, nation or state. Some suggest that this word currently has four meanings which describe: 1) a person with political rights to participate in processes

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<sup>1</sup> *Perseus Digital Library*. Ed. Gregory R. Crane. Tufts University  
<http://www.perseus.tufts.edu/hopper/text?doc=urn:cts:greekLit:tlg0086.tlg010.perseus-eng1:1097b>

<sup>2</sup> Aristotle, *Politics*, Book 3, Section 1278b  
<http://www.perseus.tufts.edu/hopper/text?doc=urn:cts:greekLit:tlg0086.tlg035.perseus-eng1:3.1278b>

of self-governance (e.g. active political citizenship), 2) a purely legal status (e.g. citizenship of Austria), 3) almost any human association (e.g. corporate citizenship, world citizenship), 4) certain standards of proper conduct (e.g. good citizenship).<sup>3</sup> More accurately, but also more abstractly, citizenship is simply the word that describes a relationship between any individual and its community, whether this community be defined geographically (a city), sociologically (a group), or politically (a “nation” or “people”). Without all three components (an individual, a community and a bond), the concept of citizenship is rendered absolutely meaningless. Even in ancient societies, this was necessarily the case and “there was no city, no republic, in the full meaning of the word, if the people were not the source and the measure of authority: a sign of this is the fact that the same word (*politeia* in Greek and *civitas* in Latin) means both the city, the civic body and citizenship.”<sup>4</sup>

The thesis describes the history and evolution of a concept, but as the discussion above shows, this concept has been applied to various disciplines and contexts, which has made it sometimes hard to understand its usage. Does being a citizen of a monarchy mean the same thing as being a citizen within a democracy? Is someone who considers herself/himself a “world citizen” simply ignorant of what citizenship actually means? How can there be “good citizens” if citizenship is merely a descriptive bond rather than a prescriptive judgment? All of these questions show the potential ambiguities that come with the modern use of “citizenship” or “citizen”, but they are not immediately relevant to the purpose of this study; they are secondary issues that only become relevant after fully understanding the concept described throughout this thesis.

To many people, citizenship carries political/legal connotations, but out of the four meanings suggested above, “the latter three of these meanings have emerged especially over the last several centuries, with the last two probably most prevalent in the last 100 years.”<sup>5</sup> Furthermore, this has led to “a paradox that strikes at the very heart of citizenship. Interest in the subject and status is now greater than it has been for some two hundred years or more; yet at the same time, it might appear to be disintegrating as a coherent concept for the twenty-first century.”<sup>6</sup> But it is precisely

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<sup>3</sup> Smith, Rogers M. “Modern Citizenship”

<sup>4</sup> Magnette, Paul. *Citizenship: The History of an Idea*. p. 8

<sup>5</sup> Smith, Rogers M. “Modern Citizenship” p. 106

<sup>6</sup> Heater, Derek. *A Brief History of Citizenship* p. 143



for the sake of clarity and coherence that Chapter One will develop its own coherent concept and theory of citizenship based on historical analysis. As this thesis will show, citizenship of any kind and at any level is defined as special type of bond/membership along with the protection of particular rights and the fulfillment of duties that sustain this membership/bond. Citizenship as a concept describes this mutual bond vertically (i.e. individual-group) and horizontally (i.e. individual-individual), regardless of what kind of group is being described (political, social, ideological, etc). To question this point would be a thorough and fundamental misunderstanding of the very concept of citizenship. Wherever there are individuals and communities, there can be a binding status of membership or an exclusionary status of nonmembership and therefore a [formalized] status of citizenship and non-citizenship.

### Citizenship ~ the political/legal status of persons

Having established that citizenship is a status of identity and a bond between an individual and a community, it is worth noting that this thesis will ultimately focus on its aforementioned usage/understanding as “the political/legal status of persons.” In his monograph of the idea of citizenship, Paul Magonette argues that there are two features that “form the continuous basis, and permanent structure of citizenship”: exclusion and legality.<sup>7</sup> Essentially this point contends that all political societies define their citizens through inclusion/exclusion and then they legitimize this political definition by implementing laws that provide and protect the freedom of their citizens. Hence, political citizenship and legal citizenship become identical.

In the world of politics, the status of ‘legal/political membership’ is unsurprisingly called *citizenship*, while in the context of international relations this term has become synonymous with *nationality*. But given that the word is politically divided into nation-states and these have different conceptions of citizenship, there are as many legal-political nationalities/citizenships as there are nations. For this reason, Chapter Two will study the synonymy between these concepts from the international legal perspective by analyzing how the concept of nationality (i.e. national citizenship) is defined and used to settle disputes at the international level. Various international disputes have sought to mediate and establish an international

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<sup>7</sup> Magonette, Paul. *Citizenship: the History of an Idea*. p. 182

understanding of “nationality” in order to solve conflicts between various national citizenships and to set precedents for future disputes. This focus on the international approach to nationality will be much more efficient and promising than trying to find commonalities between the national citizenship laws of some 195 countries.

Finally, Chapter Three will take the case of European Union Citizenship in order to analyze the link between citizenship and nationality from the same international legal perspective [similar to Chapter Two]. It is important to keep in mind throughout the analysis that the main focus is to study the relationship between citizenship and nationality. The non-national citizenship of the European Union makes the issue particularly interesting and it is the perfect case to study their relationship because placing the citizenship of an international organization and its functions into the historical context of what “citizenship” itself is/does will either draw a line between citizenship and nationality or it will render the concept of “EU citizenship” as equally imaginary and unfitting to the real world as “world citizenship.”

## Methodology and Disciplines

*“How does ‘European Union Citizenship’ fit within the historical evolution of citizenship?”*

That is the driving question behind the thesis. But answering this question will require various preliminary steps as described in the section above. The first and foremost step is providing a definition of citizenship that is grounded on historical facts. Naturally, this entails the use of historical analysis and the best method for such an endeavor is *etymology*. Etymology is the study of the origins of words and the way in which their meanings have changed throughout history.<sup>8</sup> Interestingly, the very word “etymology” derives from the Greek term *ἐτυμολογία* (*etymologia*), which is made up of the root *etymon* (meaning “true sense”) and the suffix *logia* (“the study of”).<sup>9</sup> Thus, etymology is “the study of true sense” and it is for this reason that it becomes the perfect candidate to explore what the true sense of legal/political “citizenship” is and how that has evolved throughout history.

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<sup>8</sup> The New Oxford Dictionary of English (1998) p. 633

<sup>9</sup> “ἐτυμολογία, ἔτυμον.” In Liddell, Henry George; Scott, Robert. *A Greek–English Lexicon at the Perseus Project*.

As Chapter One will show, the true meaning of a word does not derive from the way it is written or perhaps even the language that it originated in. The Greek *politeia* and the Roman/Latin *civitas* come from different languages and cultures, but they both denote the same *idea*, and thus they may be said to have the same sense. This idea will be traced from its roots until modern times in order to develop a coherent concept of *citizenship*, which eventually became synonymous with *nationality*. Once this relationship has been established, it should be clear how citizenship and nationality acquired the same “true sense”, at which point the thesis will shift its focus to the second discipline: international law.

Currently, the modern world is shaped by an *international* system of *nations*, and individual persons are considered *nationals* through the bond of *nationality*. This makes the legal concept of nationality a fundamentally important factor that ties everything together and is perhaps why it has remained under the exclusive control of sovereign nation-states. But this sole jurisdiction does not mean that the concept has been entirely avoided by international law. Quite the contrary, throughout the 20th Century it became necessary for international courts and tribunals to develop precedents and a common international understanding of what nationality is and how the interplay between various national citizenships affect the relationship between individuals and States. Every type of interaction from individual-individual or individual-State to State-State can be adjudicated differently depending on the nationality of the persons, objects or transactions involved. For example, a dispute between two individuals with the same nationality is completely under domestic jurisdiction while an identical dispute becomes a matter of international law if different nationalities are involved.

It is for these reasons that an international legal understanding of nationality in the 20<sup>th</sup> Century becomes crucial in order to understand citizenship in the 21<sup>st</sup> Century. To this end, Chapter Two retains a combination of the two main disciplines (history and international law) by chronologically analyzing the cases and verdicts that took place during the early 1900s. But Chapter Three steps away from the chronological analysis in order to focus on purely legal aspects and implications of EU citizenship. In order to properly understand what Citizenship of the European Union is and does, it is important to look at the most prominent cases and how these relate to previous cases and principles of EU law and international law. For this

reason, European Law is a third discipline that is used, but it is important to remember the priorities of this thesis and the order of precedence. This study is *not* an analysis of EU Law or the direct interplay between EU Law and international law. The first and foremost focus of this thesis is citizenship and its historical evolution, which then requires delving into international law and subsequently into as much EU Law as necessary for the historical focus. A different focus such as “The Law of EU citizenship and its foundations” might entail primary attention on EU Law followed by discussion of EU political structure and perhaps *some* history afterwards, but that is why it’s essential to keep in mind the order of priorities within this research.

Thus, it can be said that one limitation of this thesis is a limited discussion of EU politics and the peculiarities of EU Law. Nevertheless, the reader can be assured that the best sources have been selected for quoting, other sources have been read as background research, and the results are valid and sound.

# CHAPTER ONE: CREATION & EVOLUTION OF CITIZENSHIP

## *Sparta (500 BC) to League of Nations (1920)*

From the outset, it is important to note that citizenship has been described as a predominantly Western concept.<sup>10</sup> Therefore, the focus of this research is primarily concerned with and limited to the evolution of it *as a Western legal and political idea*. This means that other regions such as Asia or the Middle East are not directly included in the analysis and conclusions drawn here may not be as relevant to their citizens. Given this “western” focus, it is perhaps not surprising to find that most historical accounts trace the roots of “citizenship” back to the classical cultures of ancient Greece and Rome.<sup>11</sup> Throughout its history, citizenship has emerged and reemerged across different regions and within various political climates such as democracies, republics and monarchies, but the Greco-Roman roots have always remained at least below the surface. Some authors progressively built upon their immediate predecessors [without returning to these roots], but it is largely accepted within the literature that eventually all roads lead to Rome and Ancient Greece.

## 1. Ancient Greece

### 1.1 Sparta (5th Century BC)

It has been suggested that the term “*politeia*” (πολιτεία) was invented in Book IX of **Herodotus’** *Histories* around 460 BC.<sup>12</sup> In proper context, the term referred to a full-fledged citizenship of Sparta, which is to say that it entailed political inclusion *and* participation. Indeed, “[s]ubsequent history would confirm the dual meaning of this first use: *belonging* and *participation*, belonging to a community that is defined by its capacity for action”<sup>13</sup>. Much like subsequent variations of “citizenship”, this term did not apply to a slave, nor to a mere local resident, or even a woman or child. Some suggest that, in today’s language, the usage

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<sup>10</sup> Zarrow, Peter. *Imagining the People: Chinese Intellectuals and the Concept of Citizenship, 1890-1920*, edited by Joshua Fogel and Peter Zarrow. (Armonk, NY: M.E.Sharpe, 1997) p. 4

<sup>11</sup> Heater, Derek. *A Brief History of Citizenship*. (New York City: New York University Press, 2004); Magnette, Paul. *Citizenship: The History of an Idea* (Colchester, UK: European Consortium for Political Research Press, 2005); Burchell “Ancient citizenship and its Inheritors”, Smith “Modern Citizenship”

<sup>12</sup> Magnette, Paul. *Citizenship: The History of an Idea* p. 9; Bordes, Bordes, Jacqueline. *Politeia dans la pensée grecque jusqu’à Aristote* (Paris, Les Belles Lettres, 1982) p. 19

<sup>13</sup> Magnette, Paul. *Citizenship: The History of an Idea* p. 10 Emphasis added.

of *politeia* would entail being a “citizen/national/royal” of Sparta<sup>14</sup> but the precise connotations of this term and its implications must be properly understood. Citizens of Sparta, also called *Spartiates*, were the so-called “true citizens” of the city-state. They were exclusively male and heavily trained in military life ever since childhood.<sup>15</sup> They referred to each other as *homoioi*, which means ‘those who are alike/equals’, and this already entailed a sense of exclusion [of *non-homoioi*] that is often considered a key component of what citizenship is. Two other classes of inhabitant were present in Spartan society: the *perioikoi* (merchants) and the *helots* (workers, slaves). Perioikoi were technically free but did not enjoy the status of citizens and for the most part they lived in outlying towns.<sup>16</sup> Meanwhile, the helots worked the land under threat of death, which was largely due to the fact that homoioi/Spartiates were “economically utterly dependent on slave labour” because they were required to spend all of their time governing and defending the city.<sup>17</sup> The main lesson to be drawn from Sparta is that citizenship was identical to military and political duties. A young man [and only men] did not become a citizen until he completed his military training, was elected into a mess (communal hall) and began paying mess dues; failure to fulfill any of these activities would lead to a loss of citizenship, which could not be regained.<sup>18</sup>

Perhaps the two most important and enduring features of this ancient citizenship were related to virtues and principles. The former were understood through the term “*arete*” which referred to the “civic virtue” that Spartiates were required to have. This virtue entailed a high regard and respect for Spartan laws and way of life<sup>19</sup> and was best exemplified by citizen-soldiers’ unwavering courage as well as loyalty and deep commitment to duty. Meanwhile, the principles are often attributed to **Lycurgus of Sparta** (dating as far back as the 9th Century BC) and the Lycurgan Constitution which “establish[ed] what became perennial principles of citizenship... citizens should exist in conditions of basic equality with each other; they should have a keen sense of civic duty; they should participate in the political

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<sup>14</sup> Ibid. p. 10

<sup>15</sup> Heater, Derek. *A Brief History of Citizenship* p. 8

<sup>16</sup> Cartledge, Paul. *The Spartans: An Epic History*. Macmillan, 2002. p. 67

<sup>17</sup> Heater, Derek. *A Brief History of Citizenship*. p. 8

<sup>18</sup> Ibid. p. 10

<sup>19</sup> Ibid. p. 10-11

affairs of their state; and they should be ready to defend their country.”<sup>20</sup>  
In short: *citizenship was a status based on principles of equality and civic virtue and demanded the fulfillment of civic duties through military and political participation.*

## 1.2 Athens (5th Century BC)

At around the same time in another famous Greek city-state, the laws of **Solon** (638-558 BC) began the reformation of Athens, which has been attributed as the foundation of Athenian democracy.<sup>21</sup> One could begin discussion of how citizens started being listed into *demes* (townships) which were grouped into *trittyes*, which in turn made up the Council of Five Hundred and prepared the work of the *ekklesia* (Assembly) in order to rule the *polis* (city). However, this would lead us to the history of *demokratia* (democracy), a word which appeared around 450 BC when citizens “probably made up only one-tenth of the total population of Athens”.<sup>22</sup> Although citizenship, democracy, and their history are closely intertwined, the focus here is primarily on citizenship and the abstract concept referring to the relationship between individuals, groups and polities. Solon did not speak of ‘citizens’ but rather ‘Athenians’ and the word *politeia* would not appear until a century and a half later; but he can nonetheless still be attributed with the birth of Athenian citizenship.<sup>23</sup> Therefore the main takeaway from Solon’s reformation is that “an equal status was in principle awarded to every Athenian on a strictly formal basis and that he was endowed with real powers of political and legal participation [which] undoubtedly explains why modern historians date the birth of a ‘fully developed citizenship’ to the end of the sixth century BC.”<sup>24</sup> In conclusion, the principles that underlie Athenian democracy are also at the heart of citizenship and can be summarized as: ideal of equality, enjoyment of liberty and belief in participation (all of which are closely connected in the Greek mind to freedom of thought, speech and action).<sup>25</sup> Thus, despite the new connotation of freedom, we once again find the origins of

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<sup>20</sup> Ibid. p. 13

<sup>21</sup> Stanton, G.R. *Athenian Politics c800–500BC: A Sourcebook*, p. 76.; E. Harris, A New Solution to the Riddle of the Seisachtheia, in *The Development of the Polis in Archaic Greece*, eds. L. Mitchell and P. Rhodes (Routledge 1997) p. 103

<sup>22</sup> Magnette, Paul. *Citizenship: The History of an Idea* p. 13

<sup>23</sup> Sealey, R. ‘How citizenship and the city began in Athens’; Manville, P. B. *The Origins of Citizenship in Ancient Athens*. p. 156

<sup>24</sup> Ibid. p. 13. Also making reference to Manville, P. B. *The Origins of Citizenship in Ancient Athens*. p. 198 in single quotes.

<sup>25</sup> Heater, Derek. *A Brief History of Citizenship*. P. 24

citizenship as: *a Greek city-state development which culminated in the 5th Century BC with a definition that entailed legal status, principles of equality and the duties of political participation.*

### 1.3 Plato & Aristotle (4th Century BC)

Naturally, no discussion of Ancient Greece would be complete without mentioning Plato and Aristotle. Around the 4th Century BC, both of these authors referred to and built on the Spartan idea of citizenship in one way or another. On the one hand, it is well-known that **Plato's** ideal Republic also divided the citizenry into [three] classes: guardians (to govern), soldiers (to defend), producers (to work); consequently he seemed to approve of the Spartan-like division of labor where “the fighting class will abstain from any form of business, farming, or handicrafts”.<sup>26</sup> But on the other hand, all of these classes were recognized *citizens* of the polity and hence there was a certain inherent aspect of inequality, all of which is certainly in disagreement with Spartan citizenship. Furthermore, despite permitting this inequality, Plato’s “prime objective is a stable and harmonious polity [with] friendly and trusting relationships between citizens.”<sup>27</sup> This entailed the education of good citizens who were self-controlled and law-abiding, leading to the “perfect citizen who knows how to rule and be ruled as justice demands.”<sup>28</sup> In short, Plato was more focused on the State and society as a whole, and it’s easy to see here that Plato’s notion of citizenship valued education in justice and civil concord (comradery) as civic virtues rather than war [the way Sparta did].

Conversely, **Aristotle** provided a more direct commentary on citizenship itself. But he was also critical of the Spartan way of life. “The Spartans... did not know how to use the leisure which peace brought; and they never accustomed themselves to any discipline other than that of war.”<sup>29</sup> He observed that, rather than their desired equality, Spartan way of life led to a division of rich and poor citizens<sup>30</sup> and both of these led to the Spartan’s demise. In other words, he seems to have been quite critical of Spartan citizenship, but he also took a different approach to the topic

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<sup>26</sup> Plato, *The Republic*, VIII. 546

<sup>27</sup> Heater, Derek. *A Brief History of Citizenship*. p. 15

<sup>28</sup> Plato, *Laws*, I. 643

<sup>29</sup> Aristotle, *Politics*, 1271b

<sup>30</sup> Heater, Derek. *A Brief History of Citizenship*. p. 16



from his mentor (Plato). One of the key differences between the two is that Plato focused on drafting a normative blueprint of what citizenship *should* be while Aristotle sought a positive analysis and exposition of the principles that underlay it.<sup>31</sup> Given that he was born in the Greek region of Macedonia but lived in Athens, Aristotle was also among the first to note the issue of foreigners as well as disenfranchised citizens, the young, and the old.<sup>32</sup>

In *Politics*, Aristotle acknowledges the complexity of the very endeavor that this thesis is seeking: “The nature of citizenship, like that of the state, is a question which is often disputed: there is no general agreement on a single definition.”<sup>33</sup> One of the biggest reasons for these disputes over definition is precisely because of interrelated terms and the various conceptions that one can have regarding how these terms are interrelated. For example, the civil concord that Plato spoke of (i.e. friendly and trusting relationships between citizens) was defined by Aristotle as “something more than agreement in opinion... when the citizens agree about their interests, adopt a policy unanimously and proceed to carry it out.”<sup>34</sup> These are very similar conceptions, though they seem to place a slightly different value on feelings vs. action. Nevertheless, both of these philosophers considered this concord to arise from the aforementioned idea of *arete* (civic virtue), which must be cultivated through education according to both of their philosophies<sup>35</sup>. Once again, Aristotle spoke more explicitly about this term and its fourfold content consisting of: temperance (self-control and avoidance of extremes), justice, courage (including patriotism), wisdom (prudence, capacity for judgment).<sup>36</sup> To discuss these in depth would lead us into a philosophical discussion beyond the scope of this thesis, but there are two more fundamental features of Greek citizenship that are crucial to understand: scale & meaning.

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<sup>31</sup> Heater, Derek. *A Brief History of Citizenship*.

<sup>32</sup> Magonette, Paul. *Citizenship: the History of an Idea* p. 19;

<sup>33</sup> Aristotle, *Politics*, 1275a

<sup>34</sup> Aristotle, *The Ethics of Aristotle*, IX. 6

<sup>35</sup> For example, Plato: “What we have in mind is *education in virtue*, a training which produces a keen desire to become a perfect citizen who knows how to rule and be ruled as justice demands” Plato, *Laws*, I. 643. And Aristotle: “It is true that the citizens of our state must be able to lead a life of action and war; but they must also be even more able to live a life of leisure and peace. [...] These are the general aims which ought to be followed in the *education of childhood* and of the stages of adolescence which require education” (Aristotle, *Politics*, 1333a-b). Emphasis added

<sup>36</sup> Heater, Derek. *A Brief History of Citizenship*. p. 19

## 1.4 *Politeia* - Scale and Meanings

While it is true that the Greek notion of citizenship is almost identical to the modern notion of nationality, it is imperative to remember one limiting, human factor. The origins of *politeia* within city-states can be placed in high contrast to the *nationality* of most nation-states by virtue of **scale** and what's called the *imagined community*. Benedict Anderson defines a nation as “an imagined political community - and imagined as both inherently limited and sovereign.”<sup>37</sup> Although he acknowledges that “in fact, all communities larger than primordial villages of face-to-face contact (and perhaps even these) are imagined”, he stresses that “the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion.”<sup>38</sup> But it is precisely here that we return to the concept of citizenship and the issue of scale. Aristotle acknowledges this problem by stating “Ten people would not make a city and a hundred thousand would exceed its natural proportions”<sup>39</sup> and he makes this observation while on the topic of civil concord. While defining citizenship, Aristotle does not elaborate on the optimum size of a polis, but it has been pointed out that “direct participation in civic affairs, the underlying principle of Aristotle’s definitions, presupposes a small state. He is absolutely insistent on this point.”<sup>40</sup> And he is not the only one to make this point. “The state that emerges from the *Republic* is Plato’s unattainable vision of perfection. [But] He sketched a more realistic model in the *Laws*. The size of his proposed *polis* (city-state) in this work is quite precise, namely, 5,040 citizen households.”<sup>41</sup> Thus we see that the two most prominent and widely-recognized original sources of citizenship (and arguably much of Western political ideas) were adamant on the small size of the state. This was precisely because “citizens must know each other, live together in a tightly-knit community. Only then can they know what is best for all and reach just judgments.”<sup>42</sup> Although the bond between citizenship and nationality will not be established until the end of this chapter, this fundamental issue of scale is important to remember because it alludes to the origins

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<sup>37</sup> Anderson, Benedict. *Imagined Communities*. p. 6

<sup>38</sup> *Ibid.* p. 6

<sup>39</sup> Aristotle, *The Ethics of Aristotle*, IX. 10

<sup>40</sup> Heater, Derek. *A Brief History of Citizenship*. p. 18

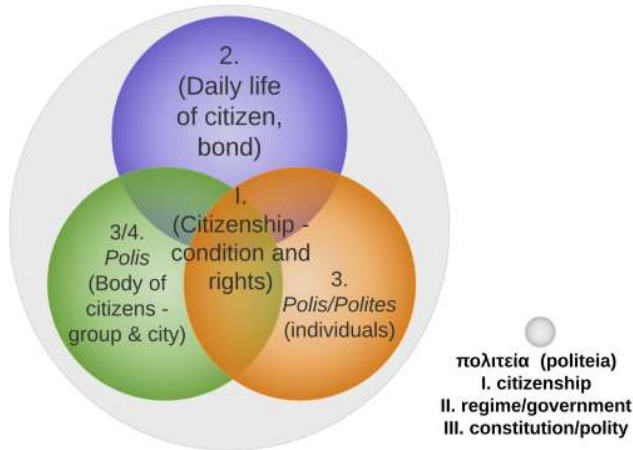
<sup>41</sup> *Ibid.* p. 15

<sup>42</sup> *Ibid.* p. 18

of citizenship being closely tied to a civil bond that requires a small community where citizens can participate and establish common identities and interests.

This issue of scale also leads us to the need to conclude this introductory section with a linguistic note regarding the **meaning** of *politeia*. Any study on citizenship must touch on the relationship between 1) the citizen/civilian, 2) the group that is the citizenry/civilization, 3) the polity/territory, and 4) the citizenship/civility or civic virtues that bind these all together. Understanding which of these is being defined or referred to can be as crucial as it is confusing. To show this, we can use the example of another term that is also related to individuals and communities: commune. One could speak about “a commune where people commune” and be able to conclude that one is a noun and the other a verb. But one can also speak about “a citizenship that requires citizenship” and encounter ambiguities because their usage as nouns makes it unclear what the term refers to in each instance. It may denote a legal or political status of *citizen/national*, a membership/bond with a geographical or ideological *citizenry* [which need not necessarily political] (e.g. *world citizen*) or a virtue (*civility*). This is precisely what is peculiar about *politeia*: it refers simultaneously to so many of these ideas for which we have different terms today. For this reason, it will be helpful to develop a visual aid throughout the analysis.

The *Perseus Project* by Tufts University provides a digital library of classics works and collections covering the history, literature and culture of the Greco-Roman world as well as a research tool understand ancient terminology. Their dictionary provides the following understandings for *politeia*:



### πολιτεία<sup>43</sup>

I. condition and rights of a citizen, citizenship

2. the daily life of a citizen

3. (concrete) body of citizens

4. (= Lat.) *civitas* in geographical sense

II. government, administration, course of policy

2. tenure of public office

III. civil polity, constitution of a state, form of government

The diagram above has been created in order to facilitate understanding and this visualization will be helpful throughout the entire thesis. Definition I “condition and rights of a citizen” (i.e. “citizenship” today) can be found at the center of the diagram. To the Greeks, it was not its own distinct concept but rather synonymous with definitions I.2, I.3 and I.4, which are the purple, orange and green circles respectively, and therefore it is the intersection of these rather than its own separate bubble. Definition I.2 can be understood as the aforementioned *arete* or *civil concord* that bound citizens together. The reason why definition I.3 is divided into two while definitions I.3 and I.4 can be grouped into one concept/circle is worth noting. Unlike the Romans and their Latin term, for the Greeks, the concept of citizenship was most closely related to the city and the citizenry rather than the individuals, which is why *politeia* (citizenship) and *polites* (citizen) are derived from *polis* (city)<sup>44</sup>. This is why *polis* may refer to the geographical city (definition I.4) or the concrete body of citizens (definition I.3) which are identical in the diagram (green circle) but also why there is a separate bubble (orange) designating “individuals” even though [to the Greeks] *one* individual (*polites*) was inseparable from his whole *polis* (whether this is understood as the city or the citizenry). This linguistic quirk also underlines one crucial feature of ancient Greek citizenship: sovereignty.

<sup>43</sup> *Perseus Digital Library*. Ed. Gregory R. Crane. Tufts University  
<http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.04.0057:entry=politeia/a>

<sup>44</sup> Magonette, Paul. *Citizenship: the History of an Idea*. p. 19

**Sovereignty** is a concept that will arise throughout the history of citizenship but will play a more prominent role in Chapters Two and Three of this thesis. However, it is important to point out the practical synonymy between these terms stemming from the very dawn of citizenship. In referencing previous work on citizenship, Paul Magnette argues that from its earliest days, *politeia* meant ‘sovereignty’ (Greek *arche*) as well as the ways in which citizenship was formalized (‘constitution’; definition III above) and the corresponding government (‘regime’; II above) and even the ‘civic culture’ consisting of laws and morals (*nomoi* and *topoi*).<sup>45</sup> This final understanding was referred to by Isocrates as the ‘soul of the city’<sup>46</sup>, by Aristotle as ‘the life of the city’<sup>47</sup> and is summarized in the 4-layered definition I above. Returning to the issue of scale, all of these definitions of *politeia* also explain why the city-state had to be small enough to allow the citizens to be *one* community, one citizenry, one people, one government, and in short: *one sovereign*. The evidence for this is also plenty. Among the greatest and most influential philosophers of ancient Greece, it has already been pointed out that the perfect citizen should be wise enough to rule and be ruled as justice demands.<sup>48</sup> Meanwhile, Aristotle is perhaps even more famous for his statements that “citizens [...] are all who share in the civic life of governing/ruling and being governed/ruled”<sup>49</sup> and that “one who has the right to participate in deliberative or judicial office is a citizen of the state [...], and a state is a collection of such persons sufficiently numerous, speaking broadly, to secure independence of life.”<sup>50</sup> Thus the identity/unity between the citizen, the citizenry and sovereignty can also be found in Aristotle. Finally, **Thucydides**, in admiration of Pericles, quotes the latter as declaring of Athenians that “each single one of our citizens, in all the manifold aspects of life, is able to show himself the rightful lord and owner of his own person.”<sup>51</sup> All of these show the interdependence and perhaps even the *unity* of the concepts of citizen, city-state, and sovereignty that were inherent within the Greek *politeia* that translates into what we now understand as *citizenship*.

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<sup>45</sup> Ibid. p. 14-16

<sup>46</sup> Isocrates, *Panathenaicus* 138; *Areopagiticus* 9.

<sup>47</sup> Aristotle, *Politics*, IV, 1295b1,

<sup>48</sup> Refer to note twenty-eight above.

<sup>49</sup> Aristotle, *Politics*, 1283b, different terminology used depending on the translation

<sup>50</sup> Aristotle, *Politics*, 1275b

<sup>51</sup> Thucydides, *The Peloponnesian War*, p. 119

But *politeia* did not entirely pass on to other languages and this is already where the history of citizenship begins to get complicated.<sup>52</sup> This was one main reasoning behind the need for the preceding linguistic breakdown. Some point out that the only Latin terms derived from *politeia* are *politicus* (“governing”) and *politia*, which referred to the specific ideal polities by Greek philosophers (i.e. Plato’s Republic and Aristotle’s Politeia).<sup>53</sup> And yet this is perhaps the most fascinating example of the complicated evolution of *politeia*. The title of Plato’s most famous political work was originally *Πολιτεία* (Politeia) in Greek, but in Latin it sometimes became *De Re Publica*.<sup>54</sup> Thus, it seems that “politia” referred to his and Aristotle’s conceived polities, but Plato’s main work was *De Re Publica*, which is not the same as *res publica* (“public affairs”), which often meant the same *res populi* (“affairs of the people”)<sup>55</sup> and was sometimes used interchangeably with *civitas*.<sup>56</sup> All of this confusion is precisely what leads into the discussion of the alternative ancient source of citizenship: Rome.

## 2. Rome

### 2.1 Republic (5th & 4th Century BC)

As we have seen, for the Greeks the ideas of citizenship and the citizen were derived from and secondary to the city. For the Romans it was the opposite. Latin gave priority to the citizen (*civis*) and from him came the concepts of city and citizenship (both *civitas*).<sup>57</sup> This comparison between the Greek and Latin/Romans, along with their simultaneous chronological development, provides a striking juxtaposition. These classical cultures are often attributed as the roots for many Western ideas, especially for political concepts that are at the core of our democracies and republics. And yet, the Greek system of *demokratia* was predicated on the notion that the citizenry/citizens are ultimately *derived members of a polis*, while the Roman *res publica* was founded on the understanding that a citizen *defines a civitas*. Thus, both of these conceptions are credited for what we now understand as “citizenship”

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<sup>52</sup> Magnette, Paul. *Citizenship: the History of an Idea*. p.19

<sup>53</sup> Ibid. p 19

<sup>54</sup> Henri Estienne (ed.), *Platonis opera quae extant omnia*, Vol. 2, 1578, p. 327.

<sup>55</sup> Burchell “Ancient citizenship and its Inheritors” p. 93

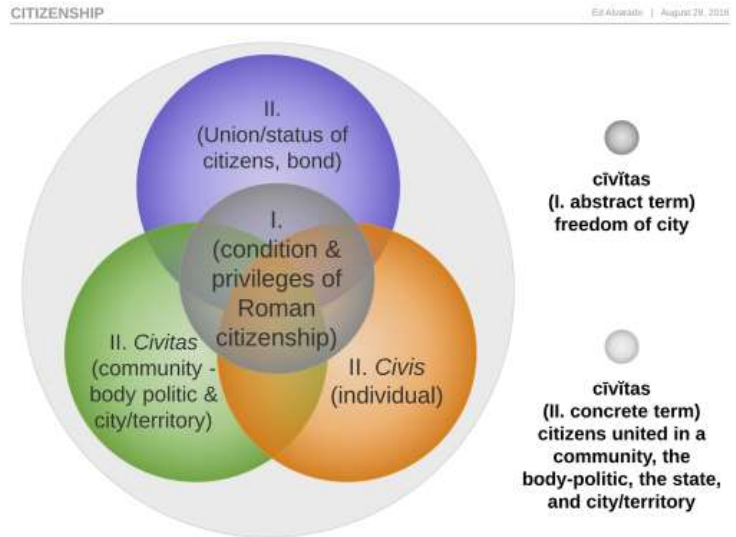
<sup>56</sup> Magnette, Paul. *Citizenship: the History of an Idea*. p. 29-30, footnote 36.

<sup>57</sup> Magnette, Paul. *Citizenship: the History of an Idea*. p19

despite the fact that they are centered on fundamentally and diametrically opposing views on whether a *community* is ultimately derived from individuals or vice versa. For this reason it is now necessary to explore the Latin/Roman *civitas* based on its own merits:

### **cīvitas**<sup>58</sup>

I. *Abstr.*, the condition or privileges of a (Roman) citizen, citizenship, freedom of the city  
 II. *Concr.*, the citizens united in a community, the body - politic, the state, and as this consists of one city and its territory, or of several cities, it differs from urbs, i.e. the compass of the dwellings of the collected citizens



Because the nature of citizenship [necessarily] requires these three items, this diagram uses the same colors as in *politeia* to designate the individual (orange), group (green) and their bond (purple). Rather than providing a linguistic explanation of the terms in the same way that closed the previous section, it will be better to return to the historical timeline. But it will be important to keep in mind that some of these terms did not have a specific and separate word to designate it at the time (e.g. the bond in purple) and it is because of our *current* language that we may label them as separate.

Unlike Lycurgus for the Spartans and Solon for the Athenians, no individual can be credited as the primordial source of Roman citizenship. However, it has been suggested that one of the catalyst dates that sparked the development of Roman citizenship is 494 BC when the plebeians marched out of Rome and threatened revolt against the patricians, which led to the appointment of officials to safeguard plebeian

<sup>58</sup> *Perseus Digital Library*. Ed. Gregory R. Crane. Tufts University  
<http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.04.0059%3Aentry%3Dcivitas>

interests through the newly-established **Tribune of the People/Plebs**.<sup>59</sup> This eventually allowed all Romans to enjoy the status and rights of Roman citizenship and it is important to note that this type of citizenship differed from the Greek particularly because it was to be recognized despite the natural boundaries of the city<sup>60</sup>; in other words, the citizen of Rome was a highly respected and non-geographically-limited status, as evidenced by the saying “*Civis Romanus sum*” (“I am a Roman citizen”). It is perhaps because of this coveted status that the expansion of Roman dominion did not immediately lead to the expansion of citizenship status and its privileges.

Although some accounts differ, the expansion of citizenship began in either 390 BC towards the Etruscan Town of Caere after their help against the Gauls<sup>61</sup> or in 381 BC to the Latin city of Tusculum, which was surrounded by Roman territory and becoming hostile.<sup>62</sup> Nonetheless, this was the first step in granting a status of *civitas* to those outside Rome, but it is essential to understand that in both of these cases, residents were allowed to maintain their local form of government and the citizen status that was awarded to them was ‘*civitas sine suffragio*’. It is here that we begin seeing a separation of citizenship into two types of citizenship through the emergence of a type of “second-class citizenship”.<sup>63</sup> This also explains the distinction in the above diagram between *civitas* as a concrete term (outer light grey circle) and *civitas* as an abstract term that designates the freedom and privileges of a Roman citizen (inner dark grey circle). In brief, the status that was granted to these territories described an allegiance to Rome and membership within its political structure rather than the ‘true’ *civitas* of Rome. But what did Roman *civitas* entail?

The *civitas romana* meant that the individual lived under the guidance and protection of Roman law. This Roman law ensured the protection and fulfillment of equal rights and duties, which brings us once again to the roots of citizenship. As with the Greeks, Roman citizenship was defined by rights and duties that stood as evidence of full membership status. Also in similar fashion, Roman duties included

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<sup>59</sup> Heater, Derek. *A Brief History of Citizenship*. p. 30

<sup>60</sup> Magonette. *Citizenship: the History of an Idea*. p. 19

<sup>61</sup> Magonette. *Citizenship: the History of an Idea*. p. 20

<sup>62</sup> Heater, Derek. *A Brief History of Citizenship*. p. 33

<sup>63</sup> This distinction is still evident today in some countries such as the United States which distinguishes citizens from nationals (e.g. Guam, American Samoa, U.S. Virgin Islands, Puerto Rico) or the German distinction between *Staatsangehörigkeit* and *Staatsbürgerschaft*.



military service and a system of taxation (which was largely over inheritance and property)<sup>64</sup>, though theirs was famously-complicated. However, it is here that we find another crucial distinction between Greeks and Romans: political participation was not a duty but rather a *right*. This simple difference is at the very core of what makes these two understandings of citizenship so vastly different. As the previous section showed, Greeks believed that political participation was a *duty* and failure to fulfill this would result in loss of citizenship. Conversely, the status that Romans awarded many of their provinces (the aforementioned *civitas sine suffragio*) was precisely *citizenship without suffrage*. Although the Greeks did not grant political power/rights to every resident, they did demand it from all citizens, and noncitizens could not enjoy legal protections. Meanwhile the Roman *civitas* carried legal protections under Roman law even in cases where political rights were not included in this status.

In summary, *civitas* was a two-tiered concept that included a more abstract, first-class *civitas romana* and a more concrete term for political allegiance which included the former as well as all second-class citizenships (*civitas sine suffragio*, *socius iniquo foedu*, *Latinus*, etc).<sup>65</sup> Only *civitas romana* guaranteed all the rights possible under Roman law, which have been classified in various ways by various authors. Some have categorized them as “civil, military, criminal and civic”<sup>66</sup> while others focus on public rights versus *jus privata* (private).<sup>67</sup> However it is the latter distinction that makes it more clear which rights were political and which rights were legal. Public/political rights included: the right to vote, right to sit in assemblies, right to become magistrate; private rights included: right to marry into another citizen family, right to trade with another citizen, lower taxes than non-citizens, and protection by trial against authority. This modern distinction between legal and political rights can also be seen today and it summarized in Table 2 of Appendix 1. Another important note is the *staus familiae* separation of *civis optimo iure* (“citizens by right”) and citizens with legal *capacity* [which was based on relation to a full citizen and applied to wives, children, freed slaves and ‘clients’]<sup>68</sup>. The former was

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<sup>64</sup> Heater, Derek. *A Brief History of Citizenship*. p. 31

<sup>65</sup> Magonette. *Citizenship: the History of an Idea*. p. 21

<sup>66</sup> Ibid.

<sup>67</sup> Heater, Derek.

<sup>68</sup> Magonette. *Citizenship: the History of an Idea*. p. 22

the citizenship held by the *pater familias* while the latter is exemplified by the *filius familias*, a male citizen still under authority of the head of the family. The filius had commercial rights (*ius commercii*), he could marry (*ius conubii*), could obtain certain public offices (*ius honorum*) and take part in assembly decisions (*ius suffragii*) but could not own goods and slaves (*dominium*) or free slaves (*munissio*), establish a family cult, inherit or bequeath property.<sup>69</sup>

All of this shows the complexity of *civitas* and Roman law in general which adapted to the various expansions of the Roman Republic. Regardless of whether these complexities and adaptations are the result of or a reason for Roman expansion, there is no question that *civitas* also had to evolve and adapt as the Roman territory became larger. Another key date is **338 BC**. This marked the end of the Latin War and the abolition of the Latin league, which led to the extension of *civitas sine suffragio* to all of the Latin cities.<sup>70</sup> After this date, territorial expansions, jealousies over citizenship status, and the proliferation of citizenship “to a vast collection of heterogeneous communities and individuals undermined its centrality to personal identity”<sup>71</sup> The ‘Social War’ from 91 to 87 BC cost roughly 300,000 lives and was fought over allies of Rome who had not received citizenship; it resulted in the *lex Julia* in 90 BC which conferred citizenship on ‘probably hundreds of thousands throughout Italy’ which made “Roman citizenship [...] something like a ‘national’ status, by no means confined geographically to the city of Rome itself.”<sup>72</sup> Thus we arrive at the time of the Roman Empire.

## 2.2 Empire (1st Century BC to 4th Century AD)

The diffusion of civil wars that led to the fall of the Roman Republic and the rise of the Roman Empire also coincided with perhaps the greatest political thinker of Roman times: **Cicero** (106-43 BC). Naturally, this means that Cicero provided commentary on the topic of citizenship that is worth discussion. Furthermore “[Aristotle’s] concept of citizenship was transmitted via adherents of Stoic philosophy into Roman thinking on the subject, notably by Cicero. [...] Aristotle’s great corpus of work was rediscovered and revered in the Middle Ages, with the

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<sup>69</sup> Ibid.

<sup>70</sup> Ibid.; Heater, Derek. *A Brief History of Citizenship*. p. 33

<sup>71</sup> Burchell “Ancient citizenship and its Inheritors” p. 98

<sup>72</sup> Heater, Derek. *A Brief History of Citizenship*. p. 34

result that his ideas on citizenship shaped the writings of a number of political philosophers, including Thomas Aquinas and Marsilius of Padua.”<sup>73</sup> Therefore it seems clear that Cicero played a large role in 1) the development of Roman citizenship, 2) commentary of Greek citizenship, and 3) the translation and transmission of these into the Middle Ages and beyond.

In his critique of modern interpretations of ancient citizenship, Professor David Burchell points out that “For Cicero, civic activism was dangerous as well as laudable, disruptive as well as potentially liberatory. Civic heroes needed to be treated with kids’ gloves.”<sup>74</sup> His essay focuses on the misrepresentation that a distinction between active and passive citizenship is a unique feature of modern notions of citizenship. To begin with, he argues that “Modern scholars have staked a good deal on reclaiming what they see as the distinctively ‘republican’ political culture of ancient city-states. Yet ‘republicanism’ as a presumed doctrine about the nature of politics in the classical city, is a modern invention.”<sup>75</sup> This once again returns to the linguistic issue because *res publica* in Ciceronian Latin has many meanings, but ‘republic’ and ‘republicanism’ are not among them.<sup>76</sup> In terms of citizenship, the diagrams above show that *civitas* and *politeia* differ precisely in that *politeia*’s definitions II and III are no longer captured by *civitas*. Latin would use the term *constitutio* to refer to the “constitution/organization” or “form of government” of a city (i.e. *politeia*’s definition III) and the terms *res publica* and *res populi* for *politeia*’s definition II regarding the government’s course of policy.<sup>77</sup> Therefore the issue is not whether Cicero’s citizenship is closer to *republicanism* or *liberalism* (refer to Table 1 in Appendix 1), but rather how the citizen is connected to the citizenry. The best way to discuss this, along with active-passive citizenship will be to reconnect with the concept of *civic virtue*.

As noted above, civic virtue (*arete*) was a fundamental feature of *politeia* to both Spartans and Athenians.<sup>78</sup> Furthermore, according to both Plato and Aristotle, the *civil concord/comradery* required to harmoniously bind the citizens into a united

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<sup>73</sup> Ibid. p.21

<sup>74</sup> Burchell “Ancient citizenship and its Inheritors” p. 90

<sup>75</sup> Ibid. p. 93

<sup>76</sup> Schofield, Malcolm. ‘Cicero’s Definition of Res Publica’

<sup>77</sup> Magnette, Paul. *Citizenship: the History of an Idea*. p. 30, footnote 36.

<sup>78</sup> Refer to notes 10 and 26.

citizenry was derived from education on this *arete*.<sup>79</sup> Again, these concepts of civic virtue and civil concord are shown as the purple bubble describing a “bond” in both diagrams above and they existed in both classical cultures because they are a necessary “glue” to unite a *polites/civis/citizen* to a *polis/civitas/community*.<sup>80</sup> The equivalent term for civic virtue in Latin was *virtus* while civil concord was made up of the terms *dignitas* and *libertas*. One possible explanation for the separation of one Greek term into two Latin concepts might be the aforementioned fact that political participation was a Roman *right* rather than a Greek *duty* but these terms drive precisely at the heart of the active-passive citizen distinction.

Although the term could merit an entire essay by itself, *dignitas* was “a status- and gender-specific attribute” denoting the “political charisma” of “that special group of citizens who aspired to high political office”.<sup>81</sup> It consisted of: a good appearance (neither negligent nor affected); a careful gait (neither halting nor mincing, hurried nor listless); a finely calibrated mode of speech (neither loquacious nor curt, appropriate to the situation at hand); even one’s choice of house.<sup>82</sup> In short, this was the mark of the great, political men; and it is evident that these men were politically inclined and therefore active citizens. Conversely, the majority of the free male population were considered *privatus* (private citizen). This distinction leads Burchell to a fascinating discussion of the interplay between these types of citizen, whereby he argues that *libertas* (freedom) was a two-sided term that referred to the “positive freedom” of the active, great man and the “negative freedom” of the passive, small men. The main point of his essay is thus:

“Until recently historians of Roman citizenship, eager to follow in the footsteps of the Great Men, overwhelmingly stressed the political rights and duties of citizenship - usually monopolised by a small number of great citizens - to the exclusion of these ‘private rights’ (*iura privata*),

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<sup>79</sup> Refer to note 25 above.

<sup>80</sup> Once again, this is a fundamental and necessary feature of citizenship itself [as described in the introduction] and the strategic use of “polis/civitas/community” allows for any interpretation that seeks to bind citizenship with either a group or a territory (or both).

<sup>81</sup> Burchell “Ancient citizenship and its Inheritors” p. 95

<sup>82</sup> Cicero, M. Tullius. *De Officiis*, I. 126-139

rights which arguably formed the actual ‘core and heart’ of citizenship for ordinary Roman citizens and their legal dependents.”<sup>83</sup>

The upshot here is that, because of political participation being understood as a right rather than a duty, even the most ideal *civitas romanus* consisted of a divided citizenry of active-passive citizens. The civic virtue that manifested itself as civil concord in order to make a good Roman citizen became translated into two versions of freedom: one “positive freedom” (*dignitas*) to pursue “power and glory, position and prestige”<sup>84</sup> and one “negative freedom” (*libertas*) to protect all citizens from “extra-legal predation”<sup>85</sup>. In today’s terms, the best way to summarize and explain these two concepts would be to understand *dignitas* as *political rights* and *libertas* as *legal guarantees*<sup>86</sup>. Before providing a final summary and comparison of the Greek-Roman roots, there is one final note to be made on a concept that is also tied to freedom, namely: sovereignty.

As we saw at the end of the section on Greek citizenship, all of the great Greek philosophers lauded the **sovereignty** of the people.<sup>87</sup> The case of Rome and Cicero was no different. In a republic, a city where the law proceeds from a free people that is equal in liberties, freedom “does not consist in having a just master, but in having none.”<sup>88</sup> This also endorses the idea that citizenship entailed sovereignty. However, “one must keep in mind how much these general and abstract statements are rhetorical. Rome was not Athens, and if its constitutional theory gave all authority to the people, its institutional system did not.”<sup>89</sup> To show this, it is once again necessary to make a final breakdown/distinction of terms. The legal power that we currently understand as “sovereignty” was divided and encompassed in various Latin terms, which included: *potestas* (the power exercised by tribunes on behalf of plebeians)<sup>90</sup>, *auctoritas* (“an admitted primacy towards which other men could yield

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<sup>83</sup> Burchell “Ancient citizenship and its Inheritors” p. 96. Also making reference to Gardner, Jane. *Being a Roman Citizen*.

<sup>84</sup> Earl, Donald. *The Moral and Political Tradition of Rome*. p. 16

<sup>85</sup> Burchell “Ancient citizenship and its Inheritors” p. 96.

<sup>86</sup> This can once again be referenced to in Table 2 of Appendix 1 and the difference between *legal rights* and *political rights*.

<sup>87</sup> Refer to notes forty-five through fifty-one above

<sup>88</sup> Cicero. *De Republica, De Legibus*. II, p. 42

<sup>89</sup> Magnette, Paul. *Citizenship: the History of an Idea*. p. 24

<sup>90</sup> *Ibid.* p. 24

without loss of self-respect”<sup>91</sup> within the Senate<sup>92</sup>), *princeps* (‘first man’ - “indicating that the holder was first on the list of senators and was the first to be asked his opinion”<sup>93</sup>) and *imperium* (“the domain within which the jurisdiction of a ruler operated, be that civil or military, metropolitan or provincial, ‘republican’ or ‘imperial’”<sup>94</sup>). Although *imperium* was eventually the main power which the *Princeps* and [subsequently] the Emperor monopolized after the end of the Republic<sup>95</sup>, this plethora of terms stands as evidence of the breakdown of political power which shows that the people/citizens were never in practice the true, direct or sole sovereign/master of Rome [unlike Greece]. And thus we have finally the conclusion of this second source of citizenship. Before continuing with the subsequent development of citizenship up to the 20th Century, it will be useful to have summary of how the two classical roots of citizenship compare and contrast. This is important because all theories of citizenship that developed after this classical period were rediscoveries or reinterpretations of the Greek and/or Roman conceptions of citizenship.

### 2.3 *Politeia* & *Civitas*

Despite the undisputable influence that both Greek and Roman ideas had on the development of Western society, and the fact that they developed the idea of citizenship with similar units (i.e. the individual, the group and their bond) at roughly the same time, they did so with vastly different centers of focus (Greeks focused on the group while Romans focused on the individual). The peculiar results of their diametrically opposite approaches are worth pondering:

- Athenian *demokratia* derived an individual *polites* from the *polis* (city/citizenry), but each individual played a large role in the sovereignty of the State thanks to direct democracy. Therefore, political participation was understandably seen as a civic *duty*.

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<sup>91</sup> Burchell “Ancient citizenship and its Inheritors” p. 99; Adcock, F.E. *Roman Political Ideas and Practice*. p. 71-88, 79

<sup>92</sup> Magonette. p. 24

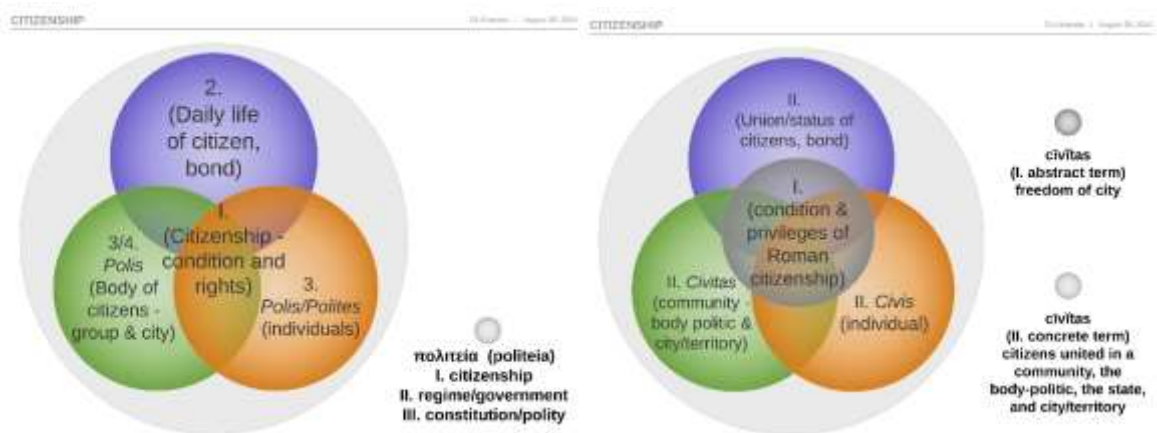
<sup>93</sup> <http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.04.0062:entry=princeps-harpers>

<sup>94</sup> Burchell “Ancient citizenship and its Inheritors” p. 99

<sup>95</sup> *Ibid.* p. 99; Magonette. p. 24

- Roman *res publica* derived a *civitas* (city/citizenry) from the individual *civis*, but each individual played a minor role in the sovereignty of the State thanks to representation. Political participation was here seen as a civil *right*, rather than a duty.
- Hence, paradoxically, the system that prioritized the group gave more structural responsibility/power to the individual (i.e. Greeks) while the system that prioritized the individual gave more structural power to [interest] groups.

Nonetheless, both of these societies relied on the same key features and principles that define the very notion of citizenship: rights & duties, civic virtue (leading to civil concord), equality of citizens, justice, freedom, and sovereignty. Regardless of the various terms that each society used to define and describe these principles, it is evident that both ideas conceive the same representation:



Although the Roman/Latin term seems to have an additional component, it is evident that this is nothing more than a more abstract formulation of the *same* concept. Furthermore, this abstract component is also inherently present in the Greek term despite the fact that a separate, more abstract *definition/understanding* of the *same term* was not created. In other words, the breakdown of *civitas* into (I) concrete and (II) abstract understandings is nothing more than precisely an *abstraction* of one term into many (i.e. the creation/conceptualization of a new term to define specific features of the same idea)<sup>96</sup>. The following sections will follow the evolution of this

<sup>96</sup> Perhaps the best way to understand this point is the following: the Greek *politeia* did not need an abstraction because it was always a concrete term referring to the relationship between an individual with a *specific* population and a *particular* territory as well as all its implications (rights, duties, virtues, etc); conversely, *civitas* developed an abstraction in order to account for qualitative differences between *civitas romana*, *civitas sine suffragio*, etc. In short: "Spartan/Athenian" *citizenship* was a concept that didn't exist outside the city-state

idea in order to show that this abstraction is *precisely* the reason why the multi-faceted terms “πολιτεία” and “cīvitas” evolved into various terms while nevertheless retaining the definition of “citizenship”, a term which seems to only have become more abstract and complicated over the 21st Century.<sup>97</sup>

The summary of this evolution through diagrams can also be found in Appendix II.

### 3. Medieval Citizenship

The first section of this Chapter ended with an important note on the issue of scale and meaning in Greece. As the closing of the previous section showed, the Roman meaning of citizenship was also very much affected by scale, given that the meaning of citizenship in the Roman Empire was different than it had been when citizenship was confined to city-states and Rome. Perhaps then it is no surprise that the extension of citizenship to various parts of the Empire led to a decrease in its significance and, with the fall of the Roman Empire, citizenship entered a period of relatively dark ages where it was practically non-existent. Briefly, the sequence of events that led to this period can be summarized as follows.

The Greek city-states and their concept of citizenship were absorbed into the Roman Empire. Then, historians suggest that Roman citizenship underwent roughly three phases of extension. The first stage was during the rule of Augustus (27 BC-14 AD) where citizenship was extended to reach a total of over one million citizens, which made up roughly 7% of the population within the Empire.<sup>98</sup> However, citizens’ obligations began eroding under Augustus and even more after his rule.<sup>99</sup> The second expansion was during the times of Claudius (41-54 AD) and Hadrian (117-138 AD), largely because “[Claudius] was among those who believed that the greatness of Rome was due to the openness of its political community.”<sup>100</sup> Finally, Emperor Caracalla (211-217 AD) promulgated the Antonine Constitution which virtually eliminated all the different types of citizenship based on geography and

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and was therefore concrete whereas “*Roman citizenship*” required a qualifier to differentiate between “citizens of *Rome*” and “citizens of *non-Rome Roman territory*”.

<sup>97</sup> This has also been suggested by Heater, Derek. *A Brief History of Citizenship* p. 143: “[A] paradox that strikes at the very heart of citizenship. Interest in the subject and status is now greater than it has been for some two hundred years or more; yet at the same time, it might appear to be disintegrating as a coherent concept for the twenty-first century.”

<sup>98</sup> Heater, Derek. *A Brief History of Citizenship*. p. 35

<sup>99</sup> Magonette, Paul. *Citizenship: the History of an Idea*. p. 27

<sup>100</sup> *Ibid.* p. 27



thereby extended it to practically ‘any free inhabitant of the civilized world’.<sup>101</sup> Some have noted the diminished value of this citizenship whereby one could be a Spaniard, a Roman citizen, and a resident of a non-Roman jurisdiction at the same time<sup>102</sup> while others have noted the eventual irony of Roman troops being defeated by foreigners with possession Roman citizenship.<sup>103</sup> Gradually, the Empire fell and the meaning of Roman citizenship became even more irrelevant than it had already become.

### 3.1 Dark Ages (5th Century to 13th Century)

“Relations between the state and the Church, or in the words of the time, between *regnum* and *sacerdotium* would become the central concern of medieval political thought.”<sup>104</sup> This quote exemplifies the reason why citizenship fell into the background particularly during the early Middle Ages. During this period, the most notorious names to discuss an idea related to ancient citizenship were: St. Augustine, St. Thomas Aquinas, and Marsilius of Padua. Their ideas are briefly summarized in the following paragraphs.

Augustine of Hippo (354-430 AD), perhaps better known as “**St. Augustine**” was most famous for his influence on Western Christianity. However, in the present context, one of his most famous works speaks [somewhat indirectly] to the topic of citizenship. In *City of God*, St. Augustine argued that there were two “*civitates*” (cities), one of God and one of men. It’s interesting to note that up to this period the geographical meaning of *civitas* “was an urban core surrounded by agricultural land and satellite towns and villages, the whole area something like the size of an English county.”<sup>105</sup> This geographical scale continues to be consistent with the understandings of Greeks (definition I.4) and Romans (definition II). Augustine is said to have been an acute reader of Cicero<sup>106</sup> and perhaps the best way to summarize his thoughts on citizenship were his ideas that 1) “The ‘Christian city’ was a

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<sup>101</sup> Heater, Derek. *A Brief History of Citizenship*. p. 36; Magnette, Paul. *Citizenship: the History of an Idea*. p. 27; Sherwin-White, A.N. *The Roman Citizenship*. p. 287

<sup>102</sup> Sherwin-White, A.N. *The Roman Citizenship*. p. 274

<sup>103</sup> Heater, Derek. *A Brief History of Citizenship*.

<sup>104</sup> Magnette, Paul. p. 32; also referencing Canning, J.P. *A History of Medieval Political Thought*.

<sup>105</sup> Heater, Derek. *A Brief History of Citizenship*. p.43

<sup>106</sup> Burchell “Ancient citizenship and its Inheritors” p. 97

community of values, a civilization, which surpassed political groupings”<sup>107</sup> and that 2) “participation in prayer rather than civic duties was the mark of the good man”.<sup>108</sup> In other words, we can already begin to see the roots of subjugation of individuals [and citizenship itself] to *regnum* (State) and/or *sacerdotium* (Church) that marked the Middle Ages and Early Modern period.

**St. Thomas Aquinas** (1224-1274) was the next prominent thinker who made a contribution to citizenship. However, notice that this next major contributor came almost 800 years after the death of St. Augustine. This supports the practical non-existence and dark ages of citizenship during the Early Middle Ages. As previously mentioned, it was Cicero’s translation of Aristotle’s works that allowed these to be rediscovered in the Middle Ages.<sup>109</sup> Aquinas was one of those who were most heavily influenced by Aristotle and he considered Aristotle’s *Politics* a masterful analysis of citizenship.<sup>110</sup> Following his lead, Aquinas concurred that it was possible to be a good *citizen* without necessarily possessing the qualities of a good *man*.<sup>111</sup> But one crucial point of division between the two was caused by Aquinas’ desire to maintain the importance of Christianity, thus “if the citizen existed again in theory, Thomas Aquinas subordinated it to his Christian conception [...] hence, citizenship is reduced to following evangelical precepts that theologians set up as law.”<sup>112</sup> In other words, it was no longer the *polis* that was sovereign and it wasn’t the citizenry’s task to determine civil law; instead, they were to follow divine/natural law that was uncovered by theologians.

### 3.2 *Rinascimento (14th and 15th Centuries)*

Immediately after Aquinas’ death came the birth of the next thinker, **Marsilius of Padua** (1275-1342), and it was he “more than anyone [who] restored citizenship to its secular Aristotelian interpretation” by stating unequivocally that his

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<sup>107</sup> Magnette, Paul. *Citizenship: the History of an Idea*. p. 34

<sup>108</sup> Heater, Derek. *A Brief History of Citizenship*. p. 44

<sup>109</sup> Refer to note seventy-three

<sup>110</sup> Heater, Derek, *A Brief History of Citizenship*. p. 44

<sup>111</sup> *Ibid.* p. 44 Where the former stated “it is possible to be a good citizen without possessing the qualities of a good man” (Aristotle, *Politics* 1276b)” and the latter contended that “It sometimes happens that someone is a good citizen who has not the quality according to which someone is also a good man, from which it follows that the quality according to whether someone is a good man or a good citizen is not the same.”

<sup>112</sup> Magnette, Paul. *Citizenship: the History of an Idea*. p. 40

views on citizenship were derived directly from him.<sup>113</sup> There are two crucial features that Marsilius revived for subsequent generations. First, he defined the citizen through civic participation “in accordance with Aristotle... as one who participates in the civil community in the government or the deliberative or judicial function according to his rank.”<sup>114</sup> (Although the final aspect regarding rank was clearly a non-Aristotelian adaptation to Marsilius’ time <sup>115</sup>) The second crucial feature pertained to sovereignty. Again in accordance with Aristotle, Marsilius believed that the law came from the city, from its people. His reasoning was extremely logical since, in essence, he argued that allowing people to dictate their own laws would be more effective, more intelligent, and it would compel citizens to follow laws because these were self-imposed rather than emanating from a monarch; in short: “Sovereignty belonged to all the citizens, the *universitas*, which the lawyers of the twelfth century had endowed with legal personality of its own, separate from that of its components.”<sup>116</sup> This final point is critical for the timeline on citizenship because it signals what is perhaps a merging of Greek and Roman notions of citizenship. On the one hand, Marsilius places large focus and emphasis on the citizen [as Romans had], but he defines him through civic participation in the way that Aristotle did. Thus participation is more of a duty that *defines* citizenship rather than a right or commodity. But conversely, it is the *people* and *their legal personality* as one *universitas* that hold sovereignty, and this feature [along with the size of cities and their large populations] implied a modern style of representation that he was clearly beginning to conceive of.<sup>117</sup>

Finally, the last two thinkers of the Middle Ages that are worth noting are a **Bartolus of Sassoferrato** (1314-1357) and his pupil **Baldus de Ubaldis** (1327–1400). However, it is important to mention that a revival of citizenship was already in full force. For this reason, these two authors may be considered authors in the Renaissance, particularly in the context of a “rebirth” of citizenship. One of Bartolus’ main contributions was a direct discussion of citizenship by birth and citizenship by

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<sup>113</sup> Heater, Derek, A Brief History of Citizenship. p. 44

<sup>114</sup> Marsilius of Padua. *Defensor Pacis*, I,XII, p. 45

<sup>115</sup> Magnette, Paul. p. 41

<sup>116</sup> *Ibid.* p. 41

<sup>117</sup> *Ibid.* p. 42; Quillet, J. ‘Souveraineté et citoyenneté dans la pensée politique de Marsile de Padoue’, p. 80, in *Actes du colloque sur la citoyenneté et la souveraineté*, pp. 73-85

legal conferment.<sup>118</sup> To this end, he stressed the fact that citizenship was not an act of nature but rather an act of law; therefore all citizens are *citizens* by virtue of the civil law.<sup>119</sup> This is perhaps the first official historical formulation of citizenship *exclusively as a legal political act* and indeed Paul Magnette refers to Bartolus as “the author of the first modern doctrine of citizenship” despite the fact that this concept appeared in his writings only as secondary to and implicitly connected with sovereignty.<sup>120</sup> (Although, confusingly, Bartolus did not mean that citizenship entailed *participation* within the sovereignty of the state<sup>121</sup>). The final contribution by Bartolus is revolutionary in its effects but not in its origins: while elaborating the notion of citizenship as a legal political act that binds an individual to a community, Bartolus “occasionally evoked the rights related to the *civilitas*, [but] he did not go as far as giving a substantial definition of it.”<sup>122</sup> This new term (*civilitas*) had begun being used with a very specific meaning that “designated the codified status which made the citizen and determined his prerogatives.”<sup>123</sup> For this reason, his usage of the term was not revolutionary. But, arguably, he was the catalyst that eventually led to the emancipation of modern citizenship, as Magnette suggested [above].

**Baldus de Ubaldis**, his apprentice, agreed that citizenship was legal rather than natural and existed only by virtue of legal creation/constitution/definition. More importantly, he agreed with and elaborated on the conceptual precedent [set by Marsilius and Bartolus] of merging the Roman and Greek ideas of citizenship. On the one hand, he identified the citizen and the citizenry as *one* sovereign unit in the same way as the concrete notion of *politeia*. But on the other hand, he predated a modern and abstract legal notion that “endowed the people-city with its own legal personality, which distinguished it from the individuals who constituted it.”<sup>124</sup> In his own words: “separate *individuals* do *not* make up the *people*, and thus properly speaking the people is not men, but a *collection* of men into a body which is *mystical*

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<sup>118</sup> Heater, Derek, A Brief History of Citizenship. p. 47

<sup>119</sup> Bartolus of Sassoferrato, *Consilia* 1. 62 in *Opera Omnia*, quoted on p. 699 by J Kirshner, ‘*Civitas sibi faciat civem: Bartolus of Sassoferrato doctrine on the making of a citizen*’, *Speculum* 1973. XLVIII/4, pp.694-713.

<sup>120</sup> Magnette, Paul. *Citizenship: the History of an Idea*. p. 45

<sup>121</sup> *Ibid.* p. 45

<sup>122</sup> *Ibid.* p. 45

<sup>123</sup> *Ibid.* p. 43

<sup>124</sup> *Ibid.* 46.

and taken as *abstract*”<sup>125</sup> and “every collection of people, corresponding to one man, is to be regarded as *a single person*... It is clear therefore that this word, ‘**person**’, is sometimes used for an individual, sometimes for a corporation and sometimes for the head or prelate.”<sup>126</sup> Hence we have reached the breakdown of ancient citizenship through abstraction which became the roots of the modern understanding and developed over the next few centuries. To see this, the key divisions are:

- the detachment of citizenship from a particular, small territory  
(e.g. *politeia* vs *civitas romana*<sup>127</sup> and St. Augustine’s non-geographical city of god)
- the abstraction of a ‘people’ *not* derived from ‘men’ or ‘individuals’ and the establishment of legal personality for this ‘person’  
(e.g. the ‘corporatist’ ideas of Marsilius, Bartolus and Baldus)
- the conception of a new legal term for a status that binds individuals to communities.  
(i.e. *civilitas*).

It is imperative to understand why this marks the turning point in the evolution of citizenship from ancient to [early] modern, particularly because of the third point regarding a new legal term and its evolution. Because of the fundamental effect that this has through the remainder of this thesis, the explanation by Paul Magnette warrants full citation:

“The fact that citizenship was built empirically, by the work of jurists who considered specific cases, is revealing: it testifies to the fact that this concept, which was then specifically qualified (*civilitas*), mainly designated an individual’s membership of a particular *civitas*. Today, this would be called nationality. However, this did not imply that it was strictly a formal concept lacking political content. Indeed, it only appeared in autonomous, or ‘sovereign’ cities, and was only codified by jurists whom history remembers as the forbears of the modern idea of sovereignty. ”<sup>128</sup>

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<sup>125</sup> Canning, J.P. *The Political Theory of Baldus de Ubaldis*. p. 114 Emphasis added.

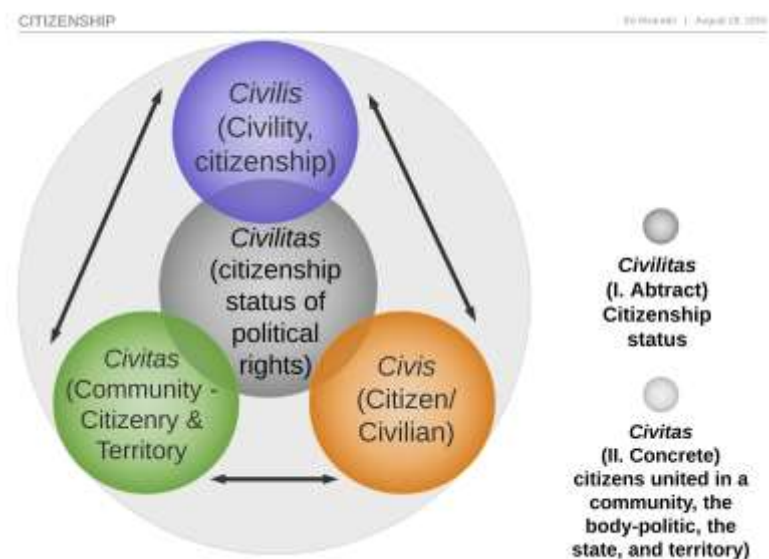
<sup>126</sup> *Ibid.* p 189

<sup>127</sup> Refer to note ninety-six above

<sup>128</sup> Magnette, Paul. *Citizenship: the History of an Idea*. p. 48

It's also important to note that Marsilius, Bartolus and Baldus may have been the catalysts of this development [along with the jurists of their time], but this had been a gradual development since the time of Aquinas or perhaps even earlier. Some historians note that by the twelfth and thirteenth centuries, town life was flourishing in Europe and essential features of urban civic life were already being developed and enjoyed (i.e. a sense of community and of freedom) but these civic features only came through the self-administration and independence of cities which provided “a sense of civic identity and pride, an essential ingredient of citizenship.”<sup>129</sup> All of this falls perfectly in line with Magnette’s points regarding sovereignty and the analogy between this type of citizenship and our current notion of nationality.

Finally, it should be remembered that Aquinas pointed out the difference between a good man and a good citizen, Marsilius practically revived the definition of a citizen through civic participation, and Bartolus & Baldus stressed the existence of citizenship as an independent legal political act, all of which reinforces the fact that “citizenship also acquired an existence apart from the word *civitas*. This is linguistically marked by the invention of the derivative *civilitas*, resulting from the adjective *civilis*: “citizenship is ‘civility’, a status of political right. [...] Citizenship is not yet a status of individual rights, but it is no longer the characterization of strictly collective rights.”<sup>130</sup> Thus we have finally arrived at the new, [early] modern way to visualize the concept of citizenship:



<sup>129</sup> Heater, Derek. *A Brief History of Citizenship*. p. 47-48

<sup>130</sup> Magnette, Paul. *Citizenship: the History of an Idea*. p. 49

This “rebirth” of citizenship finally shows the conceptual and linguistic difference between the individual (*civis*), the community (*civitas*), the civic bond that unites them (*civilis*), and citizenship itself (*civilitas*). It should also be quite evident that the term ‘civilis’ is very much related to the aforementioned “civil concord” which was ultimately rooted in the “civic virtues” that Greek referred to as *arete* and Romans as *virtus*, and can be identified as synonymous with today’s “virtue of citizenship”. These are the basic and foundational roots of modern citizenship. The topic of citizenship will only become more complicated through further abstraction of the already-abstract concept of *civilitas* or its confusion with the subjective *civility* that it ultimately derived from. In other words, because of its history of abstraction, the use of the word ‘citizenship’ becomes confusing because the term may refer to a particular implementation (“German citizenship”<sup>131</sup>), a subjective bond (“good citizenship”<sup>132</sup>) or an abstract term (“citizenship itself”<sup>133</sup>). For this reason, the remainder of this chapter will not engage in thorough and in-depth discussion of further authors or their respective theories and it is up to the reader to familiarize himself or herself with these if s/he wishes to do so.

## 4. Early Modern Citizenship

### 4.1 Italian City-State Republics

Perhaps the best evidence that this was a critical turning point in the history of political thought [and particularly in the development of modern citizenship] is the work of historian Hans Baron who is credited for coining the term “**civic humanism**” which is also known as “classical republicanism”. A proper exposition of this idea and Baron’s work would require an entire thesis onto itself but civic republicanism is perhaps best summarized as “a variant of republicanism indicating active, participatory, patriotic citizenship as well as the ethos and educational ideal that goes with it.”<sup>134</sup> **Republicanism** in general is sometimes said to have been born in this era through the revival of Roman ideals and it has become one of the main modern theories of citizenship which can be found in Table 1 of Appendix 1. But it is

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<sup>131</sup> light-grey circle, *civitas*, in diagram

<sup>132</sup> purple circle, *civilis*, in diagram

<sup>133</sup> dark-grey circle, *civilitas*, in diagram

<sup>134</sup> Moulakis, Athanasios, "Civic Humanism"

the importance of active participation, patriotism and education as well as the new focus on civic virtues (*arete, virtus, civilis*) that reflect a historical evolution and *revolution* of citizenship (*civilitas*). Additionally, because of the emphasis on participation, historians far and wide have attributed the seeds of patriotism to this era.<sup>135</sup> **Patriotism** is the precursor to and less passionate version of nationalism... which was a revolutionary idea during the 18th and 19th Centuries that will be discussed shortly... but the *rebirth* of citizenship during the Renaissance and the *birth* of this new theoretical approach that combines Greek and Roman ideals (i.e. civic humanism) is perhaps one of the most crucial points in the entire chronology of citizenship. Furthermore, “as a matter of history it now seems clear that Baron's thesis made too much of the divide between the Renaissance and the Middle Ages, and that there was a venerable tradition of civic liberty in medieval communes.”<sup>136</sup> So it is seems as though the renaissance of citizenship indeed began gradually through the contributions of the aforementioned thinkers.<sup>137</sup>

As the last diagram above shows, the developments of the Middle Ages and the Renaissance led to the birth of a new term (*civilitas*) which was the abstract emancipation of one idea from its ideological components. To put it differently, citizenship cannot exist without an individual, a group, and a bond between these, but once a particular term for *any* bond of this time became abstracted from its components, *the* history of citizenship became a *histories* of [multiple] citizenships where authors placed more emphasis on one of the necessary components (as if not all of them were necessary!). This is clearly evidenced by the birth of “-isms” in the study of citizenship such as Liberalism, Communitarianism, Republicanism which respectively place more emphasis on civilians, civilizations, or civility. And yet the abstraction does not end there. These approaches have become further divided into sub-theories that try to compensate for this single-focus mistake and it's hard to determine how many “-isms” are appropriate or exactly where “Neo-Republicanism”, “Pluralism”, “Radical Pluralism” and “Expansive Democracy” are supposed to fit. It is for this reason that the remainder of this chapter cannot afford to

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<sup>135</sup> Ibid.; Baron, Hans.; Heater, Derek. *A Brief History of Citizenship*. p. 54

<sup>136</sup> Moulakis, Athanasios, "Civic Humanism"

<sup>137</sup> In short, perhaps the history of citizenship is best summarized paradoxically as a “gradual revolution” meaning: *gradual* evolution of *ideas* with sudden *revolutionary conceptualizations*.



address the specific intricacies of each author who discussed citizenship after the Renaissance. The chapter will not engage in thorough elaboration of these “-isms” and will not stress over where each author falls on the theoretical spectrum. Instead, it will provide a summary of the general pattern or approach taken by authors in the subsequent centuries. The diagram on Citizenship in Appendix 1 contains a tentative placement of theoretical approaches based on what they prioritize but the fact remains that Greece, Rome and the Renaissance provided all of the *necessary* roots and terms to discuss citizenship (i.e. the individual, the group, their *respective* bond and a term for the *abstract* bond).

Theorists during the Italian Renaissance included **Coluccio Salutati** (1331-1406), **Dominican friar Savonarola** (1452-1498), **Francesco Guicciardini** (1483-1540), **Leonardo Bruni** (1369-1444) and the quintessential Renaissance man **Niccolò Machiavelli** (1469-1527). All of these commented on the citizenship of city-states (particularly Florence) and most of these can be relatively-safely categorized under *Republicanism*. The prime example of why it would be futile to fully discuss the remaining theorists and their theories is precisely because it would be meaningless to call these thinkers “republican” without thorough explanation of the context in which “Republicanism” is understood. Thus, it would take an entirely separate essay to explain why Republicanism is not always republican, Liberalism is for liberalists but not always for liberals or libertarians, and Communitarianism is not for just for communists. Instead, let us return to the focus on citizenship.

The two most notorious thinkers of this period were Bruni and Machiavelli, whose ideas were slightly more influenced by Greek and Roman ideals respectively.<sup>138</sup> Both fall very much into the civic humanist approach. Machiavelli was particularly focused on the necessary role of *virtù* (virtue) and although this may seem contrary to our current connotations of the term “Machiavellian”, his understanding of virtue elaborated on the skills necessary for a thriving republic (i.e. the means justified by an end).<sup>139</sup> Finally, we once again find suggestions of a turning point in history taking place in the 1500s; Paul Magnette contends that the break-off from medieval representations as well as the abstract and political syntax of Roman law led to an intellectual climate in Renaissance Italy where “Man was no

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<sup>138</sup> Heater, Derek. p. 55

<sup>139</sup> Ibid. p. 56; Magnette, Paul. *Citizenship: the History of an Idea* . 57

longer the plaything of a history already written against which he could do nothing; he became its author.”<sup>140</sup> In short: Europe had now been exposed to the ideas of democratic Greece, republican Rome, imperial Rome, religious Christianity, and legal/linguistic abstraction; therefore men were now able to shape the political State through any combination of these.

#### 4.2 *Tragedy of the Communes (1490s)*

But this new awakening of citizenship was short-lived. While virtues and participation had been revived in the Italian peninsula by the work of Marsilius, Bartolus, Baldus and Machiavelli (as well as the other republican humanists), feudal political structures and religious ideas remained ingrained in the northern European polities. By 1500, a plethora of religious wars and massive conflicts were yet to be fought, particularly in the North of the European continent. So before continuing to trace the history of citizenship, it is imperative to make a brief but crucial diversion to discuss the North-South divide as well as some systemic pressures during the 1490s.

The rebirth of city-states as well as active, participatory, and patriotic citizenship was not inherently peaceful. Because of newfound civic identity and pride, many of the Italian-city states sought to expand into neighboring territories. Southern Italy was divided relatively-peacefully into the Kingdom of Sicily, the Kingdom of Naples, and the Papal States. The North, however, contained powerful and warring city-states such as Milan, Florence, and Venice. Nevertheless, by 1454 the entire Italian region reached a relative balance of power through the *Treaty of Lodi*, signed by all the major city-states.<sup>141</sup>

It has been suggested that the resulting **Peace of Lodi** was a proto-Westphalian *inter-city-state systemic order* predating the inter-national order by roughly two hundred years.<sup>142</sup> Given the aforementioned social order *within* city-states [through citizenship], and the newly-established systemic order *between* city-states, it is certainly worth pondering the durability and peacefulness of this version of political inter-community order. Interestingly, the mid-1450s also mark the end of

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<sup>140</sup> Magnette, Paul. p. 51

<sup>141</sup> Bassi, Agenore. *Storia di Lodi*. p. 55; <https://www.britannica.com/event/Peace-of-Lodi>

<sup>142</sup> Arrighi, Giovanni. *The Long Twentieth Century*. p. 39, 96; Mattingly, Garrett. *Renaissance Diplomacy*. p. 178

a major conflict in the North: the **Hundred Years' War** between England and France. This war had devastating effects on both countries and led to the **Wars of the Roses** (1455–1487) in England and the **Ancien Régime** in France. For our purposes, the significance of these two events is the fact that “by the time of Machiavelli’s death in the early sixteenth century what are usually referred to as nation-states [...] were becoming common features of the European political scene. England, France, Spain, Sweden and Poland were the large polities. They were powers to be reckoned with in their own regions, or were soon to become so. And they were answerable to no one else; they were sovereign states.”<sup>143</sup> This chronological coexistence between large sovereign territories in the North and small sovereign city-states in the South is important in the development of citizenship because both regions had different ideas about the status of an individual. The fundamental distinction between citizenship in the North and in the South warrants further discussion and a brief return to the root of their difference, the fall of the Roman Empire.

It is essential to recall that the Roman Empire, at its peak in roughly 117 AD, had reached all of modern Italy, France, Spain, and England. Furthermore, it was pointed out earlier that, as possession of Roman citizenship expanded its value decayed until the dissolution of the Empire. But after the fall of the Empire, there is a linguistic feature of Medieval communes that reveals different views towards individuals between Northern and Southern Europe. While the South continued developing the concept of *civitas*, the Germanic tribal influence is perhaps most evident in the North through the concept of **Burg**. It should be remembered that throughout the thousand years that comprise the Middle Ages, the North Germanic and West Germanic languages diversified into other languages and by 1500 this resulted in early modern versions of what are now German, Dutch, English, Norwegian, Danish, and Swedish. An extensive explanation of the etymology of the Germanic “*Burg*” (roughly meaning: fortress/stronghold, castle, or “fortified city”) and its precise comparison with the Latin “*civitas*” would be beyond the scope of this thesis, but the key lesson is that they didn’t carry the same conceptual meaning.

Even though both refer to a city, the Latin/Italian term after the Middle Ages was more often reserved for [autonomous] city-states and the *civilità* (civilized or

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<sup>143</sup> Heater, Derek. *A Brief History of Citizenship*. p. 58

civil behavior) of its *cittadini* (citizens) while the rural communes were referred to as *contadino* and their inhabitants were considered yokels.<sup>144</sup> The relationship between the *civis* and the *civitas* also differs from that between a *burgher* and a *burgh* (these being the Middle English derivations of the Germanic *Burg*) in the same way that these differ from the *polites* and the *polis*. During the period when the Germanic term propagated and evolved into different languages, it likely carried Medieval connotations.<sup>145</sup> This is supported by the Latin word *burgus* meaning “castle, fort, fortress”<sup>146</sup> which was borrowed from Frankish (a descendant of West Germanic) rather than using *civitas*.<sup>147</sup> But the most interesting evidence of their distinction is precisely how the Germanic *Burg* evolved through the Middle Ages into Frankish and Old French and eventually became the root of the French *bourgeois*, which became another type of ‘citizen’ (albeit, with a more economic connotation). Therefore it will be useful to keep in mind that after the Roman Empire, the Southern history of citizenship (*civitas*) up until the Italian Renaissance is not the same as the style of medieval “citizenship” in the North.<sup>148</sup> Thus citizenship can perhaps be called a “southern” Roman Latin concept and the remainder of this chapter will show how this idea evolved away from its “northern” Medieval Germanic sibling.

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<sup>144</sup> Heater, Derek. *A Brief History of Citizenship*. p. 51. This also supported by Italian etymological dictionaries <http://www.etimo.it/?term=borgo> and <http://www.treccani.it/enciclopedia/borgo/>

<sup>145</sup> In *The Economic and Social Foundations of European Civilization*, Dopsch argues that “Certainly there was no room for the Roman constitution in the founding of the new German kingdoms.” (p. 303 ) and in answering the question “were the late Roman forms of organization really lost in this decisive transformation of the municipalities from autonomous communities into towns governed by king or bishop?” he contends that “political development or urban constitutions” were “fundamentally reorganized on seigneurial lines” by Germans (p. 304). Both of these points signal the role of Medieval-style subjugation of *burgher* rather than participation of the *polites* or legal status of the *civis*.

<sup>146</sup> Charlton T. Lewis & Charles Short. *A Latin Dictionary*; Gaffiot, Félix. *Dictionnaire Illustré Latin-Français*.

<sup>147</sup> Another interesting point being the conscious name-change of *Juvavum* to *Salzburg* (“Salt castle/fortress”) in the sixth century at a time when “already the Latin conception of *civitas* is being replaced by the German loan-word *burgus*. This becomes more general in the Frankish period, so that *burgus* is used not only instead of *civitas* [...] but also instead of *vicus* [...] and *castrum*. While in the sixth century Crocius still interprets *burgus* as a fortified place and Isidore of Seville adopts this explanation at the beginning of the seventh century, *burgus* is already found side by side with *civitas* in a formulary of Tours belonging to the seventh century.” (Dopsch, Alfons. *The Economic and Social Foundations of European Civilization* p. 318)

<sup>148</sup> Even the few aforementioned Medieval authors who discussed citizenship were based in the South. St. Augustine was from modern-day Algeria and St. Thomas Aquinas lived in Italy, and this is also where the 800-year-old gap between these may have become important in the spread of *burgus* over *civitas*, especially in the more distant North.

The separate histories of Southern citizenship and Northern subjecthood along with the peace between Northern monarchies and Southern city-states ended in 1494 with the **Italian Wars**, which are yet another fascinating topic worthy of an entire thesis. But they are key point in the timeline of citizenship because they were a series of North-South conflicts that involved most of the city-states in the Italian peninsula and most of what became the modern Western European states. What began as North-South disputes between Milan and Naples ended with a continental conflict where large northern monarchies subjugated the Italian city-states.<sup>149</sup> This issue of subjugation is precisely where the topic of citizenship temporarily emerges in an entirely different light.

#### *4.3 Monarchy & Realism (16th and 17th Centuries)*

Practically all of the authors who wrote on the topic of citizenship during the 16th and 17th Centuries referred to it merely as a matter of subjecthood and most of the major authors came from the North. Furthermore, their work largely focused solely on **sovereignty** and the powers of the *State*, which usually boiled down to the powers of a monarch. In other words, rather than the spread of civic virtues and sovereignty of the people, the age of monarchy seemed to revert citizenship back to a Medieval-style of servitude in the way that St. Augustine and St. Thomas Aquinas had written (though this time the people were subjected to the *regnum* and its sovereign rather than god and the *sacerdotium*). But religion did not take a backseat either and the **Protestant Reformations** of the 16th Century brought their share of bloodshed and reform. Another reason why it is futile to attempt to classify this style of citizenship into an “-ism” is exemplified by the fact that writers of this period also conceived of Republics and therefore they may be considered “Republican” despite their fundamental disagreement with previous republicans.

The first prominent writer who spoke of citizenship in this period was the French lawyer, diplomat and bishop **Claude Seyssel** (1450-1520) whose writings focused on limiting the power of monarchs.<sup>150</sup> Next was the French jurist **Jean Bodin** (1529/30-1596) who is most famous for his theory on sovereignty and who

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<sup>149</sup> Another particularly fascinating topic which is deeply connected with the issue of citizenship and the 1490s were the Diets by the Holy Roman Empire and they way these affected Free imperial Cities and the Old Swiss Confederacy.

<sup>150</sup> Magnette, Paul. *Citizenship: the History of an Idea* . 63

“prided himself in opposing the mistaken ideas of those, from Plato to Machiavelli, who came before him in political science.”<sup>151</sup> In terms of citizenship, he “struggled to sustain and adapt the concept, while the seeds of a new-style citizenship were germinating in small plots of fertile soil elsewhere (e.g. the English American colonies).”<sup>152</sup> It is likely that his thought was directly and heavily influenced by the French Wars of Religion (1562–1598) but this trend of citizen subjection to a sovereign monarch continued into the 17th Century, which produced some of the key theorists and events that shaped the world of international relations that we still live in today.

The 17th Century brought some of the most devastating wars and civil wars that had ever occurred up to that period. *The Eighty Years' Dutch War of Independence* (1568–1648) and the *Thirty Years' War* (1618–1648) culminated with the **Peace of Westphalia** (1648) that established the international system of sovereign nation states that would later be reestablished in the Congress of Vienna (1815). Meanwhile, the *English Civil War* (1642–1651) brought limited monarchy to England which was followed by the *Glorious Revolution of 1688* that resulted in codification of the **Bill of Rights of 1689**. Prominent thinkers of this time began the discourse on **natural law** and they include: Dutch jurist and scholar **Hugo Grotius** (1583-1645) who has been dubbed one of the “fathers of international law”<sup>153</sup> and of the Peace of Westphalia<sup>154</sup>. Concurrently, British philosopher **Thomas Hobbes** (1588-1679) who is famous for his writings on sovereignty, selfishness and the ‘war of all against all’ helped lay the foundations for **Realism** in international relations. But both of these authors subjected citizenship to State sovereignty and Hobbes is even cited by Derek Heater as implying that citizenship was nothing but a word without proper content.<sup>155</sup>

Finally, the end of the century marked a slight change of tone where authors began to focus more on rights and duties which led to the eventual re-emergence of citizenship rather than subjecthood. German jurist **Samuel von Pufendorf** (1632-

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<sup>151</sup> Ibid. p 64

<sup>152</sup> Heater, Derek. *A Brief History of Citizenship*. p. 58

<sup>153</sup> Woods Jr., Thomas. *How the Catholic Church Built Western Civilization*. pp. 5, 141–142

<sup>154</sup> Bull, Hedley; Adam Roberts; Benedict Kingsbury) (eds.). *Hugo Grotius and International Relations*.

<sup>155</sup> Heater, Derek. *A Brief History of Citizenship*. p. 61

1694) was the first modern theorist to provide a formal definition for citizenship<sup>156</sup>, which he defined as:

“Citizenship, or the right of citizenship, includes, to their largest effects, the actions that are the prerogative of the members of the commonwealth, as well as the right to the benefits of these actions, which similarly entail a duty towards the commonwealth.”<sup>157</sup> and “In becoming a citizen, a man loses his natural liberty and subjects himself to an authority whose powers include the rights of life and death.”<sup>158</sup>

Although there is still a large aspect of subjection in his understanding of citizenship, research shows that he did not consider both of these as synonymous.<sup>159</sup> Despite the fact that von Pufendorf is not considered an influential writer in the history of citizenship, it is perhaps with him that a line can be drawn to distinguish a new approach that stressed the role of duties and rights. This can also be seen in his Dutch contemporary **Baruch/Benedict de Spinoza** (1632-1677) and his definition of citizenship: “I call men citizens in so far as they enjoy all the advantages of the commonwealth by civil right; and subjects in so far as they are bound to obey the ordinances or laws of the commonwealth.”<sup>160</sup> In short, citizenship entailed rights guaranteed through obedience of the law; rights were inversely proportional to the power of the state; and citizenship & subjecthood were two sides of the same coin, which allowed men to have citizen rights along with **natural/human rights**.<sup>161</sup> This return to rights and duties marks the last revival of citizenship as a political concept and it is after this full revival that it finally became what we now understand as *nationality*.

## 5. Modern Citizenship

### 5.1 Revolutions, Liberalism & Nationalism (18th-19th Centuries)

The 1700s and 1800s saw a lot of important physical and ideological revolutions that influenced the thoughts of various prominent authors. In particular,

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<sup>156</sup> Magnette, Paul. *Citizenship: the History of an Idea* p. 77

<sup>157</sup> Pufendorf, Samuel von. *De Jure Naturae et Gentium* 2, VII, 2, 20, p.995

<sup>158</sup> Ibid. II, 6, 7-9, pp, 136-137

<sup>159</sup> Magnette, Paul. *Citizenship: the History of an Idea* p. 78; Heater, Derek. *A Brief History of Citizenship*. p. 59

<sup>160</sup> Spinoza, Benedict de. *Tractatus Politicus*. III, 1, p. 285

<sup>161</sup> Magnette, Paul. *Citizenship: the History of an Idea*. p. 80

the **Enlightenment** and **Romanticism** provided a plethora of distinguished thinkers and writers that shaped the ideologies of **Liberalism** and **Nationalism**. It would be impossible to name all the theories and approaches by prominent authors which include Montesquieu (1689-1755), Voltaire (1694-1778), Benjamin Franklin (1705-1790), David Hume (1711-1776), Adam Smith (1723-1790), Immanuel Kant (1724-1804), Thomas Jefferson (1743-1826), Emmanuel Joseph Sieyès (1748-1836), Maximilien Robespierre (1758-1794), Giuseppe Mazzini (1805-1872), John Stuart Mill (1806-1873), and Karl Marx (1818-1883) among many others. For this reason, this section will only mention two of the most prolific writers who had a vast influence in political thought before the Age of Revolutions and who helped revolutionize the idea of citizenship at a fundamental level into what it is today.

Much like Pufendorf and Spinoza, one of the most significant authors on Liberalism was also born in 1632 and focused on natural law, rights and duties. **John Locke** (1632-1704) was an English philosopher and physician during the Enlightenment whose influence continues to be referenced in various types of governmental and political discourse. Politically, he is perhaps most famous for his ideas regarding the right to life, liberty and property. These ideas were driving forces in both the American War of Independence and the French Revolution. In fact, they are enshrined as “life, liberty, and the pursuit of happiness” in the **American Declaration of Independence of 1776** and protected by the **5th Amendment of the U.S. Bill of Rights** and they are also present as “liberty, property, security and resistance to oppression” in **Article 2 of the French Declaration of the Rights of Man and the Citizen of 1789**. Thus, the influence of Locke’s ideas on revolutionary beliefs is hard to dispute.

On citizenship, Locke believed that citizens were invested with symmetrical rights and duties which entailed the right to express the approval of laws [through representation] along with the resulting inherent obligation to live by the decisions of the majority.<sup>162</sup> Perhaps the deepest difference between Locke and his predecessors was the conception of the individual. Whereas Hobbes and his contemporaries held the notion of a passionate war-prone man, Locke’s conception of a reasoning peaceful man stood in stark contrast. Nevertheless, Magnette emphasizes that “In all scenarios, the authors admit that, to triumph, natural law and rights need an artificial

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<sup>162</sup> Ibid. p. 83



authority which asserts and protects them. Without this paradigm, one cannot understand the forming of the modern concept of citizenship: in the state of nature the individual is a man, endowed with natural rights; in the civil state he is a citizen-subject whose rights are those that the sovereign gives him.”<sup>163</sup> Thus we can see that many theorists from the 16th to the 19th Century had the topic of *natural law* and the “*state of nature*” vs *civilized society* in common. And here we also arrive at one key difference between Locke and his predecessors: **sovereignty**.

Whereas thinkers in the age of monarchy accepted the idea of a sovereign king, Liberalism and Locke in particular “clearly tried to connect the concepts of citizenship and sovereignty, although he used neither of the two words: citizenship was no longer submission to, but rather possession and exercise of, sovereignty.”<sup>164</sup> This attempt to reconnect the ideas of citizenship and sovereignty is important because it signals a return to the Ancient Greek ideal. Citizens in Athens held sovereignty because they were identical to the city; the city was theirs because all the *polites* were a part of the *polis* and responsible for its maintenance. This also signals another important factor that has been latent but present in the history of citizenship: **property**. Various authors have pointed to the historical role that property played in regards to citizenship. From Ancient Greece, all the way through Rome and to Locke, the possession of property was a precondition and result of citizenship.<sup>165</sup> But Locke was perhaps one of the first to openly support the citizens’ right to *rebel* because he believed that no individual citizen could be forced to passively accept attacks on his life and property.<sup>166</sup> This can be found at the heart of social contract theory, and it is what finally brings us to the last author who deeply influenced the Western idea of citizenship: Rousseau.

**Jean-Jacques Rousseau** (1712-1778) has been described as “one of the most extraordinary phenomena in the history of European thought, extraordinary in character, in versatility and in influence”<sup>167</sup>. Copious research has been devoted to analyzing his impact on the revolutions in France and even the United States.<sup>168</sup> He is

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<sup>163</sup> Ibid. p. 85

<sup>164</sup> Ibid. p. 83

<sup>165</sup> Heater, Derek. P. 66. Magnette, Paul. p. 83

<sup>166</sup> Magnette, Paul. p. 83

<sup>167</sup> Heater, Derek. p. 67

<sup>168</sup> Durant, Will & Ariel. *The Story of Civilization Volume 10: Rousseau and Revolution* (p. 890–1) declare that “The first sign of his political influence was in the wave of public

also one of the main theorists of the state of nature and social contract theory which is what ties him deeply to the ideas of Grotius, Hobbes, Pufendorf, Locke and Kant. On this topic, he argued that all who came before him (Grotius, Hobbes, Pufendorf, and Locke) made the mistake of not going back all the way to a state of nature but rather inappropriately stopping at pre-civil state, and this was evidenced because man could not be 'selfish' or 'jealous' unless it was a social context, so he argued instead that man had instincts for self-preservation and compassion for others.<sup>169</sup>

Another crucial aspect of his philosophy is the theory of a **general will**. This will is a common interest which, along with reason and the social contract, leads to proper liberty. The former are held together by *public fraternity*, which can be made analogous to the aforementioned Greek concord and Roman civility and "[h]e believed this quality was best achieved in a small, tight-knit community. [...] In his published *Letter to D'Alembert*, Rousseau declared that he never tired of quoting Sparta. However, it was his own Geneva that was in the forefront of his mind."<sup>170</sup> Hence we find once again the importance of small communities and the connection to city-states. More interestingly however, he contended that "the words *subject* and *sovereign* are identical correlatives whose idea is combined in the single word Citizen"<sup>171</sup> and this was because "the social contract was an act through which a shapeless multitude acknowledged itself as a people, proclaimed itself as such and decided to give itself its own law. The contract no longer gave birth to a sovereign *for* the people but to a sovereign *people*. The duality between the people and the sovereign, affirmed by his predecessors, was abolished."<sup>172</sup> In his own words:

"The *public person* thus formed by the union of all the others formerly assumed the name *City* and now assumed that of *Republic* or of *Body Politic*, which its members call *State* when it is passive, *Sovereign* when active, *Power* when comparing it to similar bodies. As for the associates, they collectively assume the name *people* and individually

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sympathy that supported active French aid to the American Revolution. Jefferson derived the Declaration of Independence from Rousseau as well as from Locke and Montesquieu. As ambassador to France (1785-89) he absorbed much from both Voltaire and Rousseau...The success of the American Revolution raised the prestige of Rousseau's philosophy."

<sup>169</sup> Magnette, Paul. p. 87. Paraphrasing

<sup>170</sup> Heater, Derek. p. 69; ideas also built from Magnette, Paul. p. 90

<sup>171</sup> Rousseau, Jean-Jacques. *The Social Contract and Other Late Political Writings*, III, XIII, p. 111

<sup>172</sup> Magnette, Paul. p. 89. Emphasis added

call themselves *Citizens* as participants in the sovereign authority, and *subjects* as subjected to the laws of the State”<sup>173</sup>

Hence, in Rousseau we finally find the culmination of what a citizen is, based on how all the previous concepts are interconnected as well as the roots of our modern understanding of citizens, States, and sovereignty. Despite potential disagreements about his direct or indirect influence, Rousseau’s conception of the citizen, people and sovereignty is the most appropriate explanation of how citizenship is seen today, at least in theory. And even the seeds of patriotism can be found in his writing when he states that “Every true republican drank love of fatherland, that is to say, love of the laws and of freedom, with his mother’s milk.”<sup>174</sup>

## 5.2 Nationality = Citizenship

Although one could make plenty more citations and references to Locke and Rousseau, there is little doubt that their philosophies and principles explain the revolutionary foundations that [directly or indirectly] culminated with the **American Revolutionary War** (1775–1783) and the **French Revolution** (1789–1815). The patriotic, liberal and romantic ideas of the 18th Century throughout all of Europe also had influence on the 19th Century nationalisms that resulted in the **Unifications of Italy and Germany** (1871). All of these nations then played a crucial role at the beginning of the 20th Century through the Great War which was the first truly global conflict and thus became known as World War I. This event marks the end of this chapter on the the history of citizenship because, after all of these wars defined many of our current nation-states, citizenship became exclusively implemented through the *law of nationality*. Nation-States became the dominant political unit of the Westphalian international system and they were the only legally-recognized international sovereign entities. Thus, the concepts of nationality and citizenship evolved exclusively and jointly through their implementation and adaptation within national law followed by their recognition in international law.

In conclusion, the *polites* and his *polis* were identical through the concept of *politeia* while *civitas romana* was an abstract term describing the relationship

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<sup>173</sup> Rousseau, Jean-Jacques. *The Social Contract and Other Late Political Writings*, I, IV, p. 50-51. Emphasis added

<sup>174</sup> Rousseau, Jean-Jacques. *Considerations on the Government of Poland and on its Projected Reformation*. Chapter 4 p. 189

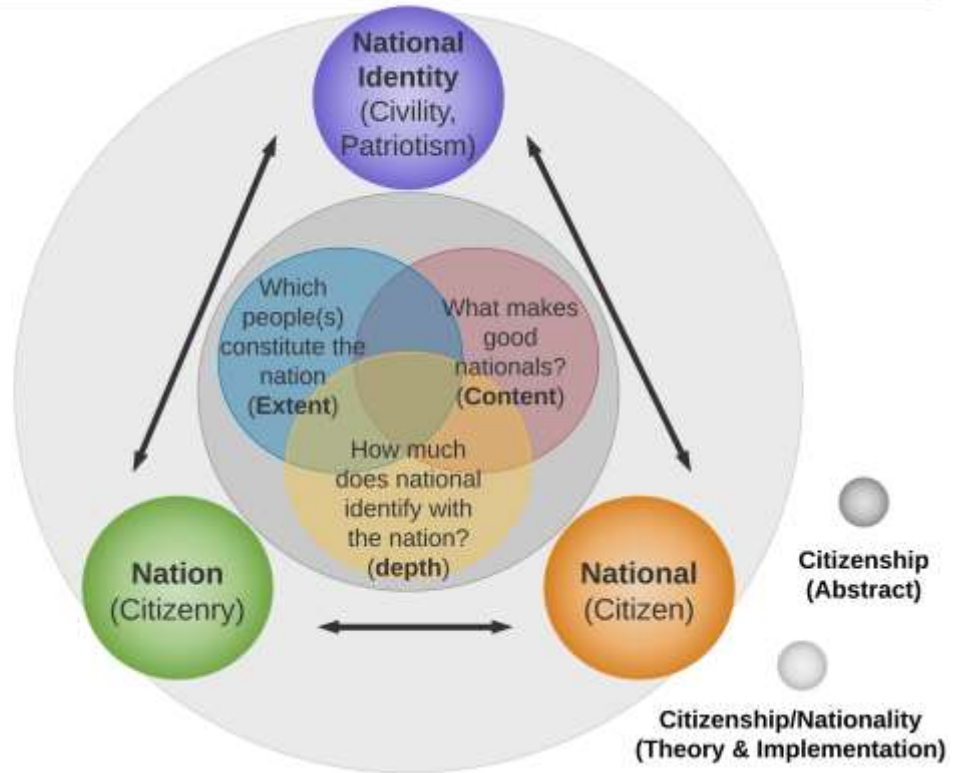
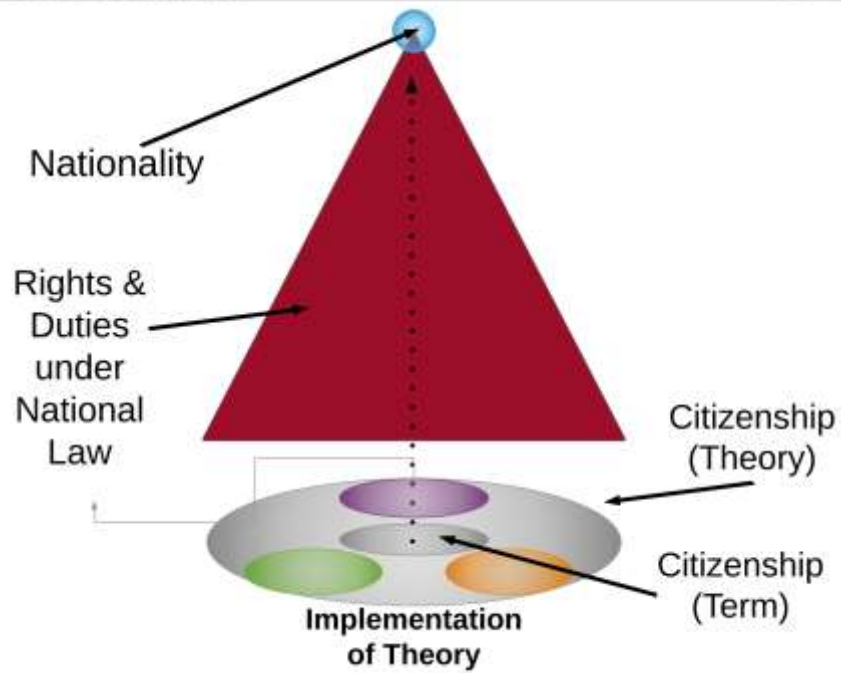
between Rome and the roman *civis*; next, as the Roman Empire expanded over a thousand years, it established various secondary forms of political identity (*civitas sine suffragio, socius iniquo foedu, Latinus*, etc) until it crumbled; the Middle Ages brought a different political structure for another thousand years where the North evolved the Germanic concepts of *Burg* and *Burghers* while the South continued to developed the idea of *civitas*; then the Italian Renaissance signaled the emancipation of *civilitas* by abstracting the concept of a *civilis* that bound a *civis* and a *civitas* together. These were the roots of citizenship that were subsequently subjugated by monarchies until the discourse of rights, duties and the social contract liberated the people through nationalism, which re-established the concept of citizenship as *nationality* and the *national bond* between a *national* and his *nation*.

An idea that was rooted in Ancient Greece and Rome, disappeared in the Middle Ages, was revived in the Renaissance only to be subordinated in the Age of Monarchy and then finally rose again in the Age of Revolutions in order to be implemented through “*citizenship as nationality*”. Thus we have reached the point where citizenship and nationality became synonymous. The diagram in the following page provides a final visual representation of how citizenship and nationality are identified. Building on the last Renaissance diagram, it can be shown that a *civis/citizen/national* (orange) is related to a *civitas/citizenry/nation* (green) through *civilis/civility/national-identity*<sup>175</sup>(purple) and all of this is expressed through the term *civitas/civilitas/citizenship/nationality* which becomes implemented through national law.

The first diagram is the topic of Chapter Two.

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<sup>175</sup> In the same way that “*civilitas*” derived from “*civilis*”, this term is sometimes referred to as a virtue/principle of “citizenship” and thereby becomes confused with the abstract term in the center; this “national identity” is also “patriotism” and closely related to [and the source of] nationalism.



## CHAPTER TWO: NATIONAL CITIZENSHIP LAW

1920-1958

One reason why it was logical to end the previous chapter with the end of WWI before proceeding with an in-depth analysis of “national citizenship” [in this chapter] is because of the birth of international institutions with supranational responsibilities and hence supranational possibilities. More specifically, the Permanent Court of International Justice (PCIJ) was the first truly international judicial court that was fully established with the main purpose of resolving international [legal] disputes. With this in mind, in order to begin the discussion regarding how national citizenship was conceived in the 20th Century, it is imperative to provide one of the most comprehensive legal definitions available, which can be found in the Max Planck Encyclopedia of International Law (hereafter referred to as “MPEPIL” or “the Encyclopedia”):

**[N]ationality** is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Thus, the legal term ‘nationality’ reflects upon the formal relationship of individuals with a State and not on their ethnic origin or affiliation. The sum of its nationals, and thus the concept of nationality as such, determines the ‘personal dimension’ of a State in its international relations and gives rise to specific rights and duties of States.<sup>176</sup>

Although this is a lengthy definition to cite in full, it provides all the key elements necessary to analyze the concept of nationality and its relation to the historical evolution of citizenship. Furthermore, the MPEPIL definition is built on the exact wording of the *Nottebohm Case* of 1955 as well as the European Convention of

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<sup>176</sup> Dörr, Oliver. “Nationality”. MPEPIL References to documents were un-bracketed but they include: *Nottebohm Case (Liechtenstein v. Guatemala)*; Second Phase, International Court of Justice (ICJ), 6 April 1955 p. 23; *European Convention on Nationality* Article 2(a).

Nationality of 1997 and other encyclopedia entries regarding the jurisdiction of states. It is for this reason that it was necessary to quote the exact definition before engaging in the analysis of how national citizenship law evolved from the perspective of international law, which will set the foundations for Chapter Three.

Specifically, this chapter explores the development of precedents on nationality law [and related concepts] under the assumption that nationality and citizenship were often interchangeable terms throughout the 20th Century. However, as the MPEPIL notes, a much more precise way to understand the relationship between nationality and citizenship is by denoting the legal status of an individual as ‘**nationality**’ and the consequences of that status (i.e. the rights and duties under national law) as ‘**citizenship**’<sup>177</sup>. This slight distinction between the terms will be helpful throughout the remaining chapters in order to understand what citizenship of the European Union is within the contexts of historical citizenship and international law. If any further clarification of concepts is necessary, the reader may refer to Appendix 1 on Citizenship, Nationality, and Residency, but the best way way to understand the scope and purpose of this chapter is through the final diagram at the end of Chapter One. It was the purpose of that chapter to elaborate a theory of citizenship based on history, and this chapter will elaborate on the international legal consequences of national citizenship (i.e. “the legal status of individuals” as the MPEPIL distinction above suggests).

## **1. Nationality - Acquisition and Legitimacy**

### *1.1 Ex Lege (jus sanguinis & jus soli), Naturalization*

Not long after the establishment of the PCIJ, the Court was asked for its first advisory opinion pertaining to matters of nationality. After a decree whereby France sought to impose French nationality on individuals born in the Regency of Tunis and in Morocco, the British government protested that Britain could not recognize the applicability of these decrees to persons entitled to British nationality. The most famous statement by the Court, which set a precedent regarding future judgments of nationality, was that “in the present state of international law, questions of nationality are, in the opinion of the Court, in principle [solely within the jurisdiction of a

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<sup>177</sup> Ibid.

State]”<sup>178</sup>. As will be shown, this statement has been cited by future opinions, judgments and legal scholars in order to support Nation-States’ unique sovereign power to determine nationality.

The next major case regarding nationality came seven months later through the *Acquisition of Polish Nationality* Advisory Opinion of 15 September 1923 (Series B, No. 7). Here, the question was whether Poland was entitled to refuse Polish nationality to both of two types of persons: 1) those who were formerly German nationals and 2) those whose parents were not habitually resident in the territory [which was now part of Poland], *both* 2a) on the date of the birth of the person concerned *and* 2b) on January 10th, 1920 (the date of the entry into force of the Minorities Treaty). The Court stated that “The Treaty, [...] adopts both the principle of habitual residence and of origin. The following became Polish: in the first place, German nationals habitually resident in the territories incorporated in Poland; in the second place, persons born in these territories, provided they are born of parents habitually resident there at the time of such birth.”<sup>179</sup> In other words, the Court determined that in order to gain nationality in this case of State succession, it was *sufficient* for the parents to have been established in the territory (i.e. habitually resident) which subsequently became Polish, in a permanent manner (i.e. with the intention of remaining there). In other words, there was no need for the parents to be habitually resident at both times(2a) and time (2b). This decision will become relevant for the concept of *continuous nationality*.

After having looked at these two advisory opinions, it is already easy to derive the two most common ways in which nationality is conferred. The two

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<sup>178</sup> *Nationality Decrees in Tunis and Morocco* Advisory Opinion of 7 February 1923 (Series B, No. 4), p. 24, with the exact statement being: "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain." Furthermore, it declared "For the purpose of the present opinion, it is enough to observe that it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law. Article 15, paragraph 8 then ceases to apply [...]" This reference to Article 15, paragraph 8 of the Covenant [of the League of Nations] which seems quite analogous to Article 2 (7) of the UN Charter (the former refers to a matter “*solely/exclusively* within the domestic jurisdiction of that Party” and the latter refers to “which are *essentially* within the domestic jurisdiction of any state”)

<sup>179</sup> *Acquisition of Polish Nationality* Advisory Opinion of 15 September 1923 (Series B, No. 7)



primary ways to confer nationality *ex lege* (i.e. “as a matter of law; by operation of law; by virtue of law”) are the principles of *jus sanguinis* (“right of blood” meaning by descent, heritage) and *jus soli* (“right of soil” meaning location of birth). Among other conventions, the principle of *jus sanguinis* is explicitly laid down in Article 6(1)(a) of the 1997 European Convention on Nationality while *jus soli* is alluded to in Articles 6(2)(a) and 6(4)(e). Before discussing the various cases and conventions where these principles have been subsequently reaffirmed, however, it is important to properly understand these concepts and the other legal means that are predominantly used to confer nationality today.

The Encyclopedia lists “the acquisition of domicile with the intention of establishing permanent residence (*animus manendi*)” as a third *ex lege* method for the acquisition of nationality but it argues that “The State must, however, usually be seen as waiving its right to confer its nationality under such circumstances, if it grants to foreign nationals by treaty the right of abode or domicile.”<sup>180</sup>. In other words, once a State provides foreigner with the rights to live in the State, it ‘usually’ waives the right to grant nationality to those who move in with the intention of settling permanently. This, along with marriage and State succession complete the main methods recognized as *ex lege* acquisition of nationality, but they are much less prevalent and all of them are either closely related to or remedied by the third main method [after *jus soli* and *jus sanguinis*] of acquisition: naturalization.

**Naturalization** is the process by which an alien (i.e. foreigner) acquires the nationality of a particular State.<sup>181</sup> The process almost always entails a special and voluntary request by an individual along with an approval from the State in question, which often requires “prolonged lawful residence or knowledge of the language, or indeed any other form of ‘genuine link’” although these additional criteria are not required under international law<sup>182</sup>. The question of a ‘genuine link’ as well as some other important concepts and principles of international law will be discussed more in depth in the following section of this chapter. However, the lesson to be drawn for

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<sup>180</sup> Dörr, Oliver. “Nationality”. MPEPIL; Randelzhofer, Albrecht. ‘Nationality’ p. 503–504.

<sup>181</sup> Dörr, Oliver. “Nationality”. MPEPIL. Note: it is imperative to note here that this is a particularly thorny issue in regards to the distinction between nationality and citizenship. In some cases such as American Samoa, residents in a territory are considered [U.S.] “nationals” but are *not* [American] “citizens”, which means they must go through the process of naturalization in order to go from nationals to citizens, rather than to become nationals.

<sup>182</sup> *Ibid.*

now is that “*The free will of the individual to associate itself with the State in question, which finds expression in the application for nationality, constitutes a sufficient connection and is therefore recognized as a legitimate ground for the conferment of nationality.*”<sup>183</sup> It could be noted that this reference to “free will of the individual” certainly seems in line with principles and ideals of citizenship developed throughout the previous chapter [especially Rousseauian ones].

## 1.2 Functions & Limits

Now that we have addressed the three most prominent ways to confer nationality, it is time to explain some of the key **legal functions** that nationality served since the start of the 20th Century. Arguably the most important consequence of nationality in the international arena<sup>184</sup> is the right of States to exercise diplomatic protection for their nationals. This is another important concept to be understood, particularly in the context of what purpose nationality/citizenship served in the 20th Century and because it has been described as one of the most well-established fields of customary international law.<sup>185</sup> The most recent legal definition of what diplomatic protection is comes from the International Law Commission’s (ILC) 2006 Draft Articles on Diplomatic Protection which states:

“**Diplomatic protection** consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.”<sup>186</sup>

Based on most literature, the concept was originally described in this way during the *Mavrommatis Palestine Concessions [Greece v Great Britain] [Jurisdiction]* of 1924<sup>187</sup> and it is considered part of existing customary international law.<sup>188</sup> More

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<sup>183</sup> Ibid. Emphasis added

<sup>184</sup> Ibid.

<sup>185</sup> Dugard, John . “Diplomatic Protection” with the full statement being “The history of diplomatic protection may be controversial, but it is also rich in State practice, judicial decisions, codification, and doctrine. Indeed it is probably true to say that it is the field of international law in which most evidence of customary law is to be found.”

<sup>186</sup> Article 1

<sup>187</sup> *Mavrommatis Palestine Concessions [Greece v Great Britain] [Jurisdiction]* PCIJ Series A No 2, p12 [1924] which stated: “It is an elementary principle of international law that a State

important than its origins, however, the relationship between diplomatic protection and nationality has been codified as declaring that a State is entitled to exercise diplomatic protection “in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim”.<sup>189</sup> However, the nationality requirement for diplomatic protection as well as the aforementioned principle of continuous nationality which is alluded to in this article will be discussed more in depth in the forthcoming discussion.

The second and final concept worth discussing in this section is that of **sovereignty**. As the MPEPIL explains, “The most fundamental rule on nationality is derived from the principle of State sovereignty: a State may *only* regulate acquisition, loss, and consequences of *its own* nationality, and not of that of other States.”<sup>190</sup> But after having laid out the history of citizenship in the previous chapter, it should be easy to see how “nationality” is the 20th Century implementation of the concept of “citizenship” and how closely intertwined its history is with the idea of sovereignty: in Ancient Greece, *politeia* defined both citizenship and sovereignty; in Rome citizenship was controlled by the sovereign power representing the *civitas* and the *res publica* (and temporarily by the *emperor*); in the Middle Ages and the Renaissance, sovereignty remained with the *city-state* until the age of absolute monarchy which made the *king* sovereign and equated citizenship with subjecthood; finally, in the Age of Revolutions, sovereignty was equated to the “[general] will of the people” (i.e. citizens of the nation) and hence the Nation (i.e. its representative, the *Nation-State*) became the sovereign power. But it is important to note that even though States cannot control how other States confer their respective nationalities on

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is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law.”

<sup>188</sup> *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo) [2007] ICJ Rep 20*, para. 39; Dörr, Oliver. “Nationality”. MPEPIL

<sup>189</sup> Art. 5 (1) ILC Draft Articles on Diplomatic Protection. Note: the MPEPIL describes this relationship as the “main requirement for the exercise of diplomatic protection under customary law”, a point which may be true in regards to diplomatic protection *by a State*, but the development of international law seems to have given a roughly equal power of protection to organizations (e.g. the power of “functional protection” for UN after the *Reparations Case* and the ability to provide something between diplomatic and “consular” assistance by one Member State of the EU towards a national of another Member State). This issue will be explored more in-depth in the following chapter.

<sup>190</sup> Dörr, Oliver. “Nationality”. MPEPIL. Emphasis added.

individuals, they do have the power to determine who is to be considered a national of another State [or not] for the purpose of *domestic* legislation.<sup>191</sup> Nevertheless, these laws of recognition only have a binding effect for the State in question [and not for others]. It will be a recurring theme to see how this practice is reflected in case law judgments [throughout this chapter] and to gauge [in the next chapter] what kind of balance has been achieved by the EU regarding the conflict between State sovereignty vs community/supranational law.

Thus we have arrived at the conclusion of the introductory sections of this chapter which defined *nationality* as well as the most important concepts that are related to it (in summary: *jus sanguinis*, *jus soli*, *animus manendi*, *naturalization*, *diplomatic protection*, and *sovereignty*). Again, it will be important to remember the definition of nationality which opened this chapter, especially because different legal cases and advisory opinions might challenge one or more aspects of this definition. The following section will analyze various cases in international courts and tribunals [chronologically] in order to study the complicating factor of multiple nationality as well as other principles related to nationality. The outcome of these cases and the evolution of the principles used in various judgments will then play a role in the final chapter, which will analyze how EU citizenship relates to the concept of nationality. If nationality is identical to citizenship, and if nationality is understood as a [unique] power sovereign states, then there is a need to find a historical context for the idea of EU citizenship, which is not directly related to a specific nation-state or a pre-defined “people” but rather to an international organization.

## **2. International Law - Cases before International Courts and Tribunals**

### *2.1 Multiple Nationality, Principles & Issues*

Although dual nationality was “not a pressing issue in a world of low mobility”<sup>192</sup> and it may seem like a unique result of the exceedingly legalistic system of the 20th Century, the question has perhaps been around for as long as citizenship has existed. “Could a man hold two citizenships? Could he be simultaneously a citizen of his native city and of Rome? The question was raised as early as 56 BC by

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<sup>191</sup> Ibid.

<sup>192</sup> Spiro, Peter J. “Multiple Nationality”. MPEPIL

that most distinguished scholar-lawyer, Cicero. [...] Cicero argued in a legal case that the strain on a man's loyalty meant that citizenship of another city was incompatible with the status of Roman citizenship: a man had to choose."<sup>193</sup> Indeed, Cicero has been quoted as saying that "I myself have seen certain ignorant men, citizens of ours, misled by this, sitting at Athens amongst jurymen and members of the Areopagus [Council of senior citizens]... since they did not know that if they acquired citizenship there, they had forfeited it here."<sup>194</sup> Today, it is still possible for individuals to lose nationality based on serving another country, particularly military service<sup>195</sup>, but in regards to acquisition of multiple nationalities, the main ways are 1) a mixture of jus soli and jus sanguinis, 2) different jus sanguinis from different parents, 3) naturalization. It is these three possibilities that have led to plenty of cases under international courts and tribunals where courts have had to determine where an individual's loyalties or attachments may lie. It is also these concepts and principles used by international courts that need to be understood before discussing where EU citizenship lies in the historical context of citizenship.

After the birth of international courts, the first prominent case of dual nationality was the *Affaire Canevaro (Italy v Peru)* which concluded on May 3, 1912. In its decision, the Court stated that "according to Peruvian legislation (Art. 34 of the Constitution), Raphael Canevaro is a Peruvian by birth because he was born on Peruvian territory. [...] on the other hand, the Italian legislation (Art. 4 of the Civil Code) attributes to him Italian nationality because he was born of an Italian father."<sup>196</sup> This clearly references a case of dual nationality which was acquired through a mixture of jus sanguinis, and the case set a precedent for the **principle of dominant/active nationality**<sup>197</sup>. In its decision, the Court determined that Raphael Canevaro had conducted himself as a Peruvian citizen on several occasions, particularly by standing as candidate for Senate "where none are admitted except Peruvian citizens" and especially by "accepting the office of Consul General of the

<sup>193</sup> Heater, Derek. *A Brief History of Citizenship*. p35. The statement is made in reference to the case trial of a Cornelius Balbo, a man from Gades (modern Cadiz) on whom Pompey had conferred Roman citizenship.

<sup>194</sup> Cicero (trans. R. Gardner) 'Pro Balbo' in *The Speeches*. p.29-30

<sup>195</sup> This point is made in the European Convention on Nationality under Article 7(1)(c) which allows the loss of nationality based on "voluntary service in a foreign military force"

<sup>196</sup> *Affaire Canevaro (Italy v Peru)* (1961) 11 RIAA 397.

<sup>197</sup> Bernhardt, Rudolf. *Encyclopedia of Public International Law, Vol. 2: Decisions of International Courts and Tribunals and International Arbitrations*; Dörr, Oliver. "Nationality". MPEPIL; Benedek, Wolfgang. "Canevaro Claim Arbitration" MPEPIL

Netherlands”, therefore “whatever Raphael Canevaro's status may be in Italy with respect to his nationality, the Government of Peru has the right to consider him as a Peruvian citizen and to deny his status as an Italian claimant.”<sup>198</sup> This decision rendered what’s been called the “**Canevaro principle**” regarding *active* or *effective nationality*. In essence, Italy was not entitled to present a case on behalf of Raphael Canevaro because he was an active/effective Peruvian national and this prevented Italy from having jurisdiction to file a claim on his behalf against another State which claimed him as a national.

The next major cases [chronologically] with a statement about nationality were the aforementioned advisory opinions of *Nationality Decrees in Tunis and Morocco* as well as the *Acquisition of Polish Nationality*, followed the *Mavrommatis Palestine Concessions [Greece v Great Britain]* judgment on 30 August 1924. Although the origins of diplomatic protection are said to go as far back as 1758<sup>199</sup>, the connection between injury to a citizen being analogous to injury to a state was reaffirmed by the *Mavrommatis Case*. Here, the court stated what has been referred to as a ‘**famous formula**’<sup>200</sup> for the relationship between diplomatic protection and nationality’:

“It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, [...] By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law.”<sup>201</sup>

Although the case began as a matter of a private individual against a State, the Court determined that “Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.”<sup>202</sup>

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<sup>198</sup> *Affaire Canevaro (Italy v Peru)* (1961) 11 RIAA 397.

<sup>199</sup> When Swiss jurist Emmerich de Vattel stated ‘whoever ill-treats a citizen indirectly injures the State, which must protect that citizen’ according to Dugard, John. “Diplomatic Protection” MPEPIL

<sup>200</sup> Benedek, Wolfgang. “Canevaro Claim Arbitration”

<sup>201</sup> *Mavrommatis Palestine Concessions (Greece v Great Britain) (Jurisdiction) PCIJ Rep Series A No 2*. p.12

<sup>202</sup> *Ibid.*

Three more cases that are worth mentioning are all arbitral awards involving Mexico. The *North American Dredging Company* case of March 1926 was largely related to a **Calvo clause**<sup>203</sup> where the U.S.-Mexican General Claims Commission decided that an individual person is *not* entitled to waive his/her right to diplomatic protection in the case where internationally illegal acts are committed against said person. In short: States retain the power of diplomatic protection and it is not an individual's right to forfeit it when an internationally unlawful act is committed.<sup>204</sup> Meanwhile, in the *Dickson Car Wheel Company* case of July 1931, the same Claims Commission stated that "A State...does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury."<sup>205</sup> This ruling confirmed that diplomatic protection could *only* be granted to nationals and not to mere *residents* of a territory (and thus, not to stateless people either). Lastly, the '*Pinson Case*' of October of 1928 dealt with damages caused to a French national during the Mexican revolution of 1910-1920. Although Pinson did not actually possess dual nationality, the French-Mexican Claims Commission reaffirmed the general principle of diplomatic protection which bars an international tribunal from having jurisdiction over a claim by an individual who possesses the nationality of both the claimant and respondent States.<sup>206</sup> In other words, all three of these cases dealt with the sovereign power of states, non-intervention in another State's internal policy, and the decision of who was to be considered a national in order to warrant diplomatic protection.

At this point it is worth mentioning that most of the main principles or formulas/rationales have already been introduced and subsequent cases began building precedents or redefining principles. Chronologically, it is also worthwhile to note that the *Convention on Certain Questions Relating to the Conflict of Nationality Laws* was agreed upon in the Hague on 12 April 1930, but it did not enter into force until 1937. The preamble references an ideal of ending both

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<sup>203</sup> Which "requires that aliens commit themselves [...] not to seek diplomatic protection from the State of which they are nationals as against the Contracting State which allegedly caused them some damage. The clause therefore amounts to a waiver of the right to diplomatic protection" according to Juillard, Patrick. "Calvo Doctrine/Calvo Clause" MPEPIL

<sup>204</sup> *North American Dredging Company (USA) v United Mexican States (1926)* 5 RIAA 26. p. 34

<sup>205</sup> *Dickson Car Wheel Company (USA) v United Mexican States (1931)* 4 RIAA 669, p. 678

<sup>206</sup> Sepúlveda, Bernardo. "Pinson Claim Arbitration (France v Mexico)" MPEPIL.

statelessness and double nationality while the most important articles for our purposes are Articles 1 & 2 [in combination] as well as 4 and 5. The first two state that each State has jurisdiction to determine who are its nationals according to domestic laws and that this law should be recognized by other States “in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality”.<sup>207</sup> It has been suggested that Article 1 [regarding jurisdiction] is now customary international law.<sup>208</sup> Article 4 states that diplomatic protection may not be exercised towards non-nationals and Article 5 has been described as incorporating the aforementioned “*Canevaro principle*”.<sup>209</sup> It may be useful to remember the timing of this Convention while we continue analyzing the chronological development of “nationality” in the 20th Century, though it should also be noted that there a numerous countries which never ratified the Convention.<sup>210</sup>

Two cases which occurred before the Convention entered into force were the *Salem Case* and the *Panevezys-Saldutiskis Railway Case*. In the *Salem Case*, George Salem was an individual who was born in Egypt to a Persian (Syrian) father but he later became naturalized as an American. The case dealt with issues of continuous nationality, effective nationality and diplomatic protection as well as fraudulent acquisition of nationality (though this was not found to be the case for George Salem). It is worth mentioning that the Tribunal declared that the principle of effective nationality did *not* seem to be sufficiently established in international law despite the *Affaire Canevaro*, and that even with this principle, Salem’s effective nationality was in fact Persian and American, which meant that Egypt had no jurisdiction to prevent diplomatic protection by claiming him as a national.<sup>211</sup> The main conclusion in relation to nationality was that “[T]he rule of international law being that in a case of dual nationality a third power is not entitled to contest the claim of one of the two powers whose national is interested in the case by referring

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<sup>207</sup> Text combines content of both articles; direct quote is from Article 2 of the *Convention on Certain Questions Relating to the Conflict of Nationality Laws*

<sup>208</sup> Amerasinghe, Chittharanjan F.

<sup>209</sup> Benedek, Wolfgang. “Canevaro Claim Arbitration”; Bernhardt, Rudolf. *Decisions of International Courts and Tribunals and International Arbitrations*; Dörr “Nationality”

<sup>210</sup> A list of signatures, ratifications, and accessions can be found at <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-4.en.pdf>

<sup>211</sup> Liberti, Lahra. “Salem Case” MPEPIL



to the nationality of the other power”<sup>212</sup> which supported the aforementioned Convention<sup>213</sup> despite the fact that Egypt was the only signatory involved [though it has not ratified it]<sup>214</sup>.

In the *Panevezys-Saldutiskis Railway (Estonia v Lithuania) Judgment*, the issue of nationality became a lot more complicated. On the one hand, the PCIJ affirmed that a State asserts its right to ensure respect for international law when it engages in diplomatic protection.<sup>215</sup> This assertion resonates with the reasoning of previous courts, particularly in the *Mavrommatis Case* and the *North American Dredging Company* case. However, it also stated that this protection was necessarily limited to nationals because of a special bond of nationality, and therefore no claim of injury could be made in behalf of the national of another State.<sup>216</sup> This brought up what is sometimes referred to as the “**nationality of claims rule**” which is very closely related to the *principle of dominant/effective nationality* since it states that diplomatic protection of natural or legal persons may be brought *only* by the national State of the injured person<sup>217</sup> (i.e. the relevance of a claim must be established through nationality). Furthermore, in his dissenting opinion Judge van Eysinga brought up the question of state succession as well as continuous nationality.<sup>218</sup> The upshot here is that this case, either directly or indirectly, touched on concepts of dominant/effective nationality (*Affaire Canevaro*), continuous nationality and state succession (*Acquisition of Polish Nationality*) and jurisdiction over nationals vs non-

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<sup>212</sup> *Award in the Arbitration Case between the Government of the United States of America and the Government of His Majesty the King of Egypt concerning the Claim of George J. Salem* (8 June 1932) 2 RIAA 1165. p. 1188; Liberti, Lahra. “Salem Case” MPEPIL

<sup>213</sup> Liberti, Lahra. “Salem Case” MPEPIL

<sup>214</sup> Refer to note two hundred and ten above for list of Parties to the Convention

<sup>215</sup> *Panevezys-Saldutiskis Railway (Estonia v Lithuania) Judgment of the Permanent Court of International Justice* (Series A/B, No. 76, p. 16)

<sup>216</sup> *Ibid.* With the precise statement being: “This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged. Where the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse.”

<sup>217</sup> Trevisanut, Seline. “Nationality Cases before International Courts and Tribunals” MPEPIL

<sup>218</sup> Where his conclusion is: “It follows from the foregoing that the Lithuanian Agent has not succeeded in establishing the existence [...] of the rule of international law to the effect that a claim must be a national claim not only at the time of its presentation but also at the time when the injury was suffered, and that this rule cannot resist the normal operation of the law of State succession.” p35

nationals (*Mavrommatis Case*, *Dickson Car Wheel Company*, *Pinson Case*, *Salem Case*). However, it is crucial to remember that the case was dismissed because local remedies had not been exhausted, and therefore the ruling is not technically a landmark judgment by an international court. Nevertheless, it is already easy to see the deep interconnection between nationality and diplomatic protection as well as sovereignty. All of these cases took place before WWII and before the dissolution of the PCIJ, but soon after the war there were two particular landmark cases by the International Court of Justice (ICJ) which were perhaps critical to the development [and arguably separation] of all these concepts.

## 2.2 WWII and the International Court of Justice

The *Reparations Case* of April 1949 is widely considered a landmark case on the topic of diplomatic protection and sovereignty of a State, but it is important here to draw out its connection to the topic of nationality. One important statement that was made in the judgment was when Article 4 of the *Convention on Certain Questions Relating to the Conflict of Nationality Laws* was indirectly confirmed<sup>219</sup> by the Court by referring to “ordinary practice whereby a State does not exercise protection on behalf of one of its nationals against a State which regards him as its own national”<sup>220</sup>. The ICJ stated that this was irrelevant to the case but the statement has been subsequently cited as support for non-intervention in questions of nationality.<sup>221</sup> This statement is consistent with the prior decision to bar Italy from protecting Raphael Canevaro from Peruvian jurisdiction (i.e. the Canevaro principle) which was also affirmed by Article 4 of the 1930 Convention and in the *Pinson Case* [though it was not used for that decision]. But perhaps the most interesting comments for our purposes come from the two dissenting opinions of Judge Badawi Pasha and Judge Hackworth.

In his opinion, Judge Badawi Pasha refers to the *Mavrommatis Case* and the *Panevezys-Saldutiskis* to reaffirm that a State has a right to claim reparation *not* because it is a representative of an individual but *because it is asserting its right to*

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<sup>219</sup> Benedek, Wolfgang. “Canevaro Claim Arbitration”; Dörr, “Nationality”; Bernhardt, Rudolf. *Decisions of International Courts and Tribunals and International Arbitrations*

<sup>220</sup> *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 173*. p16

<sup>221</sup> Trevisanut, Seline. “Nationality Cases before International Courts and Tribunals” MPEPIL

ensure respect for the rules of international law.<sup>222</sup> Furthermore, Badawi Pasha also makes reference to the PCIJ's 1928 Judgment No. 13 of the *Chorzów Factory* when he stresses that a State does not act as a *representative* of an individual and that therefore the damages experienced by the two *correspond* to each other but are not *identical*.<sup>223</sup> This once again seems to support the theory that, under international law, it is not the *violation of rights of an individual* that warrant claims for reparation but rather the corresponding *rights/damages to a State*.<sup>224</sup> However, this theory will be perhaps *seriously* contested by the coinciding/parallel/concurrent and emerging role of human rights, a topic which will be explored in the third chapter.

More famously, Judge Hackworth's dissenting opinion made a statement regarding the implied powers of an international organization. He concurred with the United Nation's implied power to "assert claims in its own behalf" and "take needful steps for its protection against wrongful acts for which Member states are responsible."<sup>225</sup> However, he also made some comments about nationality that are particularly interesting and relevant in the context of the current analysis of nationality. His dissenting opinion was centered on a disagreement about "a claim for reparation due in respect of damage caused *to the victim of a wrongful act or to persons entitled through him*, as distinguished from a claim on behalf of the Organization itself".<sup>226</sup> In other words, he agreed that the UN has a similar power to a state since it may claim damages to itself, but he disagreed [among other things] with "an analogy between the relationship of a State to its nationals and the relationship of the Organization to its employees; also an analogy between functions of a State in the protection of its nationals and functions of the Organization in the

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<sup>222</sup> *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 173. Judge Badawi Pasha Dissenting Opinion p. 206*

<sup>223</sup> *Ibid* p.207 Emphasis added. The precise quote being "The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State ; it can only afford a convenient scale for the calculation of the reparation due to the State." from *Chorzów Factory (Merits)* Judgment No. 13 of the P.C.I.J. (Series A., No. 17, pp 27-28)

<sup>224</sup> A theory which finds most support in the aforementioned *Chorzów Factory* case as well as the *North American Dredging Company* case

<sup>225</sup> *Ibid*. p. 196-197

<sup>226</sup> *Ibid*. p. 197 Emphasis added.

protection of its employees.”<sup>227</sup> In claiming that “heretofore only States have been regarded as competent to advance such international claims [for reparation due in respect of damage caused to the victim of a wrongful act or to persons entitled through him]”<sup>228</sup> he lends support to the idea that the jurisdiction/power of diplomatic protection of/for individuals belongs *solely* to States [and not to individuals or organizations]. Judge Hackworth then proceeds to quote *Panevezys-Saldutiskis Railway Case* by referencing the bond of nationality (refer to footnote 38 above) but it will be critical to remember all of these statements because they are central to the point of this thesis, particularly in regards to the development of EU citizenship and *especially* when considering the events that took place in the next and perhaps most important case regarding nationality...

One reason why *the Nottebohm Case of 1955* is so relevant to cases of nationality is because the case dealt with issues of diplomatic protection, sovereignty, naturalization, and the principle of effective nationality as well as the ‘genuine link’ theory, which will be explained shortly. As previously mentioned in the *Nationality Decrees in Tunis and Morocco*, questions of nationality are in principle solely within the jurisdiction of a State, but States also have the power to determine who is or *is not* considered a national of another State for domestic purposes. This was precisely the issue at stake in Nottebohm. The root of the issue was whether Nottebohm was effectively a national of Liechtenstein after his naturalization. **To put it differently: did international law compel Guatemala to recognize Friedrich Nottebohm, a naturalized citizen of Liechtenstein, as a Liechtenstein national?** Before analyzing the Court’s answer to this question, it will be useful to review the *Functions & Limits* of nationality introduced at the beginning of this chapter and to summarize the principles and precedents pertaining to nationality that had been built up thus far in the 20th Century.

### 2.3 Summary of Principles and Precedents

Section 1.2 discussed the interdependence between **nationality, diplomatic protection** and **sovereignty**. The close interaction between these three was evident from the very first case (*Affaire Canevaro*), where the PCIJ declared that a State has

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<sup>227</sup> Ibid. 198-199

<sup>228</sup> Ibid p. 197

the power to take diplomatic action against another State on behalf of one of its nationals. But it is ordinary practice for this power to be limited when the individual is *also* a national of the other State<sup>229</sup>, at which point the “**Canevaro principle**” should be considered in order to determine which is the **dominant/effective nationality**.<sup>230</sup> Although the validity of this principle was initially questioned in the Salem Case, the Court considered it irrelevant for that judgment<sup>231</sup> and it was subsequently taken into consideration in the Reparations Case, Nottebohm Case. the Mergé Case [which will be mentioned shortly] and in the Iran–United States Claims Tribunal.<sup>232</sup> Furthermore, it is said to be incorporated into Article 5 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws<sup>233</sup> which provides it with the status of an arguably well-established principle.

The relationship between diplomatic protection and sovereignty is also reflected in the principle of international law which entitles States to take diplomatic action or judicial proceedings on behalf of their nationals in order to thereby ensure **respect for the rules of international law**.<sup>234</sup> Once a state takes action, it becomes the **sole claimant**<sup>235</sup>; but this right to claim reparation always belongs to the State *exclusively*, given that it is **not a mere representative** of the individual, who in turn **does not have the power to forfeit** this right when an **internationally illegal act** is committed.<sup>236</sup> In terms of **third-parties**, the previous rulings seem to suggest that States may not make claims on behalf of **nationals of another State**<sup>237</sup> nor on behalf of someone **stateless**<sup>238</sup>. Both of these pertain to *diplomatic protection* while respecting the *sovereignty* ideal that nationality laws are **solely within the jurisdiction of States**<sup>239</sup> and that States have the sovereign power to recognize [or deny] who possesses another State’s **nationality under domestic law**.<sup>240</sup> After having

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<sup>229</sup> Refer to notes two hundred and six and two hundred and twenty

<sup>230</sup> Refer to note one hundred ninety-eight above.

<sup>231</sup> Refer to note two hundred and eleven

<sup>232</sup> Benedek, Wolfgang. “Canevaro Claim Arbitration”; Trevisanut, Seline. “Nationality Cases before International Courts and Tribunals” MPEPIL

<sup>233</sup> Refer to note two hundred and nine

<sup>234</sup> Refer to notes two hundred and one and two hundred and fifteen

<sup>235</sup> Refer to note two hundred and two

<sup>236</sup> Refer to notes two hundred and four, two hundred and twenty-two and two hundred twenty-three

<sup>237</sup> Refer to note two hundred and sixteen

<sup>238</sup> Refer to note two hundred and five

<sup>239</sup> Refer to note one hundred seventy-eight

<sup>240</sup> Refer to note one hundred ninety-one

reviewed these principles, it is time to discuss Nottebohm and the subsequent cases before proceeding to the next chapter.

## 2.4 *Nottebohm & Beyond*

The **Nottebohm Case** is perhaps *the* landmark and most influential case in international law for questions regarding nationality. Friedrich Nottebohm was born in Germany in 1881 and after 24 years became a resident (though not a national) of Guatemala in 1905, where he resided for over 30 years. In 1939, he acquired the citizenship/nationality of Liechtenstein through naturalization, a process by which he lost his German citizenship according to the nationality laws of both Germany and Liechtenstein, and he then returned to live and work in Guatemala at the beginning of 1940.<sup>241</sup> But in 1943 he was arrested as an enemy national (Guatemala had just entered WWII against Germany) and he was deported to the United States for internment while his property and assets were seized by Guatemalan authorities. At this point, Liechtenstein sought to intervene on behalf of Nottebohm.

In the summary of principles above, it is the final point about ‘the power to recognize [or deny] the nationality of an individual under domestic law’ that became the crux of the issue in *Nottebohm* because, according to the **principle of state sovereignty**, Liechtenstein had the power to grant nationality to Nottebohm and Guatemala had the right to treat Nottebohm as a German [enemy] national. These were not necessarily incompatible. But based on the **principle of diplomatic protection**, Liechtenstein had the right to protect Nottebohm against Guatemala, whose nationality Nottebohm did not possess, while Guatemala refused to recognize this right because of Nottebohm’s German nationality. It is crucial to point out here that *neither* the Court *nor* Guatemala had the power to question the legitimacy of Nottebohm’s ***citizenship*** *within Liechtenstein* (a domestic issue protected by State sovereignty); the issue was rather to determine the legitimacy of Nottebohm’s ***nationality*** *under international law*. This would determine whether Liechtenstein could demand respect for the rules of international law by engaging in diplomatic action. All of these facts are supported by the Encyclopedia’s slight distinction between nationality and citizenship<sup>242</sup> as well as the aforementioned principles and

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<sup>241</sup> *Nottebohm (Liechtenstein v Guatemala)* (Second Phase) [1955] ICJ Rep 4.

<sup>242</sup> Refer to note one hundred seventy-seven

rulings.<sup>243</sup> Did international law compel Guatemala to recognize Friedrich Nottebohm, a naturalized citizen of Liechtenstein, as a Liechtenstein national? The Court's answer was no, and this decision was reached because of the definition provided at the opening of this chapter. Nottebohm lacked a 'genuine link' to Liechtenstein, despite the acquisition of national citizenship, therefore he could not be considered to have 'effective nationality' of Liechtenstein for the purposes of international law. But the genuine link theory has been questioned by experts so the specific facts of this case and the intricacies of this decision will be revisited at the end of the next chapter in order to finally draw out the fundamental border between citizenship and nationality. Before proceeding, there are two last cases in the 20th Century that are worth mentioning.

Two months after Nottebohm, another case outside the ICJ made a statement on nationality. This was the *Mergé Case* by the Italian-United States Conciliation Commission on 10 June 1955. Mrs. Mergé was an American who got married to an Italian, acquired Italian nationality, but retained her American passport. The main result of the case was that the US was prevented from exercising diplomatic protection because her American nationality could not be considered her dominant nationality.<sup>244</sup> This decision was also in line with previous cases of dominant/effective nationality and has been applied in numerous proceedings involving persons with more than one nationality, but only to those cases.<sup>245</sup> These included the cases by the Iran-United<sup>246</sup> States Claims Tribunal, which largely made use of Mergé and Nottebohm.

Finally, the last point in this chapter's timeline includes another case by the Italian-US Conciliation Commission on 20 September 1958. In *Flegenheimer*<sup>247</sup>, the decision was that the case was inadmissible because it could not be proven that the claimant had US nationality. The Commission also stated that the applicability of dominant nationality was limited to cases of dual nationality and it confirmed the

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<sup>243</sup> Here, we can already see the conceptual difference between **citizenship** and **nationality** [*under international law*] that is visualized in the diagrams at the end of Chapter One and which will be supported in Chapter Three.

<sup>244</sup> Mergé (Decision No 55) (1955) 14 RIAA 236. p. 247

<sup>245</sup> Trevisanut, Seline. "Nationality Cases before International Courts and Tribunals" MPEPIL

<sup>246</sup> *Ibid.*

<sup>247</sup> *Flegenheimer (Decision No 182) (1958) 14 RIAA 327*

general principle that fraudulent acquired nationality is generally not recognized.<sup>248</sup> But perhaps what is most interesting about this case is how the language used makes a perfect transition to the focus of Chapter Three. The central question in the case was whether an individual fit the definition provided in Article 78, paragraph 9, letter (a) of the Treaty of Peace with Italy which provides:

**“United Nations nationals”** means individuals who are *nationals of any of the United Nations* or corporations or associations organized *under the laws of any of the United Nations*, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.<sup>249</sup>

Although this provision is making a reference to the thoroughly-discussed principle of States’ sovereignty over nationality<sup>250</sup>, it does make one wonder if it is possible for an international organization or a union of nations to have “nationals” or “citizens” and what it would entail.

And thus we have finally arrived at the core question of this thesis which asks:

*How does “European Union Citizenship” fit within the historical evolution of citizenship?*

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<sup>248</sup> Trevisanut, Seline. “Nationality Cases before International Courts and Tribunals” MPEPIL

<sup>249</sup> *Flegenheimer (Decision No 182) (1958) 14 RIAA 327* p. 337 Emphasis added

<sup>250</sup> The Commission states that “It is clear that the afore-mentioned provision of the Treaty of Peace, in explaining the meaning of “United Nations nationals” refers to an unquestionable principle of international law according to which every State is sovereign in establishing the legal conditions which must be fulfilled by an individual in order that he may be considered to be vested with its nationality.” (p. 337)



## CHAPTER THREE: EUROPEAN CITIZENSHIP

### *Article 8<sup>251</sup>*

1. Citizenship of the Union is hereby established.

Every person holding the nationality of a Member State shall be a citizen of the Union.

2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

With these words, the Maastricht Treaty created European Citizenship. Article 8(a-e) then defined the specific rights and duties of citizens. As we have seen throughout chapters 1 and 2 of this analysis, citizenship has historically been understood as a political/legal status of equality which is identified by specific rights and duties. Whether these rights and duties were fulfilled mostly by military training (Sparta), political participation (Athens) or as a legal status to prove allegiance and protect rights (Rome), the fact remains that citizenship in all its forms has always been identical to rights, duties and a legal-political status. From its conception, the idea of citizenship was tied to city-states, but it gradually became widespread throughout the Roman Empire until it lost all meaning and went into a dark age. When it was revived in the Renaissance, it continued to be attached to city-states until these were subdued by monarchies. Finally, after the American and French Revolutions, the idea of citizenship became practically interchangeable with the concept of nationality throughout the 1900s.

The 20th Century brought the the first truly international judicial courts and tribunals. Over the course of the century these began hearing cases regarding the issue of nationality and developing principles and precedents to address these. However, this century *also* marked the dawn of supranational organizations at the end of World War II. The creation of international political unions *by* sovereign States, through *legal* treaty, and with international *personality* is of no small consequence in the history of international relations; but the establishment of a common, legal and political status of *citizenship* that is tied to an *organization* [rather than a city-state or nation-state] is perhaps even more revolutionary. This

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<sup>251</sup> Original text from the Maastricht Treaty (Treaty on the European Union), signed 7 February 1992, entered into force on 1 November 1993.

development in the Maastricht Treaty of 1993 is precisely what makes the question of “what exactly *is* EU citizenship?” an interesting one. Although some critics would argue that European citizenship is hardly any ‘real’ citizenship because it is immediately tied to and dependent on national citizenships, the historical development of citizenship through Chapter One begs the question of what exactly a ‘real’ citizenship is supposed to be. It would also be wrong to argue that EU citizenship is *inseparable* from its components and the most immediate evidence of this can be found in the evolution of how it is formulated.

The wording used to define this new citizenship in the Maastricht Treaty led to a desire for clarification from one Member State: Denmark. Between the signing of the Maastricht Treaty and its entry into force, Denmark negotiated four opt-outs, one of which pertained to a clarification regarding EU citizenship.<sup>252</sup> In *European Council document 92/C 348/01*, the Heads of Government and the European Council agreed that citizenship of the Union provided *additional* rights & protection and that [in line with customary international law] questions of nationality were still a matter for each Member State to determine individually.<sup>253</sup> Furthermore, Annex 3 of this document provides unilateral Danish remarks which, though not necessarily representative of other Member States, remain interesting because they express the view that:

“Citizenship of the Union is a political and legal concept which is *entirely different* from the concept of citizenship within the meaning of the Constitution of the Kingdom of Denmark and of the Danish legal system. Nothing in the Treaty on European Union implies or foresees an undertaking to create a citizenship of the Union *in the sense of citizenship of a nation-state*.”<sup>254</sup>

However, it is imperative to remember that this opt-out was never actually incorporated into the treaties, and the reason for that is because the **Amsterdam**

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<sup>252</sup> Miles, Lee. *The European Union and the Nordic Countries*. p. 90

<sup>253</sup> Official Journal C 348 , 31/12/1992 P. 0001 - 0001. With the exact statement being: “The provisions of Part Two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned.”

<sup>254</sup> *Ibid.* Emphasis added

**Treaty**<sup>255</sup> amended the article on citizenship of the Union by clarifying that “Citizenship of the Union shall *complement and not replace* national citizenship.”<sup>256</sup> From this wording, it can be understood that Union Citizenship is indeed an additional object *in and of itself* and this can be proven further because the wording was changed yet again in subsequent treaties. As it stands in both Article 9 of the TEU and Article 20(1) of the TFEU in September 2016, it is stated that “Citizenship of the Union shall be *additional to* and not replace national citizenship”[emphasis added]. Thus, citizenship of the Union may be labeled as “complementary” or “additional” to national citizenship, but this only emphasizes the question of what EU citizenship actually is *by itself* and where it fits into the history of legal and political citizenship that undoubtedly predates the concepts of nationality and the Nation-State. This chapter explores the answer to this question by analyzing case law and legal commentary that defined or redefined the relationship between EU citizenship and the sovereign nationality of Member States. We begin with a brief note on the research literature on citizenship and nationality.

### *1. Introduction to Literature on Citizenship-Nationality*

One starting point to discuss nationality and citizenship is the work of sociologist **Saskia Sassen** who observes two dynamics taking place in the early 21st Century. First, she points out that the nation-state is no longer the exclusive center for the enactment of “the organization of formal status, the protection of rights, citizenship practices or the experience of collective identities and solidarities”.<sup>257</sup> This alludes to the discussion in the previous chapter regarding status, protection and solidarities as well as the way these interact through the concept of nationality. Even more directly, Sassen discusses part of the second dynamic as “changes in the law of nationality entailing a shift from purely formal to effective nationality and enabling legislation allowing national courts to use international instruments”.<sup>258</sup> Such statement is a very clear reference to the already-discussed **principle of effective nationality** and the judgments of international courts that were discussed in the previous chapter. In regards to a possible distinction between citizenship and

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<sup>255</sup> signed on 2 October 1997 and entered into force on 1 May 1999

<sup>256</sup> Amsterdam Treaty, Part One, Article 2(9). Emphasis added

<sup>257</sup> Sassen, Saskia. "Towards Post-National and Denationalized Citizenship." p.277

<sup>258</sup> *Ibid.*

nationality, she states that “in a technical legal sense, while essentially the same concept, each term reflects a different legal framework. Both identify the legal status of an individual in terms of state membership. But citizenship is largely confined to the national dimension while nationality refers to the international legal dimension in the context of an interstate system.”<sup>259</sup> Once again, this distinction is consistent with the understanding by the Max Planck Encyclopedia of Public International Law (MPEPIL).<sup>260</sup>

Nevertheless, by mere definition it can be argued that thanks to EU Citizenship, it is no longer the case that citizenship is confined to a domestic legal status but rather to an international one as well, although that exact topic will be explored throughout this chapter. It is indeed the case that EU citizenship is immediately tied to the nationality of Member States, but it will be shown that “EU citizens” is intended to be the “fundamental status” of nationals of the EU Member States. Since “nothing in the Treaty on European Union implies or foresees an undertaking to create a citizenship of the Union in the sense of citizenship of a nation-state”<sup>261</sup> it seems clear that there is a conceptual distinction between a “citizen” and a “national.” In other words, Citizenship of the Union is something *different*<sup>262</sup> and, although this does not yet explain what EU citizenship *is*, it does suggest that it is *not* “citizenship” in the traditional modern sense that is so intertwined with nation-states.

Perhaps one author who makes a direct reference to EU citizenship in the context of history is **Andrew Linklater**. He places particular importance on the **principle of direct effect** which “obliges national courts to apply [European] Community provisions even though national legislatures have not transformed [these] into domestic law” and on the “idea of supremacy of Community law, [which] holds that Community Law prevails when its provisions clash with national law”<sup>263</sup>. Although he makes the argument that the rights of European citizens are thin when compared to the rights of national citizens, it is precisely this issue that deserves more

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<sup>259</sup> Ibid. p. 278

<sup>260</sup> Refer to note one hundred seventy-seven in the previous chapter.

<sup>261</sup> Refer to footnote two hundred fifty-three above

<sup>262</sup> Furthermore, the opinion of Advocate General Maduro in the Rottmann Case (which will be discussed soon) states that “Union citizenship assumes nationality of a Member State but it is also a legal and political concept independent of that of nationality” (parag. 23)

<sup>263</sup> Linklater, Andrew. “Cosmopolitan Citizenship”

exploration... How does European citizenship relate to a direct effect? What happens when Community Law regarding EU Citizenship clashes with national law regarding nationality? Which are the rights [however thin the may be] that distinguish citizenship of the Union from national citizenship? In order to explore these questions, it is necessary to analyze the developing case law and legal commentary about citizenship of the Union.

## 2. Cases and Legal Commentary Regarding EU Citizenship

The legal cases dealing with EU citizenship are of a particularly unique nature. Given the historical recency of Union Citizenship, the impact that it has on State sovereignty, and the revolution in communication that is the internet, *a lot* of material has been produced on the topic, whether it be academic or legal in nature. Indeed, the database “Citizenship Case Law” provided by **EUDO CITIZENSHIP**<sup>264</sup> lists 52 cases<sup>265</sup> and a quick advanced search for case-law within the European Court of Justice (ECJ) website<sup>266</sup> results in 166 cases even while narrowing the subject-matter exclusively to “Citizenship of the Union”. For this reason, to speak of every single case that touched on any particular aspect of EU citizenship would be equivalent to building a Gothic cathedral by collecting bricks of different sizes from 52 houses in one community and 166 bricks from another potentially-overlapping community. Therefore, rather than analyzing each major case chronologically [as in the previous chapter], it will be more helpful to take a broader look at *what EU citizenship is/does* by looking into the most recent major cases as well as the legal commentary on these. One reason for this is because the ECJ is the ruling authority on citizenship of the Union and its approach to cases on this particular matter has been said to progressively build on each case through very minute but decisive steps,<sup>267</sup> which would render the latest cases as well-grounded.

A very promising starting point is the opinion of **Sir Francis G. Jacobs** and his article “Citizenship of the European Union - A Legal Analysis”. Jacobs was

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<sup>264</sup> An observatory within the European Union Observatory on Democracy (EUDO) which is externally funded by the European Commission, the European Parliament, UNCHR and the British Academy

<sup>265</sup> <http://eudo-citizenship.eu/databases/citizenship-case-law/?search=1&name=EU+citizenship>

<sup>266</sup> <http://curia.europa.eu/juris/recherche.jsf?language=en>

<sup>267</sup> This statement is from ECJ President Koen Lenaerts and his article “EU citizenship and the European Court of Justice’s ‘stone-by-stone’ approach”

President of the European Law Institute from 2011-2013, but more importantly he served as Advocate General for the European Court of Justice from October 1988 to January 2006, a span of 18 years which began five years before the establishment of EU citizenship and continued for another 13 years while the legal implications of this citizenship developed. One very important point to keep in mind when reading his article is the nature of EU law and the evolution of its articles through subsequent treaties. Jacobs often refers to Article 8 of the EEC Treaty and he points out that this became Article 17 of the EC Treaty after the Treaty of Amsterdam. But as of September 2016 that article is now **Article 20 of the TFEU**, thus, articles 8, 17 and 20 may refer to the same thing [depending on the date of publication], which can create serious and gravely-consequential confusions. For this reason, it is important to bear in mind that the forthcoming discussion will only use the current article numbers as of September 2016 and will translate references to these as necessary.

Article 20(2) explicitly states that citizens shall enjoy the rights and are subject to the duties provided in the Treaty. Those are summarized under Article 20(2)a through 20(2)d and they are elaborated on in Articles 21-24. Jacobs argues that these articles “add relatively little that is both new and significant; and the most important article, Article [21 TFEU], is expressly made subject to the limitations and conditions already laid down by Community law.”<sup>268</sup> This seems to support the idea that the concept of EU citizenship does not make substantial contributions in terms of rights & duties. He even points out that many regarded its introduction as a ‘false prospectus’, but he also immediately counters these suggestions by declaring that “the European Court of Justice was able to give the concept a more substantial content than the authors of the Treaty provisions may have envisaged.”<sup>269</sup> Jacobs then proceeds to list some of the results of ECJ case law until finally providing his conclusions. Rather than summarizing his conclusions now, it will be more beneficial to discuss other authors before collecting all of their conclusions and providing some of my own conclusions about where EU citizenship falls in the historical context of what citizenship is.

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<sup>268</sup> Jacobs, Francis G. “Citizenship of the European Union - A Legal Analysis”. Again, he refers to Article 18 EC which is now Article 21 TFEU and I have made this substitution for easier reading.

<sup>269</sup> Ibid. Also supported by Davies, Gareth T. “The entirely conventional supremacy of Union citizenship and rights”

A second source for legal commentary which is more recent and even more authoritative is the legal commentary by **Koen Lenaerts**. Lenaerts has been judge at the ECJ since 2003, served as Vice-President of the ECJ from October 2012 to 7 October 2015, and has been *President of the European Court of Justice* since 8 October 2015.<sup>270</sup> Picking up precisely in line with the idea that the ECJ has provided substantial content to the concept of EU citizenship, Lenaerts published the article “EU citizenship and the European Court of Justice’s ‘stone-by-stone’ approach” in the opening pages of the first issue of *International Comparative Jurisprudence* in November 2015. In it, he outlines the exact impact that Citizenship of the Union has had on citizens’ rights, as well as the manner in which the ECJ approaches this crucial topic in order to make decisions.

#### Withdrawal of Nationality

Although there had been plenty of case law on the issue of citizenship since 1993, Lenaerts refers to the *Rottmann Case [2010]* as the “founding stone that paved the way towards the emancipation of EU citizenship from the limits inherent in its free movement origins.”<sup>271</sup> Indeed the importance of this case cannot possibly be understated. To begin with, the Court determined that cases where a national decision “withdrawing his naturalization” would cause an individual “to lose the status conferred under Article [20 TFEU] and the rights attaching thereto” are “clearly” within the ambit of EU Law.<sup>272</sup> Thus, a decision regarding nationality, a matter which has thus far been under the unique jurisdiction of States, *can in fact be legally questioned* by the ECJ. This immediately becomes a crucial point because it seems to question the exclusive jurisdiction of states over nationality.<sup>273</sup> Alternatively, it would suggest that EU citizenship, like Community Law, *is different from and takes precedence over* Member State nationality. The implications of either of these options in terms of a historical distinction between citizenship and nationality warrant a deeper analysis into the ECJ decisions regarding Citizenship of the Union.

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<sup>270</sup> Source: ECJ website at [http://curia.europa.eu/jcms/jcms/Jo2\\_7026/en/](http://curia.europa.eu/jcms/jcms/Jo2_7026/en/)

<sup>271</sup> Lenaerts, Koen. “EU citizenship and the European Court of Justice’s ‘stone-by-stone’ approach” p.2

<sup>272</sup> Case C-135/08 *Rottmann v Freistaat Bayern*. Parag. 42

<sup>273</sup> An argument also supported by Davies, Gareth T. “The entirely conventional supremacy of Union citizenship and rights”

In paragraph 48 of the Rottmann judgment, the Court clarifies that its declaration “does not compromise the principle of international law previously recognised by the Court [...] that the Member States have the power to lay down the conditions for the acquisition and loss of nationality, but rather enshrines the principle that [...] the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, [...] is amenable to judicial review carried out in the light of European Union law.”<sup>274</sup> On the one hand, this reaffirms respect for the idea that Member States have sole jurisdiction over matters of nationality. On the other hand, by enshrining ECJ jurisdiction [and the supremacy of Community Law] *when* nationality conflicts with EU citizenship, the ECJ is certainly drawing a border between what nationality *is* and what citizenship *does*.

Research by **Hanneke van Eijken**<sup>275</sup> points out that this controversy had been developing through prior, pre-citizenship cases such as the *Micheletti Case [1992]*. In that case, the Court determined that a Member State could not refuse to recognize the grant of nationality of another Member State by imposing additional conditions<sup>276</sup> [which would thereby restrict the freedoms provided for in the Treaty]. But the central question Eijken seeks to address is precisely whether Member States can withdraw nationality given that it is now tied to citizenship of the Union. Her short answer is that States *may* legitimize it, but the question is always subject to a test of proportionality where a national court should “weigh the gravity of the offence against the consequences of the loss of the status of Union citizenship”<sup>277</sup>. Although this maintains the idea that Member States may do as they wish in matters of nationality, her longer answer makes the issue much more complicated.

In *Rottmann*, the Court asserts that **a national decision may not deprive an individual of the status and rights provided by EU citizenship**<sup>278</sup>. But despite this

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<sup>274</sup> Ibid. parag. 48

<sup>275</sup> Eijken, Hanneke van. “European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals”

<sup>276</sup> *Case C-369/90 Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria [1992] ECR I-04239*. Parag. 10

<sup>277</sup> Eijken, Hanneke van. “European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals”

<sup>278</sup> This is an imperative point that is made through paragraphs 42-49 by reference to previous case-law such as: *Case C-184/99 Grzelczyk [2001] ECR I-6193*, paragraph 31; *Case C-413/99 Baumbast and R [2002] ECR I-7091*, paragraph 82; *Case C-85/96 Martínez Sala [1998] ECR I-2691*, paragraph 62, and *Case C-403/03 Schempp [2005] ECR I-6421*, paragraph 17; *Micheletti and Others*, paragraph 10; *Mesbah [1999] ECR I-7955*, paragraph



decision, the Court *does* allow for such a decision to take place in cases [such as Rottmann] where said nationality was acquired “by means of misrepresentation or by any other act of fraud.”<sup>279</sup> One of the main reasons for this consent by the Court, however, is because acquisition by fraud is listed under Article 7(1)(b) of the European Convention on Nationality as a legitimate way to lose nationality. This caveat is of no small consequence. Arguably the biggest [or perhaps the *only*] reason why the ECJ provided Germany with the *opportunity*<sup>280</sup> to revoke Rottmann’s nationality was precisely because it was permissible under an international convention, as well as under previous precedents and principles in cases within international law.<sup>281</sup> Nevertheless, the lesson regarding EU citizenship and nationality is fundamental: the ECJ has jurisdiction in cases where Member State nationality conflicts with the rights guaranteed by EU citizenship. This, again, is of no small consequence because, besides building on previous cases, the Court’s decision took into consideration the Convention on the reduction of statelessness *and* the European Convention on nationality<sup>282</sup> (particularly Articles 7 and 4) *as well as* the Universal Declaration of Human Rights<sup>283</sup>. In other words, the ECJ made use of previous ECJ case-law, principles of international law, conventions and declarations in order to reach a decision that *enshrined* the status, legitimacy and protection/effects of Union Citizenship *even when in conflict with national sovereignty*. By demanding “due regard”<sup>284</sup> for EU Law while simultaneously asserting that possession of nationality is to be determined “solely by reference to the national law of the Member State concerned”<sup>285</sup> and equally stressing that citizenship of the Union is intended to be “the fundamental status of nationals of Member States”<sup>286</sup> even if its provisions “do not in any way take the place of national

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29; *Case C-192/99 Kaur* [2001] ECR I-1237, paragraph 19; and *Case C-200/02 Zhu and Chen* [2004] ECR I-9925, paragraph 37)

<sup>279</sup> *Ibid.* parag 52-54

<sup>280</sup> It’s worth stressing that the court did not dictate *in favor* of revoking nationality. This point is elaborated on in paragraphs 55-59 and it is the reason for the Court’s decision not to rule on the “the second part of the second question” (paragraphs 60-64) asking whether Austria is obliged to give Rottmann his Austrian nationality back in order to avoid statelessness.

<sup>281</sup> e.g. *Panevezys-Saldutiskis Railway Case*, *Salem Case*, *Nottebohm Case*, *Flegenheimer Case*

<sup>282</sup> *Ibid.* Both in parags. 34 and 52

<sup>283</sup> *Ibid.* parag. 53

<sup>284</sup> *Case C-135/08 Rottmann v Freistaat Bayern*. Paragraphs 39, 41, 45, and 47

<sup>285</sup> *Ibid.* Paragraphs 3-4

<sup>286</sup> *Ibid.* Paragraph 43

citizenship”<sup>287</sup>, the Court is *precisely* drawing a line between nationality and citizenship.

It is therefore no wonder that ECJ President Lenaerts considers this case such a ‘founding stone’ for the ‘emancipation of EU citizenship’ despite the existing previous case-law regarding the topic. The case provides clear evidence that, although citizenship of the Union is not *equivalent* to national citizenship [as the Danish feared<sup>288</sup>], its status under EU law does nonetheless provide it with a unique power and status that renders it as a *separate* entity that is certainly not *below* or *secondary to* national citizenship [even if national citizenship is a necessary precondition for the acquisition of Union Citizenship].<sup>289</sup> To put it another way: nationality of a Member State provides individuals with an EU citizen status that is not in fact subordinate to the original national citizenship that bestowed it on the individual. The monumental and perhaps revolutionary effect of this judgment will be re-discussed and placed in historical context at the end of this chapter, but there are still various points regarding EU citizenship that need to be addressed.

#### Acquisition/Deprivation of [derivative] Rights

The case of Janko Rottmann dealt with the loss of Union citizenship, fraudulent acquisition of nationality, naturalization, and potential statelessness, but on the other end of the spectrum would be the *acquisition* of Union Citizenship [or particular rights derived from it] regardless of nationality,<sup>290</sup> and such is the case of Ruiz *Zambrano* [2011]. While the question in Rottman involved an individual born and living in the EU who was at risk of becoming stateless, Ruiz Zambrano was a Colombian national who had been displaced by an ongoing civil war and living illegally in Belgium (i.e. he was, essentially/arguably, stateless). He lived there with

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<sup>287</sup> Ibid. Paragraph 4

<sup>288</sup> This reference is explicitly made in *Rottmann v Freistaat Bayern*. parag. 4 and 40

<sup>289</sup> Davies, Gareth T. “The entirely conventional supremacy of Union citizenship and rights” states that “textbooks commonly emphasise that Union citizenship is ‘subordinate’, or ‘dependant’ and that Member States continue to be the gatekeepers, deciding as an exercise of unfettered sovereignty who they will admit to citizenship status. There is however little legal support for this perspective” p. 6

<sup>290</sup> Davies, Gareth T. “The entirely conventional supremacy of Union citizenship and rights” brings up this question before *Zambrano* by stating: “The key question is whether a distinction can be drawn between revoking or withdrawing citizenship, and failing to grant it (or granting it). If taking away Union citizenship is now clearly subject to EU law, is it necessarily also the case that refusing to grant Union citizenship, or indeed granting it, are equally so subject?”

his wife (also illegal) and two Belgian children [neither of whom had ever left Belgium after birth]. The question here was whether Ruiz was legally entitled to reside in the EU and work without applying for and receiving special permission [despite being a third country national]. To answer this question, the Court first decided that the Citizens' Rights Directive did not apply to this case (as there had been no movement from one Member State to another by any EU citizen). Then, the Court determined that the two children in question did in fact possess citizenship of the Union because they were Belgian nationals under Belgian law. Finally, the Court made its judgment which is worth citing in full:

“Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.”<sup>291</sup>

Again, the lesson here [in regards to international law] is an important one: due to obligations towards Community law and the rights and freedoms conferred by citizenship of the Union, a Member State is compelled to grant particular basic rights to a foreign national when not doing so would deprive his children [who are EU citizens] of the rights guaranteed to them in the Treaties. In other words, while the Rottmann case seemed to place a limitation on whether Member States could *revoke* nationality [if this led to the deprivation of rights conferred by European citizenship], the Zambrano case suggests that Member States might be compelled to *grant rights* to foreign nationals (if it *also* leads to the deprivation of citizens' rights). The question of granting rights to foreign nationals had in fact been explored in other cases<sup>292</sup>, but the key issue clearly seems to now boil down to *when and how* a ‘**deprivation effect**’ can be determined [which would cause the ECJ to intervene and may compel Member States to behave a certain way]. In relation to this particularly crucial point, President Lenaerts concludes that there were three important questions

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<sup>291</sup> Case C-34/09 *Ruiz Zambrano v Office national de l'emploi*

<sup>292</sup> See particularly Case C-200/02, *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925

which arose after *Zambrano* and he goes on to cite subsequent cases which began the process of providing preliminary answers to these questions. The following paragraphs provide a brief summary of the questions and cases that he mentions, though his published explanation<sup>293</sup> is naturally more thorough.

The first important question after *Zambrano* is “*How do TFEU Articles 20 and 21 interact in the absence of border crossing?*” (i.e. domestically). For this, there is the *McCarthy Case*<sup>294</sup> of 2011 which dealt with a dual Irish-UK national whose application for her husband’s permanent residence in the UK was denied. After the application was rejected in the UK, however, Ms. McCarthy was still free to move to Ireland because of her dual nationality. This meant that the UK’s decision did not oblige her *necessarily* to leave the EU and therefore her rights of residence and/or free movement were neither deprived nor impeded by denial of her husband’s application for UK residency. In essence the lesson from the case is that in order for a national decision to fall under jurisdiction of EU law, the national measure must either deprive or impede the exercise of a particular right. Lenaerts uses this to draw the distinction between ‘*impeding effect*’ which entails the obstruction of rights and ‘*deprivation effect*’ which requires more than ‘serious inconveniences’ to any of the rights guaranteed by EU citizenship. This interpretation is also supported by other research<sup>295</sup>. The Court’s judgment also took consideration of prior cases<sup>296</sup> and another important point was that “dual nationality is not in itself a sufficient connecting factor with EU law,”<sup>297</sup> which means that claims must relate to EU citizenship rights *directly*.

The next question after *Zambrano* is: “*how/when does a national measure actually deprive the enjoyment of rights conferred to EU citizens?*” This was touched on with the impeding-deprivation effects question in *McCarthy*, but the issue was addressed more closely by the *Dereci Case*<sup>298</sup>. The case had much in common with

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<sup>293</sup> Lenaerts, Koen. “EU citizenship and the European Court of Justice’s ‘stone-by-stone’ approach”

<sup>294</sup> Case C-434/09 *McCarthy* [2011]

<sup>295</sup> Adam, S., Van Elsuwege, P.: “Citizenship rights and the federal balance between the European Union and its member states: comment on *Dereci*”. *Eur. Law Rev.* 37, 176–190 (2012).

<sup>296</sup> Particularly *Case C-34/09 Ruiz Zambrano* [2011] *ECR I-1177*; *Case C-353/06 Grunkin and Paul* [2008] *ECR I-7639*, paras. 23, 24 and 29; *Case C-148/02 García Avello* [2003] *ECR I-11613*, para. 26.; *Case C-369/90 Micheletti and Others* [1992] *ECR I-4239*, para. 10.

<sup>297</sup> *Case C-434/09 McCarthy* [2011] parag. 54

<sup>298</sup> *Case C-256/11 Dereci* [2011]

*Zambrano*, given that the father of children who were EU citizens (from Austria in this case) was an illegal third-country national (from Turkey). However, the ECJ's decision differed from *Zambrano* because the *mother* of these citizen-children was in fact an EU citizen and therefore the children would *not* [necessarily] be forced to leave the EU. The Court also stated that 'economic reasons' and 'family unity' were not enough to warrant the provision of residence rights to a non-EU national.<sup>299</sup> This means that the Court essentially made a statement that **fundamental rights** do not play a role in the establishment of a deprivation effect and that relying on these [rights] in this case would "expand the substantive scope of application of EU law beyond the competences conferred on the EU, [which is] contrary to Articles 6(1) TEU and 51(2) of the Charter [of Fundamental Rights]."<sup>300</sup> However, this immediately touches on the third post-*Zambrano* question posed by Lenaerts, which is: "are fundamental rights to be taken into account for the purposes of determining a deprivation effect?" Although the answer may seem clear after the *Dereci* ruling, this is not actually the case. Therefore, before focusing on the role of fundamental rights, it will be useful to first conclude this discussion about deprivation effects by providing a brief summary of the findings in these and other cases.

The *Zambrano*, *McCarthy* and *Dereci* cases were respectively cases where: 1) the citizens would be forced to leave the EU, 2) the citizen still had a right/opportunity to relocate to another Member State, 3) the citizens would *not* be compelled to move. All of these led to different conclusions regarding a deprivation/impeding effect, and these cases also showed the potential for a **narrow or broad interpretation** of when/how this deprivation of rights may occur. According to the narrow interpretation, deprivation occurs only when a national decision leads to the de jure or de facto *loss* of these rights, meaning that it's more than a mere hindrance; meanwhile the broad interpretation would be if deprivation is established simply because the measure is "*liable to hinder* or make less attractive the exercise of rights attaching to the status of citizen of the Union guaranteed by the Treaty"<sup>301</sup>. This immediately brings forth the questions of 1) when a right is actually

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<sup>299</sup> Ibid. parag. 68.

<sup>300</sup> Lenaerts, Koen. "EU citizenship and the European Court of Justice's 'stone-by-stone' approach"

<sup>301</sup> Ibid. This quote is made in reference to an 'expression commonly used by the ECJ in the context of the Treaty provisions on free movement' where the author provides "Kraus C-19/92, EU:C:1993:125, parag. 32" as an example of the expression.

lost, 2) when something is *in fact* liable to hinder/dissuade the exercise of a right, or 3) when the deprivation is purely *hypothetical*. Once again recent court rulings have suggested tentative answers to these questions, though these are by no means permanent precedents.

In the *Iida Case*<sup>302</sup> of 2012, the ECJ made a statement regarding **hypothetical deprivations**. The Court decided that, since the non-EU national had *not* relocated from Germany to Austria with his family, the *Citizens' Rights Directive* and *Directive 2003/109* did not apply to the case and therefore he could not benefit from the deprivation of his family members' *hypothetical* use of their right to free movement. Subsequently, the concept of '**dependency**' was put to the test in the combined cases addressed by the *O and S Case*<sup>303</sup> of 2012. Here, the two conclusions relevant to EU citizenship are support to the precedents that 1) "a national measure must, either in law or in fact, force the EU citizen concerned to leave the territory of the EU as a whole [and not just one Member State]"<sup>304</sup> and more importantly that 2) "a national measure that neither falls within the scope of the CRD nor produces a 'deprivation effect' but implements other EU measures must pass muster under the Charter [of Fundamental Rights of the EU]."<sup>305</sup> Upon first impression, the latter decision to take fundamental rights into consideration seems to contradict the conclusions of the aforementioned *Dereci Case*. However, the Court's decision in *Dereci* was that a violation of fundamental rights was not *enough to establish* a deprivation effect. In the *O and S Case*, the Court ruled that a violation of *Directive 2003/86* [a secondary measure of Community Law] provided the Member State with a positive obligation,<sup>306</sup> which gave jurisdiction to the ECJ and *then* made the Charter applicable. In other words, particular national decisions can indeed *also* be scrutinized by using human rights but only *after* it's been determined that *other* EU measures provide the ECJ with jurisdiction. Nevertheless, we have yet again run

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<sup>302</sup> *Iida*, C-40/11, EU:C:2012:691.

<sup>303</sup> *O et al.*, C-356/11 and C-357/11, EU:C:2012:776.

<sup>304</sup> *Ibid.*

<sup>305</sup> *Ibid.*

<sup>306</sup> *Ibid.* In parag. 70, the Court states "Article 4(1) of Directive 2003/86 imposes on the Member States precise positive obligations, with corresponding clearly defined individual rights. It requires them, in the cases determined by that directive, to authorise the family reunification of certain members of the sponsor's family, without being left a margin of appreciation (see Case C- 540/03 Parliament v Council [2006] ECR I- 5769, paragraph 60)."

into the issue of how human rights relate to EU citizenship and this is another crucial point that deserves close attention.

### Fundamental Rights ECJ vs ECtHR

The topic of fundamental rights gained political prominence after the end of WWII. In the same way that the roots of the European Union can be traced back to the European Coal and Steel Community (ECSC) of 1952 and the European Economic Community (EEC) of 1958, fundamental rights can be traced back even earlier to the Council of Europe's *Convention for the Protection of Human Rights and Fundamental Freedoms* of 1950. This Convention entered into force in 1953 and is commonly referred to as simply the European Convention on Human Rights (ECHR) which established the European Court of Human Rights (ECtHR). However, before discussing the issue of human rights directly, it is imperative to discuss the relationship between the ECJ, ECtHR, and ECHR.

In a nutshell, the ECJ adjudicates cases regarding EU Law and its 28 Member States while the ECtHR rules on cases regarding violations of the ECHR and its 47 members. Unlike some international courts (particularly the ICJ), natural or legal individuals may bring forth cases to either the ECJ or the ECtHR directly. But perhaps the most interesting feature about the relationship between these two courts came after the EU gained a single legal personality under the **Treaty of Lisbon** [2007]. This provided the EU with the right to accede to the ECHR. However, as this would put certain EU activities under jurisdiction of the ECtHR, the ECJ decided in December of 2014 *not* to accede precisely because this would give an external body the power to review the application of EU Law.<sup>307</sup> In the context of this thesis, the crucial implication is the following:

As Chapter Two showed and as the ECJ has reassured, EU Member States have sole sovereignty over matters of their own nationality [in accordance with principles of international law]; however, Member State decisions regarding *nationality* that affect the guarantees of EU *citizenship* are in fact subject to ECJ review; furthermore ECJ decisions

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<sup>307</sup> ECJ Opinion 2/13 where the Court stated that "The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms."

are *not* subject to ECtHR review, nor anyone else; thus, despite the fact that it does not have power of nationality, or consist of ‘nationals’ in the same sense as a nation-state, the ECJ is the ultimate protector/guarantor of the fundamental status of Citizenship of the Union.

Before elaborating on the implications that this has on the distinction between nationality and citizenship as well as on the historical significance of European citizenship, the current discussion of human rights should be concluded.

Despite not being party to the ECHR, the EU does incorporate fundamental rights into Community Law. The aforementioned Lisbon Treaty also provided the ECJ with a different legal means so ensure the protection of fundamental political, social, and economic rights: the Charter of Fundamental Rights of the European Union. The Charter had already been proclaimed in December of 2000, but in 2009 it gained legal effect and acquired the same legal status as the European Treaties. Despite this equal status, however, the Charter may not extend the competences of the Union<sup>308</sup> and it is precisely this provision which complicates matters regarding deprivation/impeding effects and ultimately EU citizenship vs national citizenship. When are Member State decisions protected by the principle of national sovereignty and when are they subject to Union law [and therefore to the Charter of Fundamental Rights as well]? A tentative answer is as follows.<sup>309</sup>

In *Zambrano* the ECJ was asked whether fundamental rights needed to be taken into account along with the provisions on EU citizenship. Since that case involved a direct violation of Article 20 TFEU, the Court did not feel compelled to provide an answer regarding the role of fundamental rights. Then, as previously mentioned in *Dereci*<sup>310</sup>, the ECJ determined that consideration of fundamental rights in that case would have expanded the scope of EU law and therefore these could not help determine a deprivation effect.<sup>311</sup> But it is here that we return to the second point of *O and S* (note 51 above). In this joint case, the claimants in both cases “could be recognised as ‘sponsors’ within the meaning of Article 2(c) of Directive

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<sup>308</sup> Articles 6(1) TEU and 51(2) of the Charter.

<sup>309</sup> The following opinion also derives partially from Lenaerts, Koen. “EU citizenship and the European Court of Justice’s ‘stone-by-stone’ approach”

<sup>310</sup> Refer to note three hundred above

<sup>311</sup> However, the Court does allude to the possibility of bringing a separate case focused on these to the ECtHR. (*Dereci et al.*, 2011, parag. 72 and 73; as well as Lenaerts, Koen. “EU citizenship and the European Court of Justice’s ‘stone-by-stone’ approach”)



2003/86 and apply for family reunification [...] [therefore] Finland had the ‘positive obligation’ to authorise [their husbands] to join their spouses.”<sup>312</sup> Thus, even secondary EU legislation (such as a directive) can cause the Charter of Fundamental Rights of the EU to become applicable alongside the Treaties and thereby make matters of *nationality* subject to matters of [EU] *citizenship*. This final point makes the issue of jurisdiction a lot more complex and hints at the continuing evolution of EU citizenship, but regardless of how citizenship of the Union continues to evolve, this also provides further evidence that there’s a fundamental distinction between “citizenship of the Union” and *national citizenship*.

### 3. [Re]Conceptualizing Citizenship

The last major nationality case discussed in the previous chapter was the *Flegenheimer Case* of September 1958. But the beginning of that year also marks a fundamental moment in our timeline: on 1 January 1958, the Treaty of Rome, which established the European Economic Community, entered into force. It is a mere coincidence that the *Flegenheimer Case* hinged on whether an individual was a “United Nations national” while a project that began as an economic cooperation between Belgium, France, Italy, Luxembourg, the Netherlands and West Germany evolved into a political union of 28 sovereign states with a common “Union citizenship” of all their peoples. *Flegenheimer* defined “United Nations nationals” as “individuals who are nationals of any of the United Nations or corporations or associations organized under the laws of any of the United Nations”<sup>313</sup> while the Maastricht Treaty declared that “Every person holding the nationality of a Member State shall be a citizen of the Union.” This similarity in wording is also coincidental, and it doesn’t make the term “United Nations national” anything more than a practical and useful triviality for the case where it arose. But quite contrary to being a triviality, citizenship of the Union has been consistently deemed by the European Court of Justice as the “fundamental status” of nationals of Member States.<sup>314</sup> For

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<sup>312</sup> *O et al.*, 2012, parag. 70; Lenaerts, Koen. “EU citizenship and the European Court of Justice’s ‘stone-by-stone’ approach”

<sup>313</sup> *Flegenheimer (Decision No 182) (1958) 14 RIAA 327 p. 337* Emphasis added

<sup>314</sup> *Case C-184/99 Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* parag. 31; *Case C-34/09 Ruiz Zambrano v Office national de l’emploi* parag. 41; *Case C-135/08 Rottmann v Freistaat Bayern*. Parag. 43; *Case C-413/99 Baumbast and R* parag. 82

this reason, the remaining sections of the thesis provide a comprehensive understanding of what EU citizenship is/does in its relationship with national citizenship. We begin with the historical concept of citizenship developed in Chapter One.

One of the most cited authors in the literature on citizenship is British sociologist **Thomas Humphrey Marshall**. His essay collection from 1949 titled *Citizenship and Social Class* has been referenced numerous times throughout the literature on citizenship.<sup>315</sup> Because of the prominence and influence of his conceptualization and the way it separated one concept (citizenship) into various forms, it will be serve as a good starting point to separate two concepts (citizenship and nationality). Marshall's conception is grounded on a distinction between three types of citizenship: civil, political and social. Perhaps the best way to summarize these is by citing the way he described them himself:

“The *civil* element is composed of the rights necessary for individual freedom - liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts and the right to justice... by the *political* element, I mean the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body... By the *social* element I mean the whole range from the right to share to the full in the social heritage and to live the life of a civilised being according to standards prevailing in the society.”<sup>316</sup>

Rather than being entirely separate ‘citizenships’, Marshall argues that these types of citizenship [along with their respective rights] expand and progress from the civil dimension through political and finally to social. This occurs as the middle and working classes build social pressure to expand their [civil] rights of property and protection, which then leads to “near-universal rights of political participation” until national citizens gain the social benefits/guarantees of income, housing, medical care

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<sup>315</sup> Magnette, Paul. *Citizenship: The History of an Idea*; Heater, Derek. *A Brief History of Citizenship.*; and by numerous authors in *Handbook of Citizenship Studies*, edited by Engin F. Isin and Bryan S. Turner such as: Janoski, Thomas and Brian Gran. “Political Citizenship: Foundations of Rights.”; Roche, Maurice. “Social Citizenship: Grounds of Social Change”; Smith, Rogers M. “Modern Citizenship”; Schuck, Peter H. “Liberal Citizenship”

<sup>316</sup> Marshall, T.H. and Bottomore, T. *Citizenship and Social Class*. p.8

and education.<sup>317</sup> Some authors have described the “civil” aspect as “legal” and have lent credibility to Marshall’s contention that leaping over political rights (i.e. skipping from civil/legal to social rights) creates problems in the subsequent development of political rights.<sup>318</sup> Furthermore, the various types of citizenship lead to [modern] institutions to protect and serve them, those being: legal systems (for civil rights), democratic government systems (for political) and welfare systems (for social).<sup>319</sup> But the essential part to remember is what these types are and how they evolve interdependently.

Although Marshall’s analysis is built exclusively on the development of these rights in Britain throughout the eighteenth, nineteenth and twentieth centuries [respectively], his argument “has been so influential that many scholars and some political activists, especially in Europe, today equate genuine citizenship with full possession of all three types of rights: civil, political and social.”<sup>320</sup> Some dispute this by contending that his theory has reached no more ‘canonical status’ than other theories<sup>321</sup>, but the fact that Marshall’s work is so widely cited and at least mentioned in passing by many authors<sup>322</sup> stands as evidence of its influence. The theory does admittedly fail to explain some historical developments regarding racial, ethnic and gender discrimination, and the content/extent of Marshall’s three types of rights vary greatly in different modern states.<sup>323</sup> Nevertheless, most contemporary theories of citizenship do separate rights and duties into Marshall’s categories. In order to avoid a lengthy digression into these theories, a summary explanation can be found in *Table 2 of Appendix 1 on Citizenship, Nationality and Residency*. But in order to facilitate the understanding of concepts for the remainder of this thesis, the discussion will make use of the following diagram:

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<sup>317</sup> Smith, Rogers M. “Modern Citizenship”

<sup>318</sup> Janoski, Thomas and Brian Gran. “Political Citizenship: Foundations of Rights.”

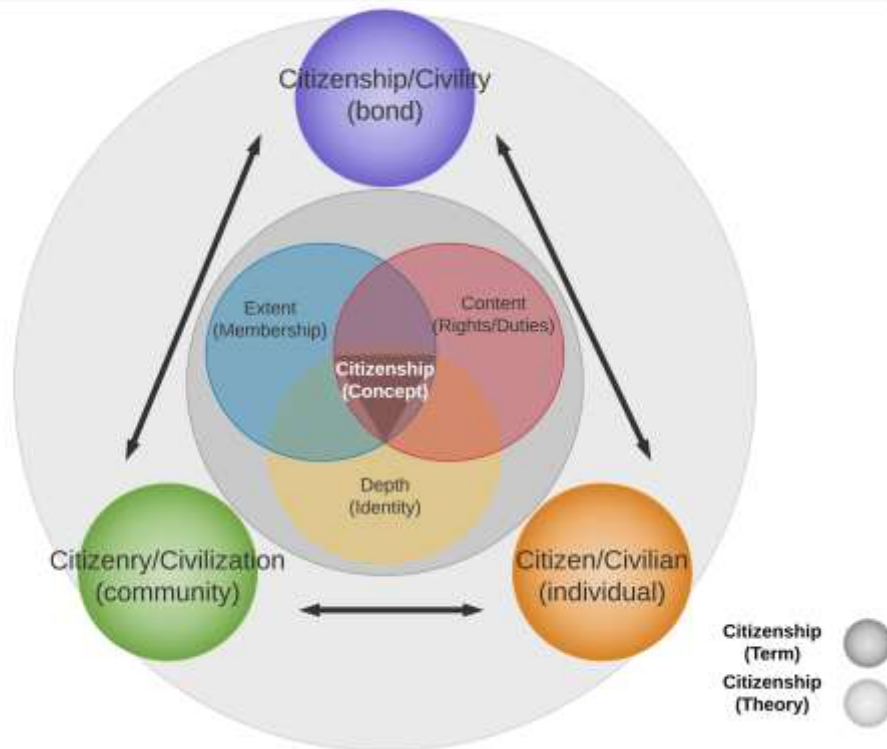
<sup>319</sup> Roche, Maurice. “Social Citizenship: Grounds of Social Change”

<sup>320</sup> Smith, Rogers M. “Modern Citizenship”

<sup>321</sup> Schuck, Peter H. “Liberal Citizenship”

<sup>322</sup> Lister, Ruth. “Sexual Citizenship”

<sup>323</sup> Smith, Rogers M. “Modern Citizenship”; Magnette, Paul. *Citizenship: The History of an Idea*; Heater, Derek. *A Brief History of Citizenship*.



*Diagram 1: Definition of Citizenship*

It should be evident that this diagram was developed throughout the historical evolution of citizenship in Chapter One. From its conception, citizenship has always necessarily involved three things: individuals, a community and a bond. This was evident from the first use of *πολιτεία* (*politeia*) by Herodotus and the Roman *civitas* (*civitas*) until today. Chapter One described the evolution of this term from its ancient roots until its emancipation as an abstract term in the Italian Renaissance. Given that all of the three components as well as an abstract term (*civitas*) became available then, I suggested that citizenship itself did not evolve further after this revival and the reason for this will be briefly explained in what follows.

T.H. Marshall's theory elaborates three *types* of citizenship. But Diagram 1 above can be used to explain all three types as well as other 'types' of citizenship that have arisen throughout the literature (such as economic citizenship, cultural citizenship, sexual citizenship, ecological citizenship, etc). The reason behind this is because all of these 'types' are better described as separate *terms* which apply the *same* concept of citizenship to *different* disciplines [or focus on different perspectives]. Perhaps the simplest way to draw this small but imperative conceptual distinction is by returning to the slight difference between *politeia* and *civitas* in

Chapter One. The term *politeia* was concrete and always referred to the three components of citizenship in conjunction and at once; conversely, *civitas* had a concrete meaning but it also developed an abstract meaning in order to draw the difference between *civitas* and *civitas romana*.<sup>324</sup> In a nutshell: the moment citizenship starts being qualified with an adjective (e.g. *political* citizenship, *ecological* citizenship, etc), the discussion and analysis are no longer about citizenship *itself* but rather about a particular *application* of it.

To understand the point being made more thoroughly, one can focus on the darker grey circle in Diagram 1 which only encompasses *extent*, *content* and *depth* (all of which are essential features of what “citizenship” *is/means* as a *concept*<sup>325</sup>, regardless of the discipline or focus). When various authors refer to civil, political, social, ecological or other ‘types’ of citizenship, they merely *include/exclude*<sup>326</sup> different *identities/disciplines*<sup>327</sup> which encompass various *rights & duties*. But a *theory*<sup>328</sup> of citizenship cannot be implemented or understood until the *bond*<sup>329</sup> between the *individual*<sup>330</sup> and a particular *community* is defined. In other words, the process of abstraction that distinguishes citizenship as a *theory*, a *term* or a *concept* is analogous to the way *politeia*, *civitas* and *civilitas* evolved until *civilitas* was fully emancipated around the time of **Bartolus** (1314-1357) and his pupil **Baldus** (1327–1400). One could potentially carry on with the process of abstraction *ad infinitum* and in fact, this endless abstraction/distinction of terms is likely a result of modern language in academia and politics.<sup>331</sup> But the abstract distinctions are not inherently found within the idea of citizenship itself. Hence, Chapter One showed that the main components of citizenship as a legal/political idea reached their current stable state after the Renaissance. Further explanation regarding the various components *within* citizenship (i.e. extent, depth and content) can be found in Appendix 1, but in order

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<sup>324</sup> Further elaboration on this distinction can be found in note ninety-six of Chapter One.

<sup>325</sup> Triangular conjunction of the red, blue and yellow circles in the diagram

<sup>326</sup> Blue circle in diagram

<sup>327</sup> Yellow circle

<sup>328</sup> i.e. largest and outermost light grey circle

<sup>329</sup> Purple circle

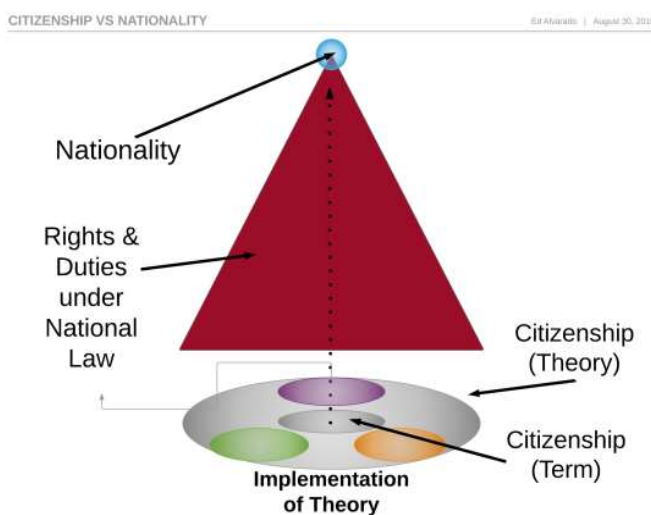
<sup>330</sup> Orange circle

<sup>331</sup> A similar point is made in Heater, Derek. *A Brief History of Citizenship* (p. 143) where he discusses “a paradox that strikes at the very heart of citizenship. *Interest* in the subject and *status* is now greater than it has been for some two hundred years or more; yet at the same time, it might appear to be *disintegrating as a coherent concept* for the twenty-first century.” Emphasis added

to continue, the main lesson is that: recent academic interest on citizenship has led to its disintegration as a coherent concept mainly because the term has been unnecessarily abstracted further and further [in the same way that *civilitas* was abstracted from *civitas* through *civilis*<sup>332</sup>] without proper focus.<sup>333</sup>

For the remainder of this thesis, “citizenship” can easily refer to any *theory* of citizenship (e.g. cultural, ecological, etc), but the analysis will naturally focus on the *legal-political* understanding and implementation of citizenship. This understanding is the one that appears in national and international law and it also includes the primary and most basic civil ‘citizenship’ that Marshall and other authors have referred to (i.e. liberty of the person; freedom of speech, thought and faith; the right to own property and to conclude valid contracts and the right to justice<sup>334</sup>). Furthermore, it remains consistent with the diagrams presented at the end of Chapter One, which are reproduced again and reviewed below.

As the diagram below shows, the terms citizenship and nationality are synonymous



in the context of international law because they refer to the same legal bond between an individual and a political community.

Domestically, the Nation-State implements a *concept* and *theory* of citizenship through national laws that define the rights and duties of its citizens.

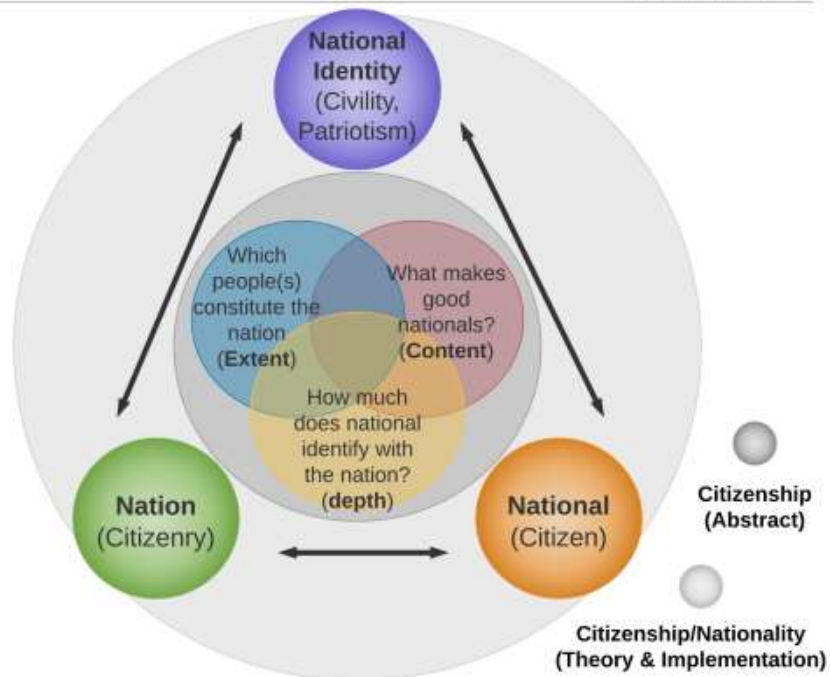
Diagram 2: Implementation of Citizenship through Nationality

The easiest way to visually represent this synonymy between citizenship and nationality [and the relationship between the two diagrams] is by simply substituting the two terms into Diagram 1 as in the illustration below.

<sup>332</sup> Refer to section “*Rinascimento (14th and 15th Centuries)*” in Chapter One.

<sup>333</sup> The various ways in which “citizenship” has disintegrated and the way it may refer to 4 different things is also summarized in Appendix 1.

<sup>334</sup> All of these are summarized as the rights & obligations of *security, justice* and *conscience* under “legal rights” in Table 2 of Appendix 1.



However it is here that one must again draw the line between citizenship and nationality *under international law*. Different countries implement the idea of citizenship in different ways, which leads to different notions of nationality that entail different rights and duties. It is precisely for this reason that one must look at the relationship between citizenship and nationality from an external perspective (i.e. the international legal perspective). And thus we return to Diagram 2 which shows the synonymy between these concepts (where the *abstract term* “citizenship” is equivalent to “nationality”) *and* the conceptual distinction that national laws create between them (since “nationality” encompasses a *particular* theory *and* implementation of the *concept* of citizenship). This also brings us back to the focus of Chapter Two, which was to analyze cases of nationality in international courts and tribunals.

Various judgments by international courts such as the PCIJ, ICJ, and ECJ have all reasserted and stressed that matters of nationality are under the sole jurisdiction of States. But despite the fact that EU citizenship derives from national citizenship, the former has also proven to guarantee and protect certain rights, and this protection/provision of rights even works *against* the sole/exclusive jurisdiction over nationality by States [as in the *Rottmann* and *Zambrano* cases]. Hence the remaining task is to understand where EU citizenship falls based on its relationship

with national citizenship. To this end, we return to the analysis and conclusions of aforementioned authors, as well as the work of other authors and the understandings of nationality and EU citizenship provided by the Max Planck Encyclopedia of Public International Law (MPEPIL).

The MPEPIL has five entries that address nationality directly and touch on EU citizenship, but it is also crucial to note that many of these were last revised before 2011 and the major cases of *Rottmann* and *Zambrano*. Chronologically, the entries are “Nationality” (Dörr, 2006), “Multiple Nationality” (Spiro, 2008), “European Passport” (Hertig Randall, 2008), “European Citizenship” (Bogdandy & Arndt, 2011), and “Nationality Cases before International Courts and Tribunals” (Trevisanut, 2011). In “Nationality”, Dörr makes note of the role the EU citizenship has in “reducing the regulatory freedom of States on those matters [of nationality]” and the way that states are to make their decisions “having due regard to Union law.”<sup>335</sup> More directly, Bogdandy and Arndt point out that “citizenship entails the prohibition to discriminate against one’s own citizens exercising their right to freedom of movement” which again supports the limitations that *citizenship* places on the treatment of *nationals*.<sup>336</sup> But for more commentary, we may return to Jacobs, van Eijken and Lenaerts.

**Jacobs’** article, written in 2007, provides tentative conclusions about the legal function of EU citizenship, which he separates into three categories: 1) The Use of Citizenship to Broaden the Scope of the Non-discrimination Principle, 2) The Use of Citizenship to Broaden the Scope of the Non-Discrimination Principle in the Context of Market Freedoms and 3) The Use of Citizenship as an Independent Source of Rights.<sup>337</sup> Naturally, it is the final category that is most interesting for our purposes because it shows what EU citizenship brings to the table by itself. Jacobs makes use of various cases to show that this citizenship by itself “provides rights of free movement and residence” although this “does not appear to go further than the previous law.”<sup>338</sup> But it is imperative to recall that his entire analysis took place long before the *Rottmann Case* and the *Zambrano Case* [which were arguably

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<sup>335</sup> Dörr, “Nationality”. It’s worth noting that the entry is said to be last updated in January of 2006 but it also makes brief reference to the *Rottmann Case* of 2010.

<sup>336</sup> Bogdandy, Armin von, and Felix Arndt. “European Citizenship”. Where they also make reference to ECJ *Case C-224/89 D’Hoop* and *Case C-520/04 Turpeinen*

<sup>337</sup> Jacobs, Francis G. “Citizenship of the European Union - A Legal Analysis”

<sup>338</sup> *Ibid.*



fundamental points of “emancipation” of citizenship from this very issue of free movement] .

Conversely, in her 2010 analysis of how EU citizenship affects Member States’ competence to grant and withdraw nationality, **van Eijken** makes use of the *Rottmann* judgment and explains that it disagreed with Advocate-General Maduro’s opinion that EU Law was *not* relevant to the case and that the ECJ did *not* have jurisdiction. She then reaches the conclusions that 1) “whenever a national provision governing nationality restricts the Union citizen without a legitimate interest and/or in a disproportionate manner, this provision shall have to be put aside by the national court” and that 2) “The idea that Member States are the ultimate gatekeepers of Union citizenship status is more nuanced than was thought by (some) Member States”<sup>339</sup> because “the ECJ becomes the final instance to scrutinise whether national conditions of nationality do comply with Union law.”<sup>340</sup> Although van Eijken’s conclusion supports the limitations that EU citizenship places on nationality, it was nevertheless focused on the *withdrawal* of nationality and does not speak of the results after *Zambrano* that *provided* derivative rights. But **Lenaerts**’ analysis makes use of all the cases listed above as well as prior and subsequent case law covering cases until November 2015 in order to argue that:

“A joint reading of *Rottmann*, *Ruiz Zambrano*, *McCarthy*, *Dereci*, *Iida*, *O and S*, *Ymeraga* and *Alokpa* shows that the legal reasoning of the ECJ is far from being laconic or cryptic. The sequence of these cases demonstrates that the new approach set out in *Ruiz Zambrano* has been built up progressively, i.e., on a ‘stone-by-stone’ basis. Indeed, *Dereci*, *Iida*, *Ymeraga* and *Alokpa* make clear that the new approach only operates under exceptional circumstances, namely in so far as the contested national measure forces EU citizens to leave the territory of the Union, depriving them of ‘the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union’”<sup>341</sup>

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<sup>339</sup> This statement is also supported by Davies, Gareth T. “The entirely conventional supremacy of Union citizenship and rights” p. 6

<sup>340</sup> Eijken, Hanneke van. “European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals”

<sup>341</sup> Lenaerts, Koen. “EU citizenship and the European Court of Justice’s ‘stone-by-stone’ approach” p.9

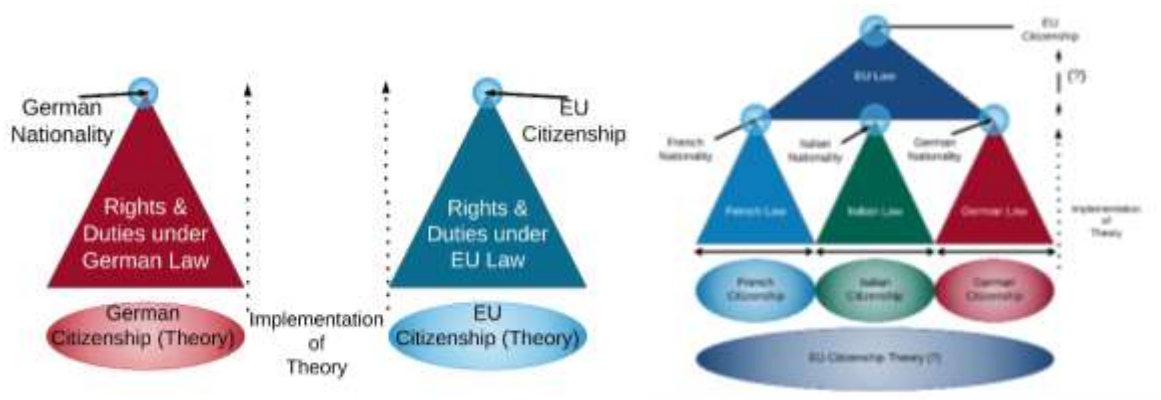
Despite the emphasis on ‘exceptional circumstances’, these cases and decisions in the European Court of Justice allow us to revisit prior reasoning in international law to draw a final distinction between citizenship and nationality. But it is crucial to see here that based on the wording of the European Treaties, ECJ rulings and reasonings, and legal analysis, citizenship of the union is not only “additional to” but also arguably *regulatory/harmonizing of* [multiple] national citizenships (i.e. supranational). In other words, there is no separate *theory* and implementation of a special *non-national* EU citizenship, but rather, there it is a *supranational* citizenship that encompasses the nationalities of Member States and protects and guarantees the rights and freedoms provided by Union Law, even against decisions by sovereign Member States and their *nationality* laws (under circumstances where these decisions would deprive citizens of EU rights). In short, EU citizenship is better illustrated by Option 2 (below) rather than Option 1<sup>342</sup> precisely because citizenship of the Union is “a political and legal concept which is entirely different from the concept of citizenship within the meaning of the Constitution of the Kingdom of Denmark and of the Danish legal system” and “Nothing in the Treaty on European Union implies or foresees an undertaking to create a citizenship of the Union in the sense of citizenship of a nation-state.”<sup>343</sup> Combining this with the fact that EU citizenship is built directly from/through the nationality of Member States leads to further evidence that it is better illustrated by the following Option 2<sup>344</sup>:

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<sup>342</sup> Davies, Gareth T. “The entirely conventional supremacy of Union citizenship and rights” warns that “Perhaps one should avoid hierarchical thinking, and speak of citizenship pluralism”. However, this was before the Zambrano and subsequent rulings that have supported a more supranational interpretation.

<sup>343</sup> Refer to note **two hundred fifty-four** above

<sup>344</sup> Kochenov, Dimitry. “Two Sovereign States vs. a Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters” seems to also support this image when he states “We are thus dealing with two autonomous legal statuses which are connected through acquisition: enjoying one is a precondition to possessing another.”



Option 1: separate, side-by-side citizenship

Option 2: supranational citizenship

Perhaps the biggest question that remains is how this affects international law and how it interacts with various principles that were the basis of previous decisions. For a brief illustration of this potential impact, we return to the case of *Nottebohm*.

#### 4. *Nottebohm Revisited*

As explained in Chapter Two, the main question in *Nottebohm* was whether Guatemala was compelled to recognize Nottebohm’s Liechtenstein naturalization. It should be stressed that the Court was not in charge of determining the legitimacy of Nottebohm’s *nationality*<sup>345</sup>, but rather the legitimacy of engaging in *diplomatic protection* as a result of this nationality.<sup>346</sup> Various authors affirm that in its decision, the ICJ made use of the Canevaro principle as the basis which led it to determine that Nottebohm did not possess effective nationality of Liechtenstein.<sup>347</sup> Nevertheless, this use of the principle and the genuine link requirement have been severely criticized in both legal doctrine and in judicial practice<sup>348</sup> on the grounds that 1) the

<sup>345</sup> Although this was the case in *Flegenheimer*, where the Commission determined that “in other words, the Commission will have to admit or reject, at the international level, a nationality, the existence or inexistence of which shall be established, in its opinion in full compliance with the law, at the national level.” p. 337

<sup>346</sup> In *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4. p. 17, the Court states that “The Court does not propose to go beyond the limited scope of the question which it has to decide, namely whether the nationality conferred on Nottebohm can be relied upon as against Guatemala in justification of the proceedings instituted before the Court. It must decide this question on the basis of international law; to do so is consistent with the nature of the question and with the nature of the Court’s own function.”

<sup>347</sup> Benedek, Wolfgang. “Canevaro Claim Arbitration”; Bernhardt, Rudolf. *Decisions of International Courts and Tribunals and International Arbitrations*;

<sup>348</sup> In reference to the *Micheletti Case*. Kochenov references the Advocate General of that case and describes the link as “an entirely arbitrary and potentially harmful rule of international law, openly dismissed by AG Tesouro as pertaining to the ‘romantic period of

principle was wrongfully applied to a case of single nationality [whereas it only pertains to cases of multiple nationality]; and 2) it created different classes of nationals: those having acquired their nationality by birth who would never lose the international effect of their nationality, and those having been naturalized.<sup>349</sup> And it is precisely both of these issues that highlight the value and novelty of EU citizenship, as the details of the Nottebohm Case will show when compared to cases in EU Law.

One heavy point of contention was Nottebohm's loss of German nationality. Liechtenstein asserted that by virtue of naturalization, Nottebohm was automatically divested of his German nationality<sup>350</sup> while Guatemala asserted that he appeared "in any event not to have lost, or not validly to have lost, his German nationality."<sup>351</sup> Here, the question of the validity of his naturalization becomes crucial, though it is a question that, as mentioned, the Court chose not to decide on. In other words, the Court was unwilling to make a statement on the legitimacy of Nottebohm's naturalization [in the eyes of international law], even though this naturalization would inherently render him as a non-German and would thereby support the argument of Guatemala's misconduct at the very least against a stateless man.<sup>352</sup> The argument presented by Guatemala was that Nottebohm "appears to have solicited Liechtenstein nationality fraudulently, that is to say, with the sole object of acquiring the status of a neutral national before returning to Guatemala, and without any genuine intention to establish a durable link, excluding German nationality, between the Principality and himself."<sup>353</sup> Putting aside Guatemala's questionable suggestion that seeking a status of neutrality is in any way equivalent to fraud, it is precisely the *exclusion* of German nationality that becomes central. Paradoxically, the Court

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international law" in Kochenov, Dimitry. "Two Sovereign States vs. a Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters"

<sup>349</sup> Dörr, Oliver. "Nottebohm Case"

<sup>350</sup> *Nottebohm (Liechtenstein v Guatemala)* p. 7

<sup>351</sup> *Ibid.* p. 9

<sup>352</sup> Despite the fact that there was no measure to protect someone stateless at the time, the main point here is that Nottebohm was targeted as an 'enemy national' *because* of his German nationality, but acknowledging his naturalization and laws on nationality would give Guatemala no legitimate excuse for his detainment, regardless of whether subsequent protection by Liechtenstein was afforded or denied.

<sup>353</sup> *Ibid.* p.11

asserts that “naturalization is not a matter to be taken lightly”<sup>354</sup> but it nevertheless deemed it “unnecessary to have regard to the documents purporting to show that Nottebohm had or had not retained his interests in Germany, or to have regard to the alternative submission of Guatemala relating to a request to Liechtenstein to produce further documents.”<sup>355</sup> This point is of fundamental importance because the Court acknowledged that, notwithstanding a special request during naturalization, acquiring citizenship of Liechtenstein would lead to *ex lege* loss of German nationality according to the national laws of both Liechtenstein and Germany.<sup>356</sup> But by denying to opine on the international recognition of Nottebohm’s Liechtenstein nationality itself [and inherent loss of German nationality], and by denying Liechtenstein’s claim for diplomatic protection, the Court rendered him as essentially **stateless**. This is particularly ironic considering the fact that his [mis]treatment by Guatemalan and American authorities was *because* of his nationality.

In regards to the process of his naturalization, the Court seems to entertain the possibility of fraudulent acquisition.<sup>357</sup> However, it is crucial to note that Liechtenstein’s engagement in diplomatic protection was arguably a clear endorsement and reinforcement of their decision to grant him nationality. In spite of whatever domestic procedures were used, this was nonetheless entirely and exclusively within jurisdiction of Liechtenstein according to the very principles of international law that the Court asserted multiple times throughout the judgment. Thus, either a) Nottebohm acquired Liechtenstein nationality [thereby losing his German one] based on the sovereign laws of two countries and their sole/exclusive jurisdiction over the matter, or b) he remained a national of Germany who could in fact be treated as an enemy by Guatemala. And it is precisely here that the role and

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<sup>354</sup> Ibid. p. 24. With the full statement being: “Naturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being. It involves his breaking of a bond of allegiance and his establishment of a new bond of allegiance. It may have far reaching consequences and involve profound changes in the destiny of the individual who obtains it. It concerns him personally, and to consider it only from the point of view of its repercussions with regard to his property would be to misunderstand its profound significance. In order to appraise its international effect, it is impossible to disregard the circumstances in which it was conferred, the serious character which attaches to it, the real and effective, and not merely the verbal preference of the individual seeking it for the country which grants it to him.”

<sup>355</sup> Ibid. p. 24

<sup>356</sup> Ibid. p. 14

<sup>357</sup> Ibid. p. 15

value of EU citizenship may be highlighted by returning to the cases which emancipated it from its formerly-perceived limit to matters of free movement.

In the case of *Rottmann*, the ECJ also asserted that Member States have the sole power to lay down conditions for the acquisition and loss of nationality. But unlike the *Nottebohm* case, it was the state of naturalization (i.e. Germany) that claimed fraudulent acquisition rather than a desire to engage in protection. And it is imperative to recall that the ECJ did not *promote* the revocation of nationality [as this would lead to Rottmann’s statelessness]<sup>358</sup>; instead the Court used all available principles, precedents and conventions to decide that revoking nationality was *permissible* under international law, but the principle of proportionality should nevertheless be observed.<sup>359</sup> In other words, whereas the ICJ’s *final* decision in *Nottebohm* rendered him as essentially stateless without claiming a fraudulent acquisition of Liechtenstein nationality, the ECJ *discouraged* the deprivation of German nationality *despite* fraudulent acquisition because it would lead to the individual’s statelessness. And the reason for this diametrically opposite approach is precisely because Rottman could count on a supranational citizenship that protected him while *Nottebohm* could not. This can be easily shown through the visual representations below:



<sup>358</sup> Refer to note two hundred seventy-seven and two hundred eighty above

<sup>359</sup> *Case C-135/08 Rottmann v Freistaat Bayern*. Parag. 55 where the Court states “In such a case, it is, however, for the national court to ascertain whether the withdrawal decision at issue in the main proceedings observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law, in addition, where appropriate, to examination of the proportionality of the decision in the light of national law.”



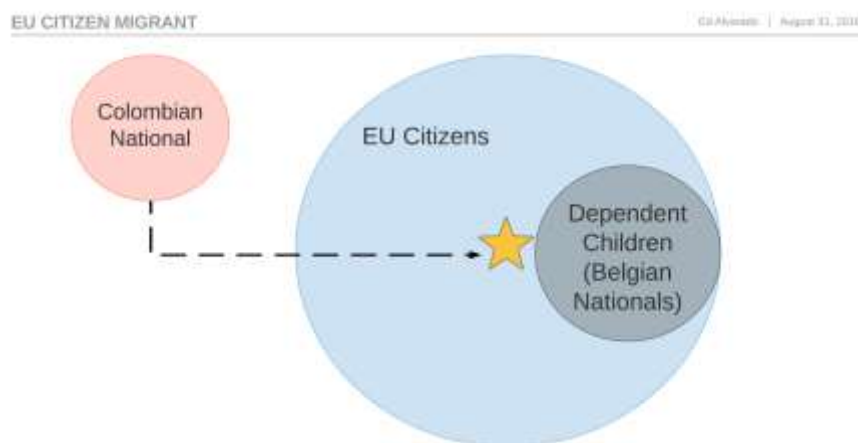
The diagrams above show how Nottebohm and Rottman can be seen through national and international laws. Applying the diagram that was developed throughout Chapter One (*Diagram 1: Definition of Citizenship* above), Nottebohm can be placed under three different types of “national allegiance” which are *citizen* (of Liechtenstein), *national* (of Germany) and *resident* (of Guatemala), all of which imply different types of rights and duties. However, because of conflict between all of these, the ICJ dispute placed him under the protection of no government and therefore he did not have a legitimate option to seek diplomatic protection from in order to demand respect for his individual rights. Conversely, Rottmann may have fraudulently acquired German nationality and thereby lost his Austrian one, but the protectionary status of “EU citizen” placed a safety net under which he could not fall and even his fraudulent acquisition of nationality *could* be excused.<sup>360</sup>

By ruling against the admissibility of Liechtenstein’s claim and the ‘effectiveness’ of his nationality, the Court concurred with Guatemala’s contention that “it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection”<sup>361</sup> Although the bond between nationality and protection has been discussed thoroughly in the previous and current chapters, it important to note that Article 4 of the 2006 ILC Articles on Diplomatic protection *explicitly* rejects the need for a genuine link. And it is here that subsequent cases of EU law become relevant to highlight its value.

<sup>360</sup> Author’s note: I am unaware of whether Rottmann’s German nationality was indeed revoked and whether he was able to reclaim his Austrian nationality but this matter is beyond my purposes. Regardless, other authors have argued that the ECJ would have likely stepped in if Austria indeed refused to restore Rottmann’s nationality in case the German one was revoked. See: Davies, Gareth T. “The entirely conventional supremacy of Union citizenship and rights”

<sup>361</sup> *Nottebohm (Liechtenstein v Guatemala)* p. 13

In *Micheletti*, the ECJ concluded that one Member State cannot impose additional conditions in order to recognize the nationality of another Member State.<sup>362</sup> Despite the fact that this is a matter that only applies to Member States of the European Union, there are provisions in EU Community Law to ensure the protection of EU citizens within third countries.<sup>363</sup> These supranational provisions would have provided Nottebohm with diplomatic protection from Liechtenstein against Guatemala regardless of his nationality status within either Germany or Liechtenstein precisely because both of the latter are EU *citizens* and diplomatic protection is a right guaranteed to them under Articles 20(2)(c) and 23 TFEU.<sup>364</sup> Furthermore, it is precisely the fact that rights under Article 20 TFEU are protected within *all* Member States *by virtue of supranational [EU] law* that the importance of supranational citizenship is highlighted. Here, the protection that would be assured can be highlighted by returning to *Zambrano*.



The diagram above shows the case of *Zambrano* and highlights the way a supranational citizenship affected two types of individuals: a national of a Member State and a third country national. Various cases before *Rottmann* and *Zambrano* showed that the right of EU citizens to move and reside within another Member State is guaranteed by EU law. Although this following point is hypothetical, a situation where supranational law included Guatemala would have guaranteed Nottebohm's right to remain and reside in the country where he had already been living for 34

<sup>362</sup> Refer to note two hundred seventy-six above

<sup>363</sup> E.g. Article 35 TEU, Articles 20(2)(c) and 23 TFEU

<sup>364</sup> Although this point is speculative... especially because it's hard to imagine a scenario where Germany is at war with Guatemala but Liechtenstein is not even though both are EU citizens... its main purpose is to show the functionality of supranational citizenship *especially* for *individuals* who seek to claim a neutrality and non-national allegiance that Guatemala suggested as 'fraudulent intent'



years. Nevertheless, without this speculation, the value of supranational citizenship is highlighted by *Zambrano* because this case showed that an individual's rights may not even be violated by his country of nationality. It is imperative to note that the forthcoming point is not focused on Ruiz (the father) and does not rely on the dependency between the third country national and his EU citizen-children [as in the combined *O and S* Case]. Instead, the point is focused on the first question posed to the ECJ by Belgium in the *Zambrano* Case, which was:

“Do Articles 12 [EC], 17 [EC] and 18 [EC], or one or more of them when read separately or in conjunction, confer a *right of residence* upon a citizen of the Union *in the territory* of the Member State *of which that citizen is a national*, irrespective of whether he has previously exercised his right to move within the territory of the Member States?”<sup>365</sup>

Here, the Belgian delegation was essentially asking if Ruiz Zambrano's minor children had the right to reside in Belgium and if this right was protected by EU citizenship. In other words, Belgium implicitly asked whether it had the right to deport Ruiz Zambrano and thereby deprive his *Belgian* children of the right to live *in Belgium*.<sup>366</sup> As we have seen the answer by the ECJ was not only that the children had the right of residence, but also that their father must be granted the derivative right to reside and work in Belgium without any special permission.<sup>367</sup> Putting aside the derivative right that was given to the father, this decision showed that EU citizenship provided the Belgian nationals with protection *against their own government*.

The final point above becomes extremely relevant to *Nottebohm* when one takes into consideration the widely-supported belief that the ICJ wrongfully applied the logic of “effective/dominant nationality” to the case. The wrongful analogy to cases of multiple nationality, along with the Court's final decision that *Nottebohm*'s Liechtenstein nationality was not ‘effective’ [enough to warrant diplomatic protection], suggests that the ICJ considered *Nottebohm*'s ties with Guatemala as much more “effective” than his ties to Liechtenstein, and the logic behind the

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<sup>365</sup> *Case C-34/09 Ruiz Zambrano v Office national de l'emploi*. Parag. 35. Emphasis added

<sup>366</sup> It's worth quoting that “It might seem a gross violation of international human rights law for a state to deport its own citizens, but in practice this has happened on a remarkably large scale since the Second World War, including in Member States of the EU such as Ireland and the United Kingdom” from Shaw, Jo. “Concluding thoughts: Rottmann in context” p. 38

<sup>367</sup> Refer to note two hundred ninety-one

decision seems quite clear in the Court's declarations before delivering its final judgment:

“He had been settled in Guatemala for 34 years. He had carried on his activities there. It was the main seat of his interests. He returned there shortly after his naturalization, and it remained the centre of his interests and of his business activities. He stayed there until his removal as a result of war measures in 1943. He subsequently attempted to return there, and he now complains of Guatemala's refusal to admit him. There, too, were several members of his family who sought to safeguard his interests. Furthermore, other members of his family have asserted Nottebohm's desire to spend his old age in Guatemala.”<sup>368</sup>

The rationale behind the Court's decision begs the question of what precisely the 'bond of nationality' is supposed to mean when an individual can be denied diplomatic protection from his country of *naturalized citizenship* in favor of a more 'genuine link' to a nation that treats him as an enemy national.<sup>369</sup> In other words, if Friedrich Nottebohm consciously sought naturalization with Liechtenstein, which he knew entailed the loss of his German nationality according to both countries, and if all of his actions signaled a more effective and genuine bond between him and Guatemala, what precisely was the logic to allow his treatment 'as a German enemy' by Guatemala? If a country that he was not a national of (Guatemala) could claim more jurisdiction than a country where he willingly became a citizen (Liechtenstein), how is the legal bond of nationality important? Lastly, why should he have been forced to choose between the two countries where he had close ties (Guatemala and Germany) rather than seeking a more peaceful and understandable neutral status? Regardless of what the logic is supposed to be, the cases presented to the ECJ show how a supranational citizenship like EU citizenship has the unique power to protect

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<sup>368</sup> *Nottebohm (Liechtenstein v Guatemala)* p. 25-26

<sup>369</sup> On this point and in regards to EU citizenship Kochenov, Dimitry. "Two Sovereign States vs. a Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters" makes a statement that "The elusive logic of nationality laws of the Member States is not only an obstacle on the way towards achieving the goals of the European integration project; it also negatively affects the lives of numerous EU citizens who are faced with random and unexplainable rules intruding in their lives virtually each time they come in contact with nationality regulation of the Member States. The latter presents a scary labyrinth of logically incomprehensible and often contradictory rules as completely justified by state 'sovereignty', ignoring the fact that while sovereignty confers competence, it does not require the bringing about of regulation which is illogical and unjust."

the rights of individuals even against their own country's wishes. To conclude this point and this chapter, it is perhaps also worth noting that the President in the *Nottebohm Case* was Judge Hackworth, who provided the famous dissenting opinion in the *Reparations Case* regarding diplomatic protection. Among various statements in that dissenting opinion, he argued that:

“Any claim in behalf of the individual must rest [...] upon general principles of international law. What reason, then, is there for thinking that the United Nations, rather than the national State, should interpose on behalf of the individual? [...] Aside from remedies afforded by local law under which private claimants may be allowed access to judicial or other tribunals for the adjustment of their claims against a government, the only remedy known to international law in such cases is through the government of the State of which the claimant is a national.”<sup>370</sup>

The creation of EU citizenship and its recognition as a ‘fundamental status’ provide a context where individuals may indeed seek remedy aside from their government of nationality and even *against* their own national government. Furthermore, the development of cases regarding Citizenship of the Union have shown precisely why sometimes an organization *should* interpose on behalf of the individual. The individual's rights are guaranteed by the European Union and the European Court of Justice, not by a nation-state. Historically, citizenship has always defined a political community along with the rights and duties of its citizens, and in this matter, European Citizenship is no different. Therefore, despite the fact that nothing in the Treaties implied or foresaw an undertaking to create a citizenship in the sense of a nation-state, a supranational Citizenship of the European Union is a proper citizenship just like the city-state and nation-state citizenships that have preceded it.

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<sup>370</sup> *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 173.* Judge Hackworth Dissenting Opinion p. 202-203

## CONCLUSION

*But when a person is vested with only one nationality, which is attributed to him or her either jure sanguinis or jure soli, or by a valid naturalization entailing the positive loss of the former nationality, the theory of effective nationality cannot be applied without the risk of causing confusion. [...] There does not in fact exist any criterion of proven effectiveness for disclosing the effectiveness of a bond with a political collectivity, and the persons by the thousands who, because of the facility of travel in the modern world, possess the positive legal nationality of a State, but live in foreign States where they are domiciled and where their family and business centre is located, would be exposed to non-recognition, at the international level, of the nationality with which they are undeniably vested by virtue of the laws of their national State, if this doctrine were to be generalized.<sup>371</sup>*

These are the words from *Flegenheimer*. The decision was made on 20 September 1958, which is 58 years ago and is as close to the 1890s as it is to today. Already in this case there seems to be evidence of the inadequacy of nationality laws for the international arena in the modern world after the two World Wars. The Commission's concern for the amount of people who would be excluded from diplomatic protection, and its decision for a narrow interpretation of the 'genuine link theory', have been endorsed by the 2006 Draft Articles on Diplomatic Protection and other authors and reports.<sup>372</sup> Therefore it is no surprise that *Nottebohm* as well as the principles and reasoning behind it have been heavily criticized.<sup>373</sup>

Nevertheless 1958 also marks the beginning of what became the European Union. As some authors have suggested: "A union of European states does not necessarily involve the creation of a legal category of European citizen."<sup>374</sup> But the concept was already "mentioned, regarded by some as embryonic in the original EEC Treaty of 1957"<sup>375</sup> and is said to have first appeared in EC documents in 1961.<sup>376</sup>

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<sup>371</sup> *Flegenheimer* (Decision No 182) (1958) 14 RIAA 327 p. 337

<sup>372</sup> Report of the International Law Commission, 58 Session (1 May–9 June and 3 July–11 August 2006) GAOR 61st Session Supp 10; Liberti, Lahra. "Flegenheimer Case"; Trevisanut, Seline. "Nationality Cases before International Courts and Tribunals"

<sup>373</sup> Spiro, Peter J. "Multiple Nationality"; Dörr, Oliver. "Nationality"; Trevisanut, Seline. "Nationality Cases before International Courts and Tribunals"; Dörr, Oliver. "Nottebohm Case"

<sup>374</sup> Heater, Derek. *A Brief History of Citizenship*. p. 103

<sup>375</sup> Jacobs, Francis G. "Citizenship of the European Union - A Legal Analysis"; Plender, R.O. 'An Incipient Form of European Citizenship'

Perhaps one concern dating back to its inception is a potential conflict between “two forms of civic identity that are, at least potentially, in competition with one another.”<sup>377</sup> But as the theoretical example of revisiting Nottebohm showed, EU citizenship can actually *help* individuals take a neutral stance between allegiances rather than causing conflict and it also protects their rights regardless of nationality. These features are easily reflected in the common European passport, which “expresses the double allegiance of European citizens to both their nation State and the EU”<sup>378</sup> while it simultaneously expresses “the equality of European citizens regardless of nationality.”<sup>379</sup> Both of these functions highlight some of the most fundamental historical features of citizenship. Emphasis on the role of equal rights and allegiance or solidarity between their citizens have been aspects of citizenship in every culture that has implemented the idea, and European citizenship is no different.

Although the rise and development of EU citizenship may seem like an outlier in the history of citizenship, it is here that we may compare the words of ECJ President Lenaerts with the way Paul Margette describes the birth of *civilitas* at the time of the Renaissance:

<p>“Indeed, <i>Rottmann, Ruiz Zambrano, McCarthy, Dereci, Iida, O and S, Ymeraga</i> and <i>Aloka</i> show that ‘the life of the law [on EU citizenship] <b>has not been logic: it has been experiencing</b>’”<sup>380</sup></p> <p>“[T]he ‘<b>stone-by-stone</b>’ approach followed by the ECJ is not only the right way of <b>building a solid edifice to the rights attaching to the status of citizen of the Union</b>, but it is also entirely consistent with the dynamics of Article 267 TFEU. The legitimacy of the ECJ requires the latter to honour the role played by <b>national</b></p>	<p>“The fact that citizenship was <b>built empirically, by the work of jurists who considered specific cases</b>, is revealing: it testifies to the fact that this concept, which was then specifically qualified (<i>civilitas</i>), mainly designated an individual’s membership of a particular <i>civitas</i>. Today, this would be called <b>nationality</b>.</p> <p>However, this did not imply that [<i>civilitas</i>] was strictly a formal concept lacking political content. Indeed, it only appeared in <b>autonomous, or ‘sovereign’ cities</b>, and was only codified by jurists whom history remembers as the forbears of the modern idea of sovereignty. [...] It did not describe</p>
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<sup>376</sup> Heater, Derek. *A Brief History of Citizenship*. p. 103

<sup>377</sup> Margette. *Citizenship: the history of an idea*. p. 171

<sup>378</sup> Hertig Randall, Maya. “European Passport”

<sup>379</sup> *Ibid.*

<sup>380</sup> Lenaerts, Koen. “EU citizenship and the European Court of Justice’s ‘stone-by-stone’ approach” p. 9; Holmes, O. W. *The Common Law*. p. 3

<p><b>courts</b> during the preliminary reference procedure. The inter-judicial dialogue that takes place under Article 267 TFEU is deeply intertwined with the way in which the ECJ builds up its argumentative discourse.”<sup>381</sup></p>	<p>citizenship, as one would be tempted to do in contemporary terms, as an active participation of citizens in the exercise of sovereignty of the city. This link appeared only in a tangential, almost fortuitous way, when <b>concrete cases forced consideration of which privileges were part of the title of citizen.</b>”<sup>382</sup></p>
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The comparison of quotes shows the way both *civilitas* and *EU citizenship* developed slowly but decisively. Furthermore, it shows the role that was played by the sovereign powers (sovereign city-states and sovereign national courts, respectively) while the jurists developed the case law that gave content to each of these terms. Finally, it shows that through specific and important cases, along with the respect for sovereignty, the status of citizen acquired the rights and privileges that became identical with it and which emancipated it from previous notions. The following sequence of diagrams (from left to right) can illustrate the way these two terms evolved from being identical to their components all the way through their emancipation:



Summary 1: Evolution of *Politeia* > *civitas* > *civilitas*



Summary 2: Evolution of *European Citizenship*

<sup>381</sup> Lenaerts, Koen. “EU citizenship and the European Court of Justice’s ‘stone-by-stone’ approach” p. 9 Emphasis added  
<sup>382</sup> Magnette. *Citizenship: the history of an idea*. p. 48 Emphasis added.

In the former case (*Summary 1*), the concept of citizenship began with the Greek and Roman conceptions, and as the Roman Republic expanded through most of continental Europe, the idea spread all the way until the collapse of the Roman Empire. Then, it began its revival as a legal concept through juridical decisions in the time of Marsilius, Bartolus and Baldus until the idea of *civilitas* was abstracted from its components (*civis*, *civitas*, & *civilis*). In the case of EU citizenship (*Summary 2*), the concept was initially described as a false prospectus and a concept without much substance or content,<sup>383</sup> but the decisions by jurists in the ECJ provided it with content until it acquired the status that it has today. The right-most image shows that Citizenship of the Union is now very much analogous to the historical concept of citizenship since it is comprised of *individuals* (Member State nationals), a *community* (Member States), and a *bond* (European values/rights expressed in the treaties).

Regardless of the rules and method for acquisition, which are nevertheless always variant/subject to the polity implementing citizenship, it is easy to see that all necessary components of citizenship are present in Citizenship of the Union. Some would argue that the citizenship diagram doesn't hold because being a citizen is dependent on first being a national and therefore it's impossible to separate the national/citizen (orange circle) from the community/Member State (green circle). However, at this point it would be crucial to remember that the Greek concept did not separate the *polites* from the *polis* and thus the situation becomes analogous once again. In other words: the fact that having a particular nationality is a prerequisite for EU citizenship does not make it less of a citizenship in the same way that the prerequisites to becoming a full citizen of Sparta, Rome, Athens or Florence did not make these any less of a citizenship.

### *Citizenship vs Nationality*

Chapter One analyzed the way citizenship developed over roughly 2,500 years until it became practically synonymous with the modern concept of nationality after the revolutions of the 18<sup>th</sup> and 19<sup>th</sup> Centuries. But one fundamental difference between citizenship in its origins within city-states and its current conception as national citizenship within nation-states is the issue of representation. "Modern

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<sup>383</sup> Refer to note two hundred sixty-nine in Chapter Three

citizenship is innately representative” and the two main reasons for this are because 1) it would be materially impossible to gather all nationals to deliberate on actions and 2) representatives are believed to be adequately representative, particularly motivated and especially adept ‘lovers of justice’ who can carry on the task on behalf of their constituents.<sup>384</sup> Regardless of how accurate or questionable this idea may be, it nonetheless reinforces the difference between citizenship and nationality simply by virtue of scale. As Section 2.3 in Chapter One showed *politeia* and *civitas* were limited to smaller territorial polities, and as Magnette points out:

“Here lies the cardinal difference between the citizenship of the ancients and that of the moderns: in Athenian democracy, the citizen ‘took part in the power of judge and magistrate’ according to the formula of Aristotle; in the Roman republic, the citizenry was renowned to be the author of the laws. In modern liberal democracies, citizens elect their representatives, who make and apply the laws in the citizens’ name. This delegation, which reduces citizenship to the power of giving a mandate, was severely criticized by proponents of a transparent, direct and immediate citizenship.”

As citizenship evolved into nationality after its subjugation in the Age of Monarchy, it became more synonymous with detached representation. Although many modern academics contend that the difference between ancient and modern citizenship boils down to active vs passive citizens,<sup>385</sup> it is arguably this very difference that draws the border between citizenship and nationality. Citizenship, given its scale, was almost inseparable from sovereignty of the citizenry, and this was the case in all the independent city-states of Sparta, Athens, Rome and Florence. Conversely, Chapter Two showed that nationality is more closely attached to diplomatic protection which comes from sovereignty of the *nation*. But the inherent need for representation in nation-states is precisely what makes nationality more akin to citizenship the late Roman Empire: detached from sovereignty, distanced from participation, and diminished in value. In short: citizenship as a concept was more closely related to sovereignty while nationality is more identical with representation.

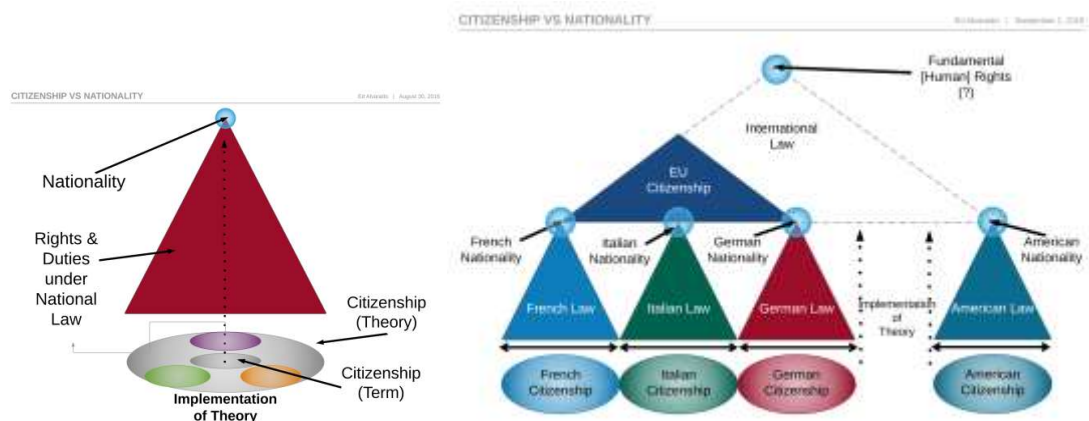
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<sup>384</sup> Magnette, Paul. *Citizenship: the History of an Idea*. p. 189

<sup>385</sup> Magnette, Paul. p. 188 states “According to general opinion, liberal democracies suffer from a deficit of civic involvement”. Furthermore, this widespread is one main reason for the article by Smith, Rogers M. “Modern Citizenship”.



The diagrams below illustrate the way Union Citizenship relates to national citizenship. It has been consistently argued that EU citizenship is not and was never intended to be analogous nor a replacement for national citizenships.<sup>386</sup> Nevertheless, given its components and jurisdiction, it is evident that the only way to place Citizenship of the Union in a historical context is precisely above national citizenships as a supranational citizenship. In the same way that *citizenship* described the status of individuals during the time of city-states, and the way *nationality* describes the status of individuals in the era of nation-states, it can be shown that *supranational citizenship* describes the status of individuals who belong to a union of nation-states.



Given that there is no explicitly-formulated, special theory of EU citizenship, and the fact that individuals may bring claims against sovereign nations in order to demand respect for individual and sometimes *fundamental* human rights, it is worth pondering if the purpose of a supranational citizenship is merely to harmonize the nationality laws of nation-states or if there is a particular quest to respect human rights of all people regardless of nationality. Either way, the fact that this new citizenship respects and protects individuals against the sovereignty of governments (even those who are supposed to represent the individual), suggests that some [human] rights may not even be violated by the most sovereign political units of our time, and this brings the question of whose integrity is more fundamental.

In ‘The Decline of the Nation-State and the End of the Rights of Man’, Hannah Arendt elaborates on the now-famous quip that nationality is “the right to have rights”. In order to close this thesis, I would like to reproduce Arendt’s quote in

<sup>386</sup> Refer to notes two hundred fifty-four and three hundred forty-three in Chapter Three

full followed by a final quote by Aristotle regarding the ‘political animal’ and brief note:

“Man of the twentieth century has become just as emancipated from nature as eighteenth-century man was from history. History and nature have become equally alien to us, namely, in the sense that the essence of man can no longer be comprehended in terms of either category. [...] This new situation, in which "humanity" has in effect assumed the role formerly ascribed to nature or history, would mean in this context that the right to have rights, or *the right of every individual to belong to humanity*, should be guaranteed by humanity itself. It is by no means certain whether this is possible. For, contrary to the best-intentioned humanitarian attempts to obtain new *declarations of human rights* from *international organizations*, it should be understood that this idea transcends the present sphere of international law which still operates in terms of reciprocal agreements and treaties between sovereign states; and, *for the time being, a sphere that is above the nations does not exist*. Furthermore, this dilemma would by no means be eliminated by the establishment of a "world government." Such a world government is indeed within the realm of possibility, but one may suspect that in reality it might differ considerably from the version promoted by idealistic-minded organizations.”

- Arendt, Hannah. *The Origins of Totalitarianism*.

‘The Decline of the Nation-State and the End of the Rights of Man’ p.298

*From these things therefore it is clear that the city-state is a natural growth, and that man is by nature a political animal, and a man that is by nature and not merely by fortune citiless is either low in the scale of humanity or above it (like the “clanless, lawless, hearthless” man reviled by Homer, for one by nature unsocial is also ‘a lover of war’) [...]*

*Therefore the impulse to form a partnership of this kind is present in all men by nature; but the man who first united people in such a partnership was the greatest of benefactors.*

- Aristotle, *Politics*

Book 1, Section 1253a

It seems as though at least one of Arendt's idealistic-minded organizations has managed to protect the rights of man from the sovereignty of states. There may not be a world *government* but international organizations have clearly achieved a sphere of *citizenship* that is above the nations. Furthermore, all who fit Aristotle's description of a 'political animal' are inclined by nature to form partnerships and belong to a State. Perhaps both of these philosophers would suggest a return to the etymological "true sense" or *nature* of citizenship attached to a self-sufficient and cohesive city-state. Regardless, the concepts of *citizenship* and *nationality* have been identified historically as a balance of rights and duties, so if nationality can be described as an individual's 'right to have rights' and as 'the right of every individual to belong to humanity', then perhaps citizenship after the EU can be described as the balancing 'duty to protect rights' and as '*the duty of every [Member] State to treat humans as equals, regardless of nationality*'.

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#### **Appendix on Citizenship-Nationality-Residency**

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## **Appendix:** **Citizenship, [Effective] Nationality, [Permanent] Residency**

These four concepts can be understood as either practically synonymous or vastly different. To the untrained eye, these might all refer to the same thing, especially when they are interpreted as the answer to the question “Where are you from?”. However, in academia and in law, the miniscule but critical differences between these terms can lead to crucial misunderstandings and fundamentally different answers. For this reason, it is necessary to clarify them before choosing which one to address from an academic or legal perspective.<sup>387</sup>

### **CITIZENSHIP**

According to Engin F. Isin and Bryan S. Turner, the concept of citizenship has three fundamental axes: extent, content and depth.<sup>388</sup> It is these three concepts that are continuously redefined and reconfigured in when discussing the theoretical concept of citizenship. *Extent* refers to the rules and norms for membership, and this membership entails inclusion which logically implies an element of exclusion. In other words, to define the extent of citizenship, one must establish the norms or rules that will allow for someone to become a *citizen*. *Content* refers to the particular rights or benefits that citizenship will provide as well as the responsibilities or burdens that a citizen must accept. This concept will be particularly useful in the next section discussing the theoretical approaches to citizenship. Lastly, the trickiest concept to explain is *depth*, which relates to how “thick” or “thin” this identity is in the minds of citizens. Perhaps the best way to understand this concept is by saying that depth: defines how loyal or attached the citizens are to their polity and how much they are expected to identify with it. For example, one could say that United States citizenship is thick [because Americans identify strongly with America] while European Union citizenship is thin [since Europeans don’t consider themselves first and foremost “European”<sup>389</sup>].

#### ***Theoretical Approaches***

One crucial step in defining the fundamental axes involves delineating the rights and duties that citizenship entails. For this, various theoretical approaches have been proposed and they are often grouped as three or four main theories depending on the author or their way of labeling the theories. For example, refer to the main theories as

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<sup>387</sup> Throughout this explanation, however, it is important to remember that these terms are still very much interconnected and therefore changes in one might affect another *without implying that they are necessarily the same thing*. It is my goal that these issues will be much clearer after reading this appendix.

<sup>388</sup> Isin, Engin F. and Bryan S. Turner “Citizenship Studies: An Introduction.” In *Handbook of Citizenship Studies*, edited by Engin F. Isin and Bryan S. Turner, 1-10. London: Sage Publications, 2002.

<sup>389</sup> at least allegedly, though one could argue that Americans might consider themselves first and foremost Californians, Texans or New Yorkers *within* the US but they are often generalized as American in an international context while Europeans are separated due to their longer histories,

Liberalism, Communitarianism, and Republicanism, which emphasize the individual, the community or balance of both, respectively.<sup>390</sup> However, authors such as Janoski and Gran have opted for four categories, one of which groups Republicanism and Communitarianism together.

<p><b>Liberalism</b> (<i>emphasis on the individual</i>)</p>	<p><b>(Traditional)</b> Importance of [negative] rights that are based on liberties. Legal and political rights come first. Few obligations include obeying laws, paying taxes, refraining from assault or rebellion. Contractual relationship between rights and obligations.</p>
	<p><b>Modern/Pluralist</b> - Aggregation of individual interests (not ‘group rights’) is/are represented in democratic legislatures.</p>
<p><b>Republicanism</b> (<i>emphasize role of conflict and contest in the expansion/protection of rights</i>)</p>	<p><b>Civic Republicanism</b> - Civic virtue rather than state obligations. Seeks to foster virtues of good citizens who act on behalf of others.</p>
	<p><b>Neo-Republicanism</b> - Operates through deliberation, debate and tolerance. Emphasizes 1) public action in civil society (not individualism) 2) enacting an office with formal rights and duties 3) organize a plurality (not majority) to guide community’s fate. “Consists of a strong and deep democracy that no longer emphasizes nationalism but rather acknowledges deep differences and loyalties between citizens.”</p>
	<p><b>Expansive Democracy</b> - emphasizes deliberation and the rights and increased participation of minorities and excluded groups (women, lower classes, etc). Seeks to balance group and individual rights and obligations in both cooperative and competitive relationships (not quite ‘social democratic theory).</p>
<p><b>Communitarianism</b> (<i>emphasis on community/society/nation</i>)</p>	<p>Effective and just functioning of society through mutual support and group action. Seeks strong community based on obligations towards common identity.</p>
<p><b>Postmodern/Radical Pluralism and Multiculturalism</b> (<i>identities are mixed</i>)</p>	<p>Complex and diverse identities. Rejects liberal pluralism and consensual communitarianism. Comprised of “agonistic pluralism/democracy” and differs from <i>deliberative democracy</i> because adversaries might disagree on <i>interpretation</i> of the rules of the game.</p>

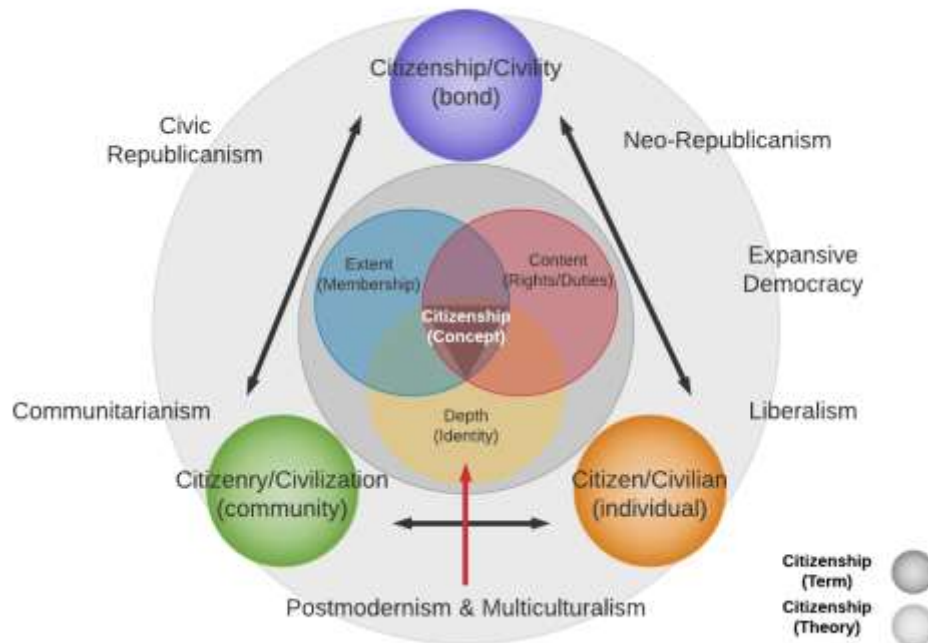
Table 1: Theories of Citizenship. Created summarizing theories from: Isin, Engin F. and Bryan S Turner. *Handbook of Citizenship Studies*.

<sup>390</sup> Isin, Engin F. and Bryan S. Turner “Citizenship Studies: An Introduction.” In *Handbook of Citizenship Studies*, edited by Engin F. Isin and Bryan S. Turner, 1-10. London: Sage Publications, 2002.

Although these tables are not comprehensive and there are likely other theories which are not included in this table/summary, these are the most prominent theoretical approaches to citizenship that one might expect to find throughout the literature. The way they are categorized varies and this can be seen with examples such as Civic Republicanism and Communitarianism being put together by Janoski & Gran but being separate branches for Isin & Turner. However, I believe that the approaches can be grouped together in various ways because of the way they analyze key elements of citizenship. These key elements are:

- 1) citizen/civilian - *identity/complexity* of the individual/group
- 2) citizenry/civilization - *focus* on the well-being of the individual, community or both
- 3) citizenship/civility - *importance/amount of rights & duties* to the individual and the group

To me, this is the best way to think about the way different authors might categorize the various approaches because the importance of (1) identity is what separates postmodernist and multicultural theories, the (2) focus is what makes liberalism, communitarianism and republicanism the three most cited branches, and the role of (3) rights & duties often creates different sub-branches within major branches and this leads to various combinations, even across theoretical approaches (e.g. Civic Republicanism with Communitarianism). To put it another way, authors' underlying assumptions about a *citizen/civilian* will lead them to a) focus on the *citizen/civilian*, b) assume a common *citizenry/civilization*, or c) establish the *citizen-citizenry [civil] relationship*, and they will then attempt to define rights & duties in order to finalize their theory of *citizenship/civility*. And is precisely what leads us to the most important and defining aspect of various theories of citizenship: rights & duties. But before moving on from the theoretical conceptualizations of citizenship, I have made the following diagram that should allow reader to recall the various issues more easily as well as how they are interrelated. Hopefully the visualization of these concepts will allow for a more proper understanding of why rights and duties are referred to at different levels.



As explained before, the *concept of citizenship*<sup>391</sup> involves ideas of extent, content and depth. Once there is an understanding of who<sup>392</sup> is a member<sup>393</sup> of the polity and which rights/duties<sup>394</sup> they [should] have, this then becomes a specific definition of the *term* “citizenship”<sup>395</sup>. But this term can mean different things or be used differently throughout social sciences. Some examples are: as a legal status, possession of rights, political activity, a collective identity and sentiment; or the more discipline-oriented: economic citizenship, cultural citizenship, etc<sup>396</sup>. For the purposes of international relations, “citizenship” here refers to a *theory of citizenship*<sup>397</sup> such as Liberalism, Republicanism and Communitarianism. But another reason why the terminology becomes confusing, even within this single discipline, is because some theorists might be tempted to invoke a *notion of citizenship*<sup>398</sup> that relates the citizen and the citizenry<sup>399</sup>. However, this notion can also be referred to as *civility* and for this reason, I have chosen to include dual formulations (e.g. citizen/civilian and citizenship/civility).

<sup>391</sup> Black triangle at the very center in the diagram (intersection between extent, content and identity).

<sup>392</sup> Identity

<sup>393</sup> Extent

<sup>394</sup> Content

<sup>395</sup> Dark grey circle in the diagram

<sup>396</sup> Sassen, Saskia. "Towards Post-National and Denationalized Citizenship." In *Handbook of Citizenship Studies*, edited by Engin F. Isin and Bryan S. Turner, 277-291. London: Sage Publications, 2002.

<sup>397</sup> Outer light gray circle in the diagram

<sup>398</sup> Purple circle at the top

<sup>399</sup> This sort of approach might be particularly tempting for Civic Republicanism since it speaks of virtues and it would be easy to claim that citizenship is itself “the virtue of being a good civilian within a civilization”.

All theories must address the individual, the group, and the way to understand the diagram is by noticing where particular theoretical approaches to citizenship fall in relation to these three issues. For example, communitarianism focuses more on the group, liberalism on the individual, and different types of republicanism might place different amounts of value on each, but republicanism in general places the highest priority on the *bond* between individual-group and the balance between rights-duties. Thus we get the triangular arrangement between the three most common theoretical approaches. Meanwhile, Postmodernism and Multiculturalism present an interesting case because, by focusing on identity, they dive back towards the deeper *conception* of citizenship in order to analyze the shared identity between the individual and the group which will naturally lead to their shared bond and the very concept of “citizenship” at a deeper level. Therefore, the triangle formed between the individual-group-bond can be read as the idea that “a citizen is joined to a citizenry through citizenship” or “a civilian is joined to a civilization through civility”, and various theories will be located closer to each term depending on which they prioritize.

So in conclusion, the term citizenship can refer to various things even within one discipline and in order of abstraction, these would be:

- Cognitive “citizenship” which refers to the *concept* or *idea*
- Linguistic “citizenship” which refers to the *term* (word to define the concept)
- The *notion* of “citizenship” as a *virtue* or as ultimate *bond* between individual-group
- A *theory* of “citizenship”, which may in turn become applied as a *legal/political term*

Once we see and understand this, it becomes easier to conceptualize where the different theories might fall on a spectrum between the individual and the community. It is my hope that this section and particularly the diagram has been enough to visualize and understand the many ways that citizenship can be interpreted and how this leads to different formulations. Particularly in the case of international relations, a theory of citizenship is what becomes most identical with national citizenship, since various nations will have slightly or radically different implementations of these theoretical approaches. The upcoming explanation will briefly introduce the most basic feature of national citizenship: rights and duties.

### ***Rights & Duties***

The reason why this can be seen as the most basic feature or the most defining aspect of citizenship is because there is a potentially endless amount of rights and duties that one can ask of citizens and there is an even greater number of ways to prioritize them. The following summary explains the main categories of rights that are often described in the literature (i.e. legal, political, social, and participatory) as well as the subcategories within these rights (e.g. security, justice, conscience) and examples within each. It is worth noting that legal and political rights are often the most

important ones mentioned and the only ones which also tend to include obligations, particularly in the case of legal rights.

<b>Legal Rights</b>	<i>Security (protection)</i>	Torture, own body (rape, abortion)
		<b>Obligation</b> to report violations and help others
	<i>Justice (access)</i>	Legal representation, legal assistance, waiver of fees, confront accuser, jury trial
		<b>Obligations</b> to testify, appear in court as party to lawsuit, serve on jury
	<i>Conscience (freedoms)</i>	Speech and press, religion, marriage, occupation
		<b>Obligation</b> to tolerate the practice of other's rights, opinions, and lifestyles
<b>Political Rights</b>	<i>Personal</i>	Right to vote, stand for office
	<i>Organizational</i>	Rights to form parties, interest groups, and social movements
	<i>Membership</i>	Right to migration and naturalization in order to become members of society
	<i>Self-determination</i>	Decolonization, secession
<b>Social Rights</b>	<i>Enabling</i>	Health care, pensions, rehabilitation, counseling
	<i>Opportunity</i>	Education
	<i>Redistributive &amp; Compensatory</i>	Payments for prior injury or deprivation of rights (e.g. American-Japanese internment camps and German Jews during WWII)
<b>Participation Rights</b>	<i>Labor market</i>	Job placement, job creation, job security
	<i>Advisory</i>	Collective bargaining, work councils/grievances
	<i>Capital Control</i>	Wage earner funds, central bank controls, anti-trust capital escape laws

Table 2: Rights and Duties. Created summarizing various authors and explanations from: Isin, Engin F. and Bryan S Turner. *Handbook of Citizenship Studies*.

To elaborate on each or even on many of these rights would likely entail delving into particular theoretical approaches or particular theories, which is beyond the scope of this section. It is likely that it would also involve political discussion about which rights should or shouldn't be included and how to prioritize them which is also beyond the scope of this conceptual explanation about the terms *citizenship* and *nationality*. Therefore, it is assumed that the reader understands these or will familiarize herself/himself with them if any further elaborations seem appropriate.

***Citizen-self Identities (typology)***

The final aspect is not prevalent or essential in the literature of citizenship studies, but it will be interesting and particularly useful to mention for the purposes of this section and in the context of citizenship and nationality. This aspect is the typology of citizenship provided by Thomas Janoski and Brian Gran. This typology describes six types of what the authors refer to as “citizen-selves motivated by value involvement and behavioral activity”.<sup>400</sup> One reason why this is important and interesting to include is because it can provide a final implementation of how citizenship is defined in theory, how citizens value it, and how they behave in response to it. It is crucial to understand that this typology does not simply relate to voting behavior or other immediate conceptions of what citizenship means in the real world; this is rather an encompassing typology of how citizens will behave and value the role of all rights and obligations demanded by their citizenship. The following table summarizes this typology and the subsequent explanation will hopefully allow for a smoother transition to the topic of nationality.

<b>Action - Behavior</b>	<b>Value involvement - Belief</b>		
	<i>Allegiance</i>	<i>Apathy/Self-interest</i>	<i>Alienation</i>
Active - Participant	Incorporated	Opportunistic	Active
Passive - Subject	Deferential	Opportunistic/Marginal	Cynical
Inactive - Alien/Neglected	Fatalistic Loyalist	Marginal	Fatalistic Opponent

Table 3: Typology of Citizenship

Source: Janoski, Thomas and Brian Gran. “Political Citizenship: Foundations of Rights.”

These describe the way that people’s behavior might reflect their beliefs regarding “citizenship” or their place and role in society, and they can be summarized as follows:

<sup>400</sup> Janoski, Thomas and Brian Gran. “Political Citizenship: Foundations of Rights.” In Handbook of Citizenship Studies, edited by Engin F. Isin and Bryan S. Turner, 13-52. London: Sage Publications, 2002.

Participant citizens are either the incorporated citizens or the active citizens. Incorporated refers to those who “are generally part of the elite, or feel that they are. They identify with party and government interests, and actively participate and support party goals”; meanwhile, active citizens are those who often conflict with the elites and are often grassroots movements.<sup>401</sup> Subject citizens are passive in the sense that they remain mostly neutral to policies. Deferential citizens accept the authority of elites but they avoid political activities and don’t internalize the government’s policies; cynical citizens are mostly critical of politics but do not believe that much change is possible, so they decide to pursue their own interests instead; marginal citizens include the poor and immigrants and they are detached/alienated from the system because they lack resources or power.<sup>402</sup> Depending on their level of detachment or alienation, these may become fatalistic loyalist, fatalistic opponent or the marginalized groups that might become targets for policy-making and social discrimination “due to fears of deviance or crime”<sup>403</sup>. Finally, somewhere between the active and passive citizens, there are opportunistic citizens who “do not participate in political activities unless these activities directly affect their interests, involve substantial income or major services, *and* can actually achieve their desired outcomes”<sup>404</sup>.

The reason why it may be important to keep these in mind is precisely because it creates a link to the concept of nationality. By understanding this typology of citizen-selves, we might be able to analyze how a citizen perceives his/her self as part of a citizenry, which would affect *their* subjective theories of citizenship and thereby lead to potential conflict with other citizens or with the State’s expectation of citizens. For example, one might expect an “incorporated citizen” to hold a Communitarian or Civic Republican view of citizenship particularly because of their close connection to the elites (i.e. inclusive membership), their high identification with policy (i.e. thick identification) and agreement with the rights & duties being demanded. Meanwhile, opportunistic and marginalized citizens would be likely to have individualist liberal views that value liberty and self-interest or perhaps even a postmodernist or multiculturalist view where they question the relationship between the community and the individual (especially in the case of immigrants).

It would be interesting to study the relationship between these citizen-selves and their subjective theories of citizenship, alas that is beyond the purpose of this analysis. The key thing to keep in mind in order to transition to the next section is that all of these citizens (with the exception of marginal immigrants) are indeed

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<sup>401</sup> Janoski, Thomas and Brian Gran. “Political Citizenship: Foundations of Rights.” In *Handbook of Citizenship Studies*, edited by Engin F. Isin and Bryan S. Turner, 13-52. London: Sage Publications, 2002. p.39

<sup>402</sup> *Ibid.* p.40

<sup>403</sup> *Ibid.* p.40

<sup>404</sup> *Ibid.* p.40



*citizens* of the country or polity in question and in our current world they would be deemed as *nationals*. This is important because many of these citizen-selves would probably confuse citizenship and nationality simply because the symbiosis is assumed rather than understood. The citizens in the best position to understand the fundamental difference between these two concepts are migrants and as the authors state it is likely that immigrants are marginal citizens (passive or inactive) simply because they owe their allegiance to another country and they disengage from citizen affairs by orienting themselves toward family and friends.<sup>405</sup> Therefore one key difference between citizenship and nationality seems to be the issue of *allegiance*.

## **NATIONALITY**

### ***Nationality and Citizenship***

Perhaps the most often-cited case in international relations with respect to nationality is the *Nottebohm case* (Liechtenstein v. Guatemala) [1955] from the International Court of Justice. In it, the Court made the following declaration which has been cited endlessly throughout the literature on nationality:

*“According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.”<sup>406</sup>*

Furthermore, in 1984, the Inter-American Court of Human Rights (IACrHR) expressed a similar view by defining nationality as:

*“The political and legal bond that links a person to a given state and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that state.”<sup>407</sup>*

Thus it would seem that some of the key aspects regarding nationality are: a legal bond, social ties/attachment, a genuine connection to the State, the existence of reciprocal rights and duties, and interests/sentiments such as loyalty and fidelity that show the individual is more connected to one State than any other. Although many of

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<sup>405</sup> Janoski, Thomas and Brian Gran. “Political Citizenship: Foundations of Rights.” In Handbook of Citizenship Studies, edited by Engin F. Isin and Bryan S. Turner, 13-52. London: Sage Publications, 2002. P.40

<sup>406</sup> Nottebohm Case (Liechtenstein v. Guatemala); Second Phase, International Court of Justice (ICJ), 6 April 1955.

<sup>407</sup> Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, OC-4/84, Inter-American Court of Human Rights (IACrHR), 19 January 1984. Paragraph 35

these might make it seem that nationality is basically the same thing as citizenship, it would perhaps be more appropriate to argue that nationality picks up where citizenship leaves off. As the previous section showed, the term citizenship can take multiple meanings from a cognitive concept through a linguistic term and all the way to a theoretical or perhaps even legal/political concept. Therefore, nationality is arguably most appropriately described as *the legal/political implementation of a theory of citizenship*. This would explain why the terms often seem synonymous and almost identical, given that we often speak about *actual* [legal/political] concepts rather than *theoretical, linguistic* or *cognitive* concepts<sup>408</sup>. One argument to support this comes from the Max Planck Encyclopedia of Public International Law (MPEPIL) published by Oxford University which explains that:

*Nationality is a legal concept of both domestic and international law. For the purposes of the former it is often referred to as 'citizenship', although as a matter of terminology, it would seem much more precise to denote the legal status of the individual as 'nationality' and the consequences of that status, ie the rights and duties under national law, as 'citizenship'.*<sup>409</sup>

In other words, *nationality* is recognized in domestic and international law as the legal status of individuals while *citizenship* refers to the consequences or various interpretations of how to balance the rights and duties that the individual has under national law. Another entry from the MPEPIL also seems to point towards the difference between these two terms and can help us understand how this distinction can be drawn. In the entry on “European Citizenship”, the author states that

*“By definition Union citizens do not share one single nationality. Moreover, Union citizenship serves different functions than nationality. Thus the two concepts have to be distinguished clearly.”*<sup>410</sup>

This is precisely because the function of EU citizenship is to provide the nationals of *all* Member States with unalienable rights within the *entire* Union and this citizenship compels all Members to respect these rights and holds them responsible for violations. Furthermore, Article 20 the Treaty on the Functioning of the European Union (TFEU) states “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.”<sup>411</sup> One way to interpret this would be by saying that although European Union citizenship has

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<sup>408</sup> This would mean that whenever someone speaks of a particular nationality, they are referring to a national theory of citizenship but not the the concept or theory of citizenship itself.

<sup>409</sup> Dörr, Oliver. “Nationality”. Max Planck Encyclopedia of Public International Law

<sup>410</sup> Armin von Bogdandy and Felix Arndt. “European Citizenship”. Max Planck Encyclopedia of Public International Law

<sup>411</sup> Treaty on the Functioning of the European Union (TFEU)

been clearly established, no European Union *nationality* has been equally or necessarily established. This interpretation would be consistent with both the MPEPIL and the TFEU. But without making this claim about EU nationality, Article 20 is enough to show that there is indeed a difference between nationality and citizenship and that citizenship does not need to be tied to a particular nation-state. Other authors have also pointed to this difference by showing that a person can be the national of a state without being a citizen<sup>412</sup> and that a minor is still the national of the state, despite not being considered a citizen yet. And another clear example of this difference is the case of people born in American Samoa who “though ‘subject to the jurisdiction of the United States,’ are ‘American nationals’ who are not birthright citizens of the United States.”<sup>413</sup> Finally, the distinction between the two can be proven by the fact that the concept of citizenship predates the concept of nationality. As Saskia Sassen shows:

“The shift of citizenship into a national state institution and away from one centered in cities and civil society was part of a larger dynamic of change. Key institutional orders began to scale at the national level: warfare, industrial development, educational and cultural institutions. These were all at the heart of the formation and strengthening of the national state as the key political community and crucial to the socialization of individuals into national citizenship. It is in this context that nationality becomes a central constitutive element of the institution of citizenship.”<sup>414</sup>

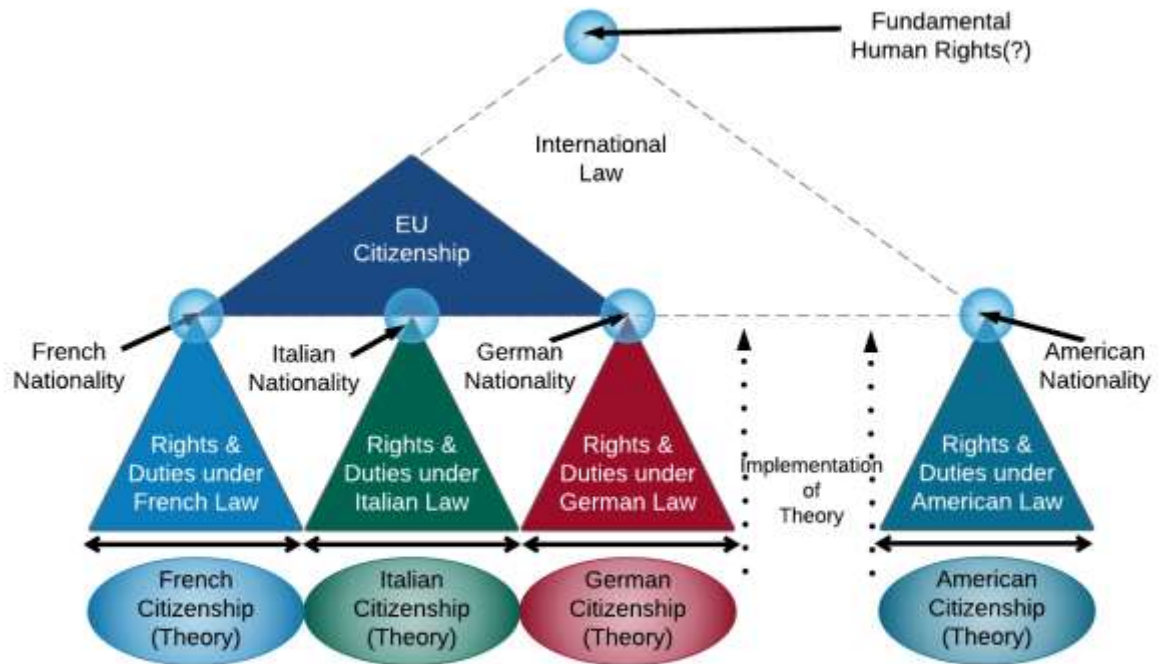
So in order to conclude this distinction, I would like to once again offer a visual diagram to remember this difference:

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<sup>412</sup> Hudson, Manley O. [Special Rapporteur appointed by the International Law Commission]. Report on Nationality, including Statelessness, A/CN.4/50 (1952)

<sup>413</sup> Brief of the Honorable Eni F.H. Faleomavaega as Amicus Curiae in Support of Defendants, United States District Court for the District of Columbia, Civil Action No. 12-1143-RJL, November 7, 2012, retrieved June 17, 2016

<sup>414</sup> Sassen, Saskia. "Towards Post-National and Denationalized Citizenship." In *Handbook of Citizenship Studies*, edited by Engin F. Isin and Bryan S. Turner, 277-291. London: Sage Publications, 2002.



As the diagram shows, each nation has its own theory of citizenship at its base which is then implemented under national law through rights and duties given to citizens. Then, in the eyes of international law, a nationality might seem identical to citizenship because it can only see the “tip of the iceberg” so to speak. Furthermore, as the diagram also shows, EU citizenship is supranational and consists of the nationalities from Member States but it’s hard to derive a specific theory that it’s built on other than the basic/fundamental rights that it guarantees citizens and the duties that it imposes on States. One interesting point of debate would be whether there is such thing as an “EU nationality” at the tip of that pyramid, but that is an already heated debate that is beyond the scope of this essay. It is also irrelevant to the existence of EU citizenship that has already been legally established in the TFEU, but from here we can transition to a brief discussion of what nationality is all by itself when considered aside from citizenship.

### Nationality

Nationality has an undeniable international legal aspect purely by virtue of the fact that every state needs a defined population in order to be a state.<sup>415</sup> To put it simply, one of the key ingredients in order to be recognized as a state is a population and without people/nationals it is impossible to have a nation-state or state

<sup>415</sup> Brownlie, Ian. "The Relations of Nationality in Public International Law." *Brit. YB Int'l L.* 39 (1963): 284

sovereignty.<sup>416</sup> With this in mind, it becomes much easier to see why nation-states need to implement a theory of citizenship in order to establish ‘*national citizenship*’ and thereby grant *nationality* to their population. Therefore it is no surprise that legal frameworks make nationality a very top-down approach and “to be considered a national by operation of law means that an individual is automatically considered to be a citizen under the terms outlined in the State’s enacted legal instruments related to nationality or that the individual has been granted nationality through a decision made by the relevant authorities.”<sup>417</sup> This is precisely what is shown in the diagram above which shows that a nation-state (e.g. the United States) will establish a concept of nationality<sup>418</sup> and it will determine rights and duties under national law which are ultimately based on a particular theoretical approach to citizenship. But once again the reader should keep in mind that some countries make further distinctions between these terms<sup>419</sup> and others provide different rights to citizens and to nationals (e.g. voting and jury duty for US nationals from American Samoa, Guam, Puerto Rico or the U.S. Virgin Islands). Since this section is mostly focused on showing the difference between citizenship and nationality, there will be no deeper elaboration or further discussion about nationality other than a brief explanation of “effective nationality”.

### **Effective Nationality & Genuine Link**

The concept of effective nationality can also be said to have come from the *Nottebohm Case* of 1955. However, its status and importance in international law is somewhat more disputable. The ICJ described a *genuine link* as “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.” This is also the basis for effective nationality, and what these refer to is basically the legitimacy and strength of the bond, connection, or attachment. As was previously mentioned, the Court’s definition of nationality stressed that an individual was “more closely connected with the population of the State conferring nationality than with that of any other State”. Although dual nationalities have become more common since the ruling, this Court was alluding to the fact that *Nottebohm* had no genuine

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<sup>416</sup> Evans, Malcolm D. *International Law*. Oxford: Oxford UP, 2010. Print. Pg. 221; Van Waas, Laura. *Nationality matters: statelessness under international law*. Intersentia, 2008. Pg. 35; Batchelor, Carol A., Philippe Leclerc, and Marilyn Achiron. *Nationality and statelessness: A handbook for Parliamentarians*. Inter-Parliamentary Union, 2005; Verena Stolcke, "The 'Nature' of nationality" in Bader (ed) *Citizenship and exclusion*, Macmillan Press London: 1997, page 61. Hailbronner, Kay “Nationality in Public International and European Law”, in: Rainer Bauböck/Eva Ersboll/Kees Groenendijk/Harald Waldrauch (eds.), *Acquisition and Loss of Nationality*, vol 1: Comparative Analyses (2006), 35.

<sup>417</sup> Batchelor, Carol A., Philippe Leclerc, and Marilyn Achiron. *Nationality and statelessness: A handbook for Parliamentarians*. Inter-Parliamentary Union, 2005.

<sup>418</sup> top of the pyramid in the diagram

<sup>419</sup> Such as the German *Staatsangehörigkeit* (formal state membership), *Staatsbürgerschaft* (participatory membership) and *Nationalität* or *Volkszugehörigkeit* (ethnocultural nation-membership). For more on this see Brubaker, R. *Citizenship and Nationhood in France and in Germany*. London: Harvard University Press, 1992

connection to Liechtenstein given the fact that he and his family were almost all residing and working in Germany or Guatemala. Therefore, his effective nationality was not that of Liechtenstein. However, there are a few reasons why this can be a controversial concept in international law. As the MPEPIL describes:

[the genuine link requirement] has been severely criticized both in legal doctrine and in judicial practice for at least two reasons: firstly, the Court in fact applied the concept of ‘effective nationality’, which is recognized for cases of multiple nationality, to the essentially different case of sole nationality where it does not quite fit. As a consequence, it deprived the individual of the advantages of nationality in relation to other States and thereby rendered him de facto stateless. Secondly, by setting up the requirement of a genuine link for naturalized persons, the Court in fact established, for the purpose of relations to other States, different classes of nationals: those having acquired their nationality by birth or change of civil status, and those having been naturalized.<sup>420</sup>

For this [among other] reason[s], the genuine link or “Nottebohm rule” is not generally accepted and has not become part of customary international law. Perhaps the best reason to see why this is the case would be by recalling the fact that the main culprit and the reason why Nottebohm way to Court was Guatemala’s seizure of his possessions and imprisonment, even though Guatemala was arguably the state that Nottebohm had the most genuine link with and therefore it might have been seen as his effective nationality, had he become a legal citizen rather than resident. This bring us to the final concept.

### ***[Permanent] Residency***

Although this final concept may seem less interconnected or controversial, it is important to address it for the sake of completeness. I should note that the concept of ethnicity is not relevant for this analysis because it is not a legal status under national or international law. Ethnicity is rather a cultural or identity concept which is subsidiary or supplementary to laws of citizenship and nationality. Permanent residence, on the other hand, is a legal status that allows individuals to reside in a particular country indefinitely. Thus the concepts of citizenship, nationality and permanent residency provide the legal status for individuals to spend their entire lives within a state’s borders, though each of these confers different amounts and types of rights and duties. In short, these concepts connect an individual to a state in various degrees, which cannot be said about the concept of nationality unless one assumes the rather uncommon ethnic nation-state with homogeneous ethnicity.

Residency, and particularly permanent residency is the third closest level of belonging to a state and can enjoy a large majority of the rights that citizens and nationals enjoy. As Peter Spiro explains, “In much of the North, those with

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<sup>420</sup> Dörr, Oliver. “Nationality”. Max Planck Encyclopedia of Public International Law

permanent resident status are *disadvantaged* in few respects. Permanent residents are eligible for *most* social benefits and can pursue *most* forms of economic opportunity. Even in the political sphere, the *differential* is diminishing. In many countries, legal immigrants can vote in local elections. In the United States, they are (with some minor exceptions) *ineligible* to vote, but they can make financial contributions to candidates for federal office and may enjoy other channels of political influence.”<sup>421</sup> This should be enough to show at least a few of the ways in which permanent residents are treated differently from nationals. However, it is imperative to understand that not all legal residents within a territory have the opportunity to become permanent residents, and not all permanent residents have the opportunity to become nationals or citizens<sup>422</sup>.

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<sup>421</sup> Spiro, Peter J., and Bosniak Linda. "An Emerging International Law of Citizenship?"  
Emphasis added

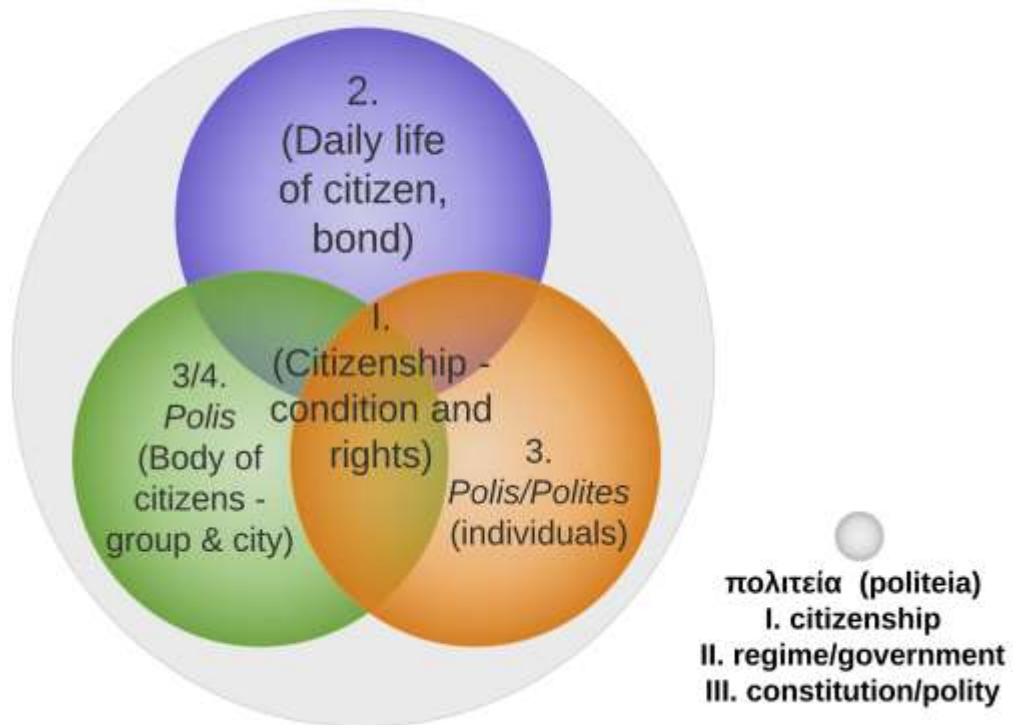
<sup>422</sup> One evidence for this claim is EU Directive 2003/109/EC of 25 November 2003 regarding “*Status of non-EU nationals who are long-term residents*” which states that “Some categories of individuals are excluded from its scope because their situation is precarious or because they are resident on a short-term basis (refugees, asylum seekers awaiting a decision on their status, seasonal workers or workers posted for the purpose of providing cross-border services, persons who have been granted temporary protection or a subsidiary form of protection and persons residing in order to pursue studies or vocational training).”

## Appendix II: Evolution of Citizenship

### Ancient Greece

CITIZENSHIP

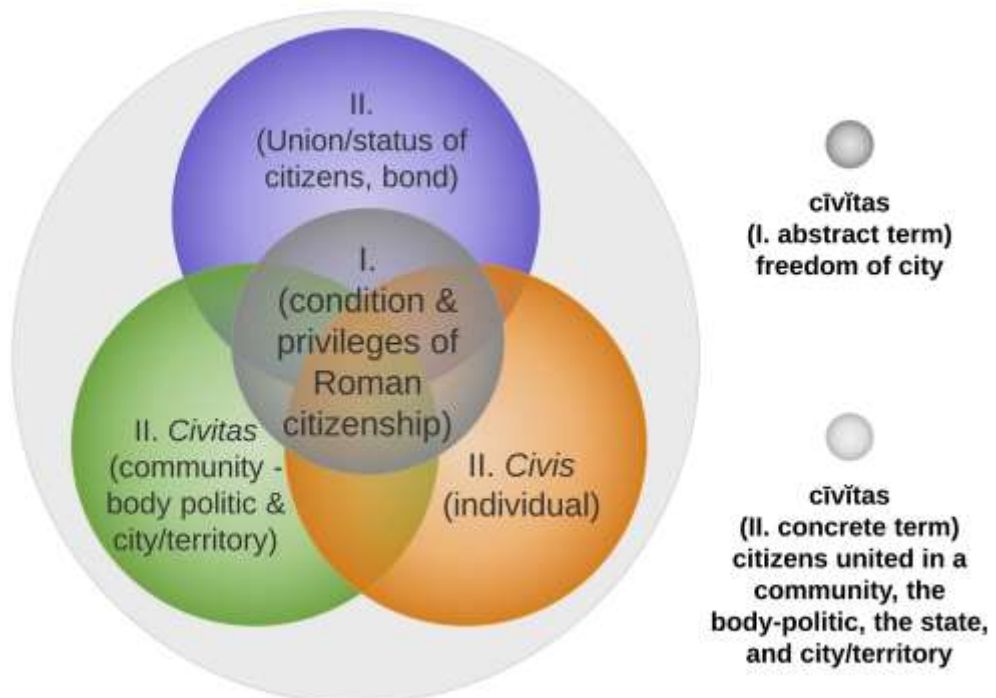
Ed Alvarado | August 29, 2016



### Ancient Rome

CITIZENSHIP

Ed Alvarado | August 29, 2016

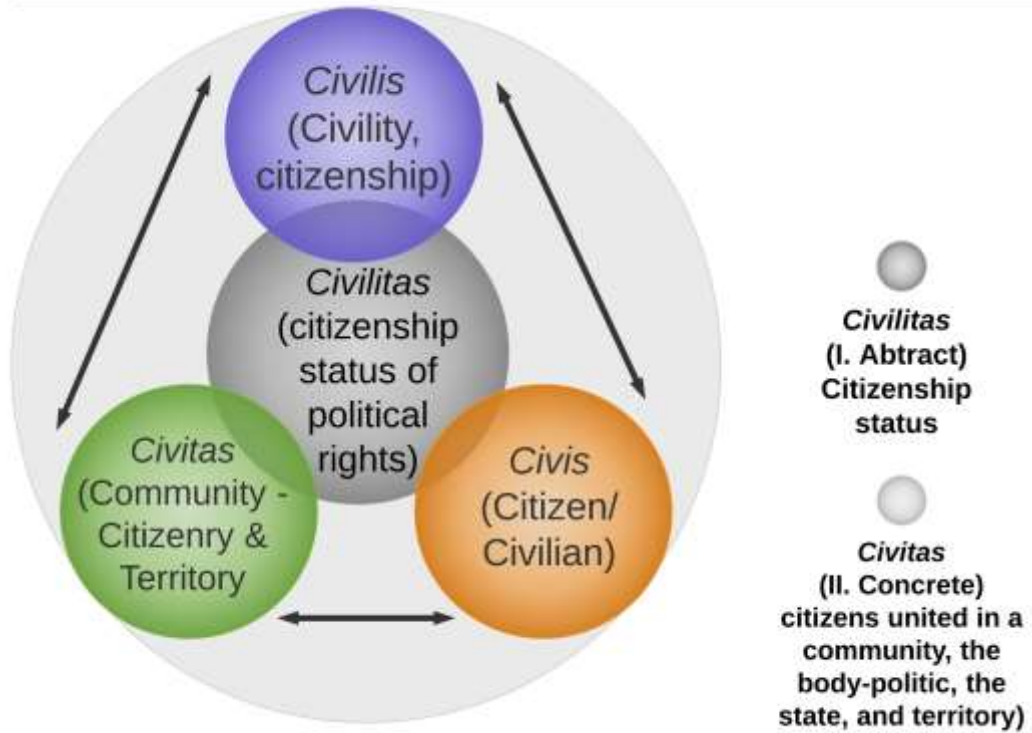




## Medieval & Early Modern

CITIZENSHIP

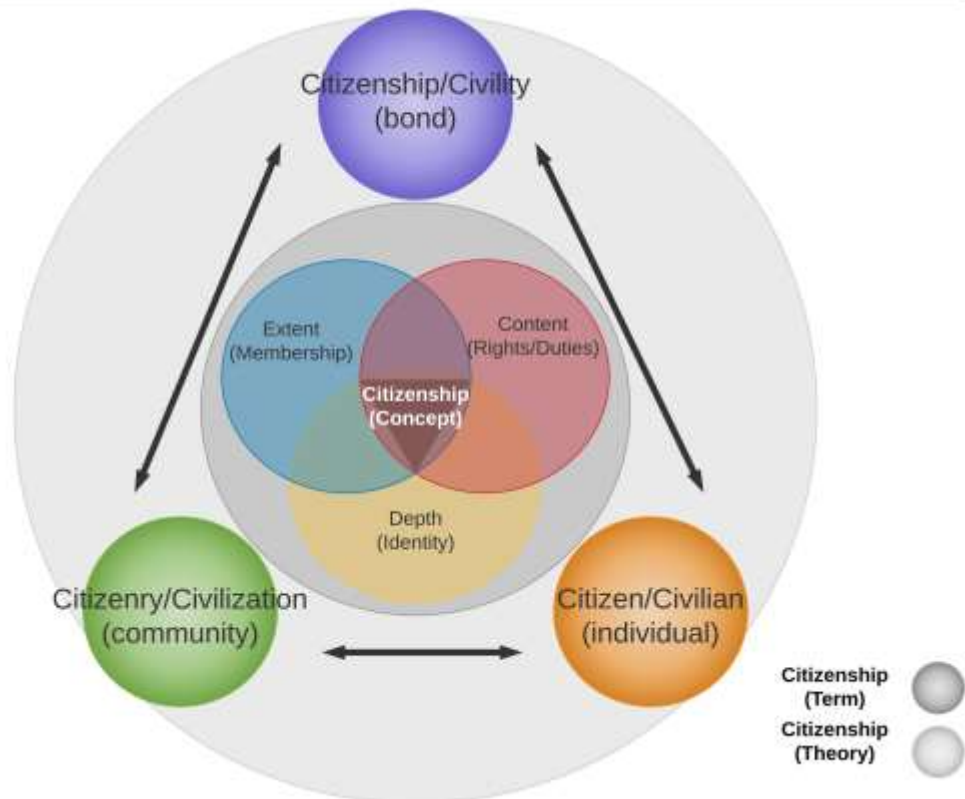
Ed Alvarado | August 28, 2016



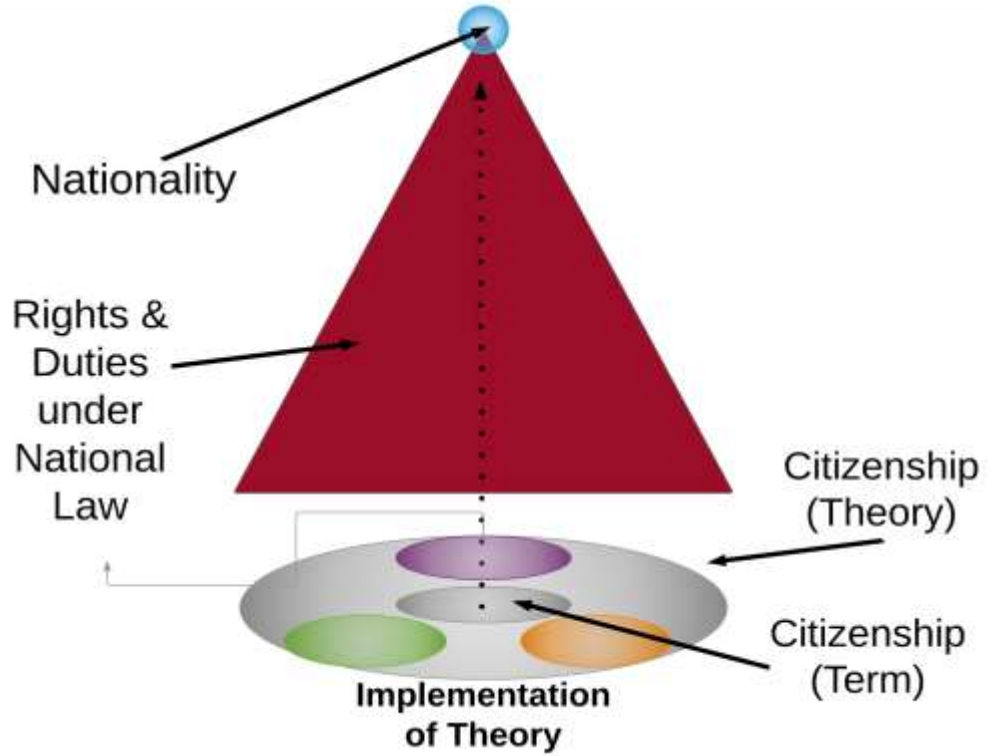
## Modern

CITIZENSHIP

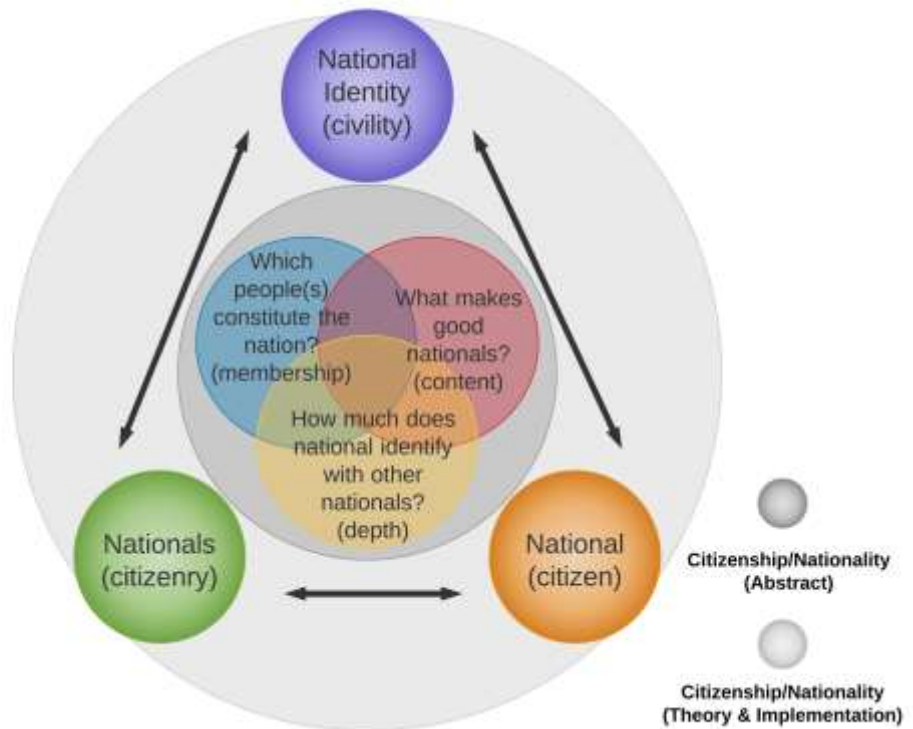
Ed Alvarado | September 9, 2016



### Citizenship & Nationality [Implementation] (3D Visual)



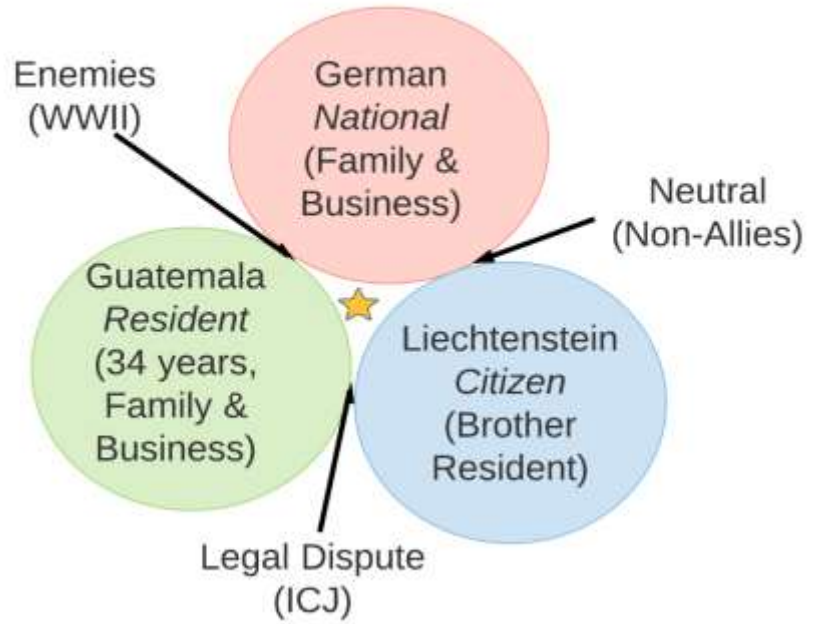
### Citizenship & Nationality [Equivalence] (2D Visual)



## Nottebohm (1943)

NOTTEBOHM (1943)

Ed Alvarado

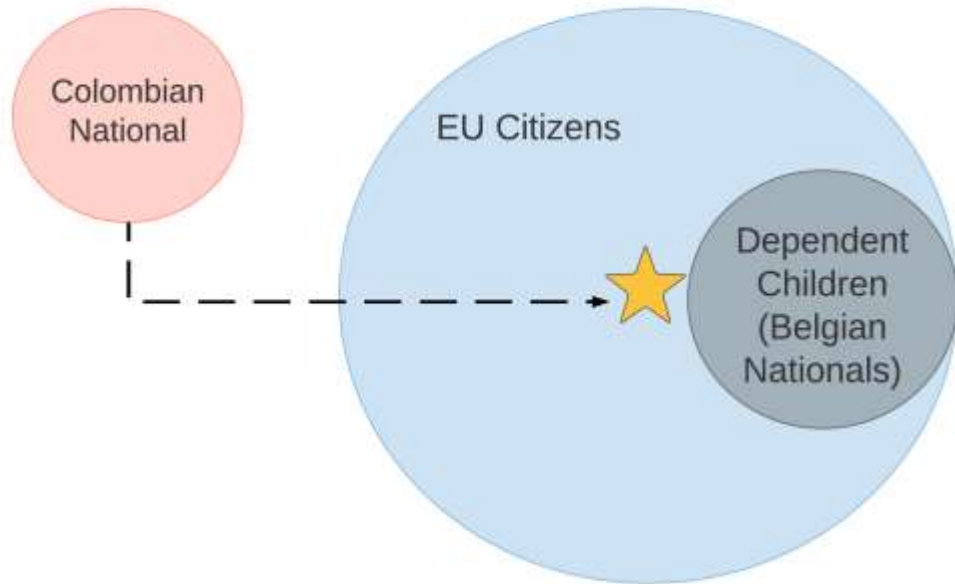


## Rottmann (2010)

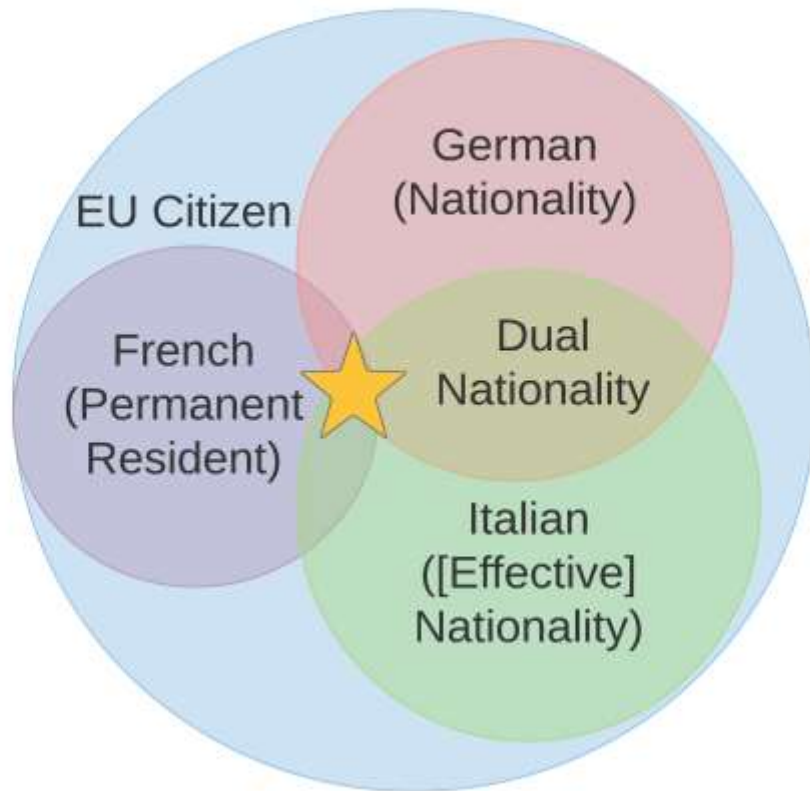
EU CITIZEN MIGRANT

Ed Alvarado

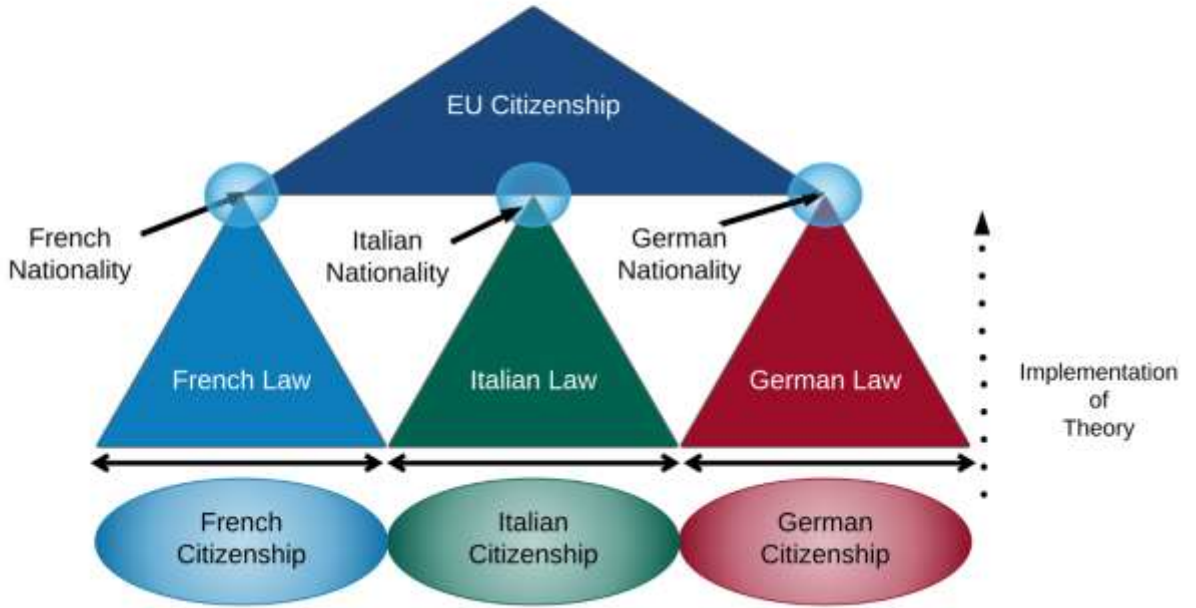




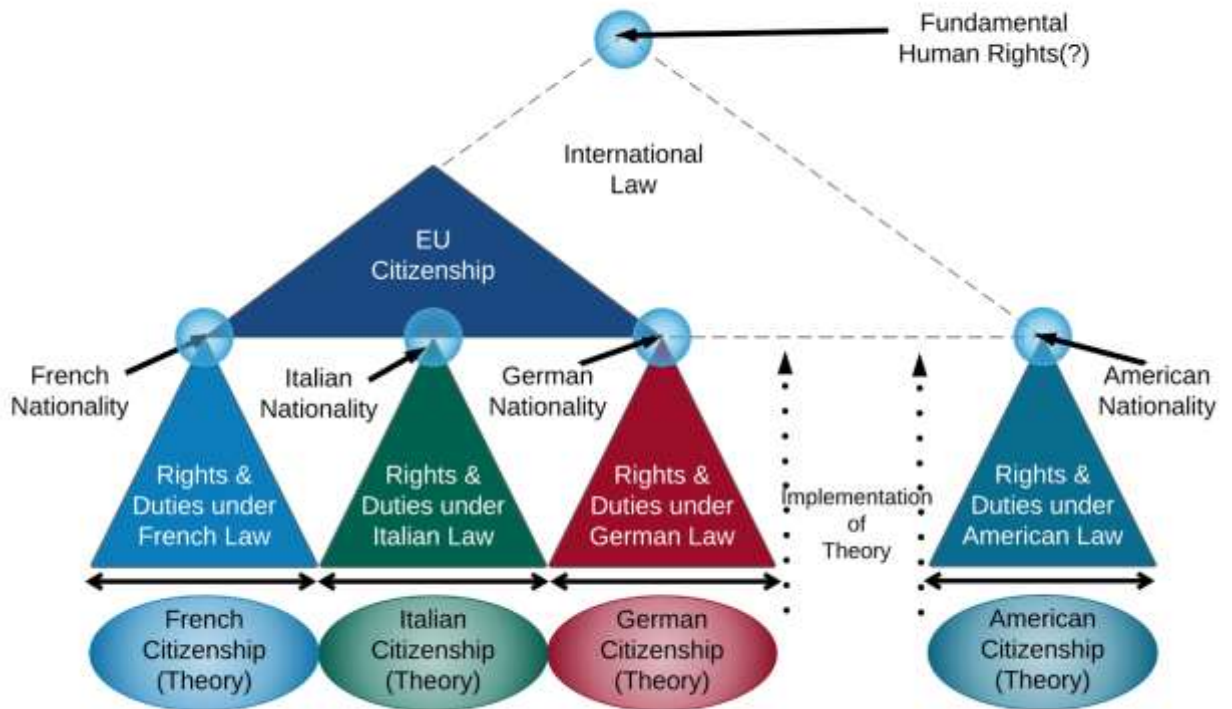
Citizenship of the Union



# EU Citizenship



# Supranational Citizenship(s)



## Honor Pledge

On my honour as a student of the Diplomatic Academy of Vienna, I submit this work in good faith and pledge that I have neither given nor received unauthorized assistance on it.

AlwEd

## Vita

Ed Alvarado Jr. (12 July 1989) was raised in Mexico City for 12 years and grew up in Kansas for another 13. He spent a semester at the Università di Bologna in 2012 and graduated from Kansas State University with Bachelors of Arts in Philosophy & Economics in May 2013. Academically, he has been member of Phi Beta Kappa and Phi Kappa Phi, presented research at the Federal Reserve Bank of Dallas, and co-authored an article for *Public Finance Review* (vol. 44, 2016).

Professionally, he's had stints as mortgage loan officer, freelance translator, writer, and of course a few unpaid internships at embassies and consulates. Linguistically, he's a native Spanish/English speaker, advanced in Italian, and will improve his German after today. Politically, he's a citizen who refuses nationality and pledges allegiance to no individual nation or political/religious affiliation.

Personally, he doesn't like to speak of himself in the third person so I would like to thank anyone who has taken the time to read and think about the contents of this thesis. I am proud to be submitting it on World Peace Day 2016 and perhaps we can all Imagine a childish new concept of citizenship that doesn't divide us into nations, parties, tribes, sects, good guys, bad guys, guys or girls.

*If we are to reach real peace in this world and if we are to carry on a real war against war, we shall have to begin with children.*

- Mahatma Gandhi, *Young India* (19 November 1931, p. 361)

„Citizenship vs Nationality:  
drawing the fundamental border  
with law and etymology“