

A Theory of Citizenship Rights. Formal Membership in the
Framework of (in)determinability of European Union Values

«The same rivers are constituted by the regular flow patterns of different and different waters which scatter and gather come together and flow away approach and depart».

(Heraclitus, *Fragment 214*)

«For justice exists only between men whose mutual relations are governed by law; and law exists for men between whom there is injustice».

(Aristotle, *Nic. Eth. V, 6*)

«Quisquis est in territorio est de territorio. Quisquis in territorio meo est, meus subditus est».

«Citizenship is man's basic right for it is nothing less than the right to have rights».

(Judge Warren's *dissenting opinion* in *Perez v. Brownell*, 356 U.S. 44, 64)

«I'm not skeptical about the idea of universal human rights.

I'm skeptical about what I call positive rights».

(John Searle)

«There can be no such thing as either a creditor or a debtor *race*.

In the eyes of Government, we are just one *race*: it is American».

(Antonin Scalia, 1936 - 2016)

«The cosmopolitan moral concern is therefore better expressed in the language of rights than in the language of democracy».

(J.K. Schaffer, *Democrats Without Borders*)

1. **Democracy and civil liberties**

Democracy may be broadly understood both as a form of government in which all the citizens of a state are involved in making decisions about its affairs and as a political ideal that claims equality of rights, privileges and freedom for its people[1]. The first democratic principle gives citizens political agency, that is, the right to participate in the making of the laws by which they are to be governed. The second democratic principle is to treat everybody fairly by giving people civil liberties[2]. The two are bound together in that full equality of rights comes only with political agency and the status attached to it: *citizenship*. Therefore, to meet the requirement of a fair government, every members of a democracy should be a citizen[3].

Several scholars highlighted the fact that the endorsement of citizenship deprivation by liberal democracies undermines both the idea of equality between citizens and the idea that citizenship constitutes a secure ground for exercising individual rights[4]. It also undermines the idea of the state as a form of protection and security offered through citizenship. Citizenship deprivation applied to certain categories of citizens[5] weakens the idea of the state as a social contract between equal members and the idea of the equality of rights and duties between citizens.

However, in actual democratic states, the acquisition of civil, political and social rights for people not born in the state or from citizens of the state, i.e. immigrants, is disconnected from the acquisition of citizenship[6]. Civil liberties such as public education, health care or social security benefits grant people rights in function of their contribution to the state (and the reciprocity principle can also be called the contributory principle). Citizenship and political agency are derived from permanent residence in the state. The direct consequence of that disconnection is that those who compose 'the people' of a democratic state are not necessarily those who constitute its 'demos'. Tomas Hammar[7]

introduced the term “*denizenship*” to describe the status of immigrants who enjoy most rights of citizenship except that of political participation. The value of self-governing polity and equality is then threatened if some people are both considered as belonging to the state and as outsiders. This inconsistency does not necessarily mean a failure of the democratic ideal, but signifies rather a failure to approach citizenship through its cosmopolitan component. The current residence-based way of thinking citizenship for immigrants shows its conceptual limits.

The aim of this paper is then to redefine citizenship for immigrants to avoid unjust political exclusions from political agency. It will be argued that residence is not a good ground for excluding immigrants from or granting them with citizenship. The evaluation of someone’s citizenship is closely related to political participation and reciprocity. Indeed, political participation is a right and as such its acquisition should not be considered differently from the acquisition of other rights. The contributory principle is a sufficient principle from which to evaluate both immigrants’ entitlement to civil liberties and citizenship[8]. It will be suggested that grounding citizenship on that principle would reduce the number of denizens and grant some of them with citizenship.

This paper focuses on the difference between political rights given on the basis of the reciprocity principle and the right of political participation given on the basis of residence. This work does not intend to focus on the difference between human rights and political rights and thus human rights will be taken as political rights, they are granted on the basis of the reciprocity principle. Indeed, these rights can be understood as the first reciprocal contract made between an individual and a state. A state must recognize the dignity of each human being present in its territory.

1.2. *Neo-constitutionalism and human rights*

‘Neo-constitutionalism’ is a term recently suggested in legal and political philosophy to label a new perspective to look at and to discuss of law and its ontological, phenomenological and epistemological dimension i.e., its forms of identification, application and cognition[9].

The term ‘neo-constitutionalism’ has been proposed and first used by some exponents of the Genoa Faculty of Law (belonging to the so-called “Tarello Institute for Legal Philosophy”)[10] to capture and to account for what, despite any difference in the arguments adopted and/or in the tenets maintained, emerges as a common assumption in the last two or three decades writings by legal and political philosophers as Robert Alexy, Ronald Dworkin, Carlos Nino, and, in Italy, Gustavo Zagrebelsky and Luigi Ferrajoli[11].

A Theory of Citizenship Rights. Formal Membership in the Framework of (in)determinability of European Union Values

The assumption along with the very notion of law together with its forms of identification, application and cognition needs to be radically revisited because of the prominent role and pervasive influence fundamental rights. This influence has been increasing since the conclusion of the World War II in both in the domestic law of an increasing number of western countries and in international law. This is the reason why fundamental rights have been so deeply affecting all major aspects of law and this justifies the need and presses the claim for a new understanding of its notion.[\[12\]](#)

Neo-constitutionalism deserves and requires a legal positivist reading in order to account for its true distinguishing feature: the demand for a new definition of the notion of law[\[13\]](#). This reading is needed because of the radical changes a great number of positive legal systems have been going through since the statement and the protection of fundamental rights have been taken to be their grounding constitutive components.

The recognition of human rights is the most outstanding feature of contemporary legal systems, as since the middle of the 20th Century individuals are immersed in a culture of rights. Neo-constitutionalism is one among many concepts that has been used to designate and study this phenomenon. Some of the central characters of the culture of rights belonging to modern state law,[\[14\]](#) here referred to as 'neo-constitutionalism', can not be explained consistently without a reference to natural law.

'Neo-constitutionalism' designate a constitutional model, namely that collection of normative and institutional mechanisms realised in an historically determined legal-political system[\[15\]](#) which limit the powers of the State and protect fundamental rights. It can simply refers to a component of positive law and to its corresponding notion in legal dogmatics,[\[16\]](#) where it rather refers to an explicative model which positive law can be given because of the way legal systems may happen to be figured out.[\[17\]](#)

Finally, the term neo-constitutionalism can be used in the language of legal and political philosophers[\[18\]](#) to refer to principles and the values which it explicitly states: the fundamental rights of the European Union, described below.[\[19\]](#)

2. Seeking human rights in the nature, history, enforceability and (in)determinability of European Union values

The 1992 amendments provided by the Maastricht Treaty only formulated expectations towards the EU member states by codifying fundamental principles[\[20\]](#). The real tuning point was marked by the Treaty of Amsterdam. The principles laid down in Article 6 of the Treaty of the European Union served as the yardstick for evaluating the activities of the

A Theory of Citizenship Rights. Formal Membership in the Framework of (in)determinability of European Union Values

Union[21]. The 1997 treaty amendment further designated these principles as the basis of the new constitutional order of the Union: “not only a restrictive, but also a constitutive European constitutionalism found its recognition in positive law”[22].

The Lisbon amendment renamed the fundamental principles of the Union as ‘values’ and significantly broadened their scope[23]. In the Lisbon Treaty, under the heading ‘Citizenship of the Union’, there are a series of rights, such as the right to petition the Parliament, the right to address the *ombudsman*, the right to good administration, the right of access to official documents and the right to free movement that are not reserved only for EU citizens but recognized to all natural persons and juridical resident or having the seat in the Union.

The Lisbon Treaty constituted another milestone in the history of European integration, since the political union once initiated by the Maastricht Treaty was completed by awarding legal personality to the European Union[24]. After less than a decade of standby mode, the “*Charter of Fundamental Rights*” also became a mandatory source of law. This way, the Charter rights and principles codifying the previous fundamental law practice of the European Court of Justice, which can also be considered as the detailed elaboration of the values of the Union, became tangible (“They leave behind their shadow existence”)[25].

The Charter of Fundamental Rights of the European Union was solemnly proclaimed by Parliament, the Council and the Commission in Nice in 2000. It was proclaimed again in 2007 After being amended. However, the solemn proclamation did not make the Charter legally binding. The adoption of the draft Constitution for Europe, signed in 2004, would have granted it binding force. The failure of the ratification process meant that the Charter remained a mere declaration of rights until the adoption of the Treaty of Lisbon. Following the entry into force of the Lisbon Treaty in 2009 the fundamental rights charter has the same legal value as the European Union treaties.

The Charter contains some 54 articles divided into seven titles. The first six titles deal with substantive rights under the headings: dignity, freedoms, equality, solidarity, citizens’ rights and justice, while the last title deals with the interpretation and application of the Charter. Much of Charter is based on the European Convention on Human Rights (ECHR), European Social Charter, and the case-law of the European Court of Justice.

The EU has attempted to raise the profile of the Charter so that citizens are more aware of their rights e.g., the fifth title (“Citizen’s Rights”) covers the rights of the EU citizens such as the right to vote in election to the European Parliament and to move freely

A Theory of Citizenship Rights. Formal Membership in the Framework of (in)determinability of European Union Values

within the EU[26]. It also includes several administrative rights such as a right to good administration, to access documents and to petition the European Parliament.

Article 51(1) of the Charter addresses the Charter to the EU's institutions, bodies established under EU law and, when implementing EU laws, the EU's member states. In addition both Article 6 of the amended Treaty of European Union and Article 51(2) of the Charter itself restrict the Charter from extending the competences of the EU. A consequence of this is that the EU will not be able to legislate to vindicate a right set out in the Charter unless the power to do such is set out in the Treaties proper. Furthermore, individuals will not be able to take a member state to court for failing to uphold the rights in the Charter unless the member state in question was implementing EU law[27].

Another significant characteristic of the Charter is its innovative grouping of rights, whereby it abandons the traditional distinction between civil and political rights and economic and social rights. The Charter also, at the same time, makes a clear distinction between rights and principles. The latter, according to Article 52(5), are to be implemented through additional legislation and only become significant for the courts in cases involving the interpretation and legality of such laws[28].

2.1. *Values and principles in the law of the Union*

By joining the European Union[29] States became part of a system of multi-level governance where the legislative, executive and judiciary powers are shared between nations and the Union. The result is a *European constitutional space*, where the whole "*corpus iuris*" of the Union appears alongside the constitutions of the member states as a sort of partial constitution[30].

While assessing Union values and principles the relationship between such values and principles must first be determined under Union law. In Art. 2, the Lisbon Treaty provides a significant amendment. The principles previously laid down in Art. 6 of the Treaty of the EU were elaborated as values and further values were added. Values are merely a "rebranding" of the previous principles of the Union, while the nature and role of the new values of the Union[31] are, however, consistent with principles. This conceptual distinction has probably been motivated by the constitutional power's intention to set apart values from principles[32].

Bogdandy states regarding the conceptual distinction between values and principles, that in this respect the Lisbon Treaty may be deemed problematic. Namely, it designates the fundamental principles of the EU as values and presents them as the ethical conviction of

the Union citizens. Value-based discourses often tend to assume a paternalistic dimension[33]. The terminology, according to Bogdandy, is rather misleading, as values are “expressions of fundamental ethical convictions” and the values introduced by the Lisbon Treaty should in fact be recognized as legal norms and fundamental principles, given the manner of their codification and possible legal sanctions ensuing from their breach[34].

A formalised political route on the basis of Article 7 TEU[35] and the infringement procedure initiated before the Court of Justice of the European Union[36] seem to be the two main areas of institutional relationship within the member states. A proposal will be discussed later that would open up the possibility for the individual enforcement of fundamental rights with recourse to Article 2 of the Treaty on the principle of subsidiarity (Article 5 paragraph 3 TEU) or on the principle of cooperation binding the member states (Article 4 paragraph 3 TEU) that can only be enforced via the annulment procedure or the infringement procedure before the ECJ[37].

Another dimension with respect to which the functional theory of citizenship offers a criterion for a critical assessment of current practices concerns the temptation recurring to crush the problems of citizenship solely on ownership as mere conferment of the *status*, without discussing and explaining what are or should have the powers to which entitles[38]. This type of reduction is evident in the project to connect citizenship to residence which was launched on the heels of the Treaty Amsterdam, in particular the Title IV on the area of freedom, security and justice, which led to the status of long-term resident to third-country nationals.

2.2. *The normativity of values and principles in the legal order of the Union*

Some years ago, Robert Alexy explained that a normative system is *not* a legal system unless it formulates a “claim of correctness”. This occurs when governmental authorities act with the assumption that what they are doing is correct, and do not consider whether it is actually entirely true. According to Alexy, when this assumption is not formulated, and when those who govern only take a personal or a class advantage with their power, practice of what law does not amount to a legal system.[39]

It seems evident that not just any content allocated to what is assumed as correct will attain legality for a normative system. For that reason, Alexy complements his thesis on correctness with a reference to *ius-fundamental* principles. The validity of the assumption of a governmental action is basically expressed through its reference to fundamental rights.

What does this mean and when does a State recognize, identify, protect and promote

A Theory of Citizenship Rights. Formal Membership in the Framework of (in)determinability of European Union Values

rights? When does it put forth its “politics of rights” as imposed by its constitution^[40]? How can human rights be consistently conceptualized, indexed, justified and interpreted^[41]? In the preceding statements, each of the problems being dealt with has directly involved these questions. The answer to such questions necessarily requires appealing to instances beyond the legal texts where rights are recognized.

Sebastian Unger’s theory states that principles only have a weakened force. For instance, those applying the laws are only required to enforce them as far as the legal and factual possibilities allow^[42].

According to Robert Alexy, the vehicle for that is discretion, with the proviso that principles should be enforced to the fullest possible extent (*optimisation*)^[43]. As opposed to legal provisions that give clear sanctions to offences^[44], Ronald Dworkin claims that principles provide arguments pointing in a certain direction, without prescribing any given decision^[45].

On the contrary, András Jakab disputes that rules and principles should be distinguished on the basis of their normativity. “We should assume that the so-called *principles* have the same type of normativity is merely their scope that is uncertain because of the vague and general expressions contained in their linguistic form”. Following Jakab’s theory^[46], principles also share the fate of legal rules, in that there are only two possibilities: they are either breached or not, *tertium non datur*. The fact that the breach of a principle can only be established by way of appreciation (*balancing*) is only a methodological question and has no bearing on the normativity of principles. Principles are not enforced by way of optimisation, since that is rather the result of the application of rules and principles to specific cases (*judicial balancing*).

Whether the theory of Alexy and Dworkin are accepted or Jakab’s approach to principles is chosen, it can be stated that principles possessing normativity and the fact that their normativity is disputed do not change the fact that in practice they are applied by way of judicial balancing.

What are the obligations imposed by a EU principle on the national legislator? The legislator can only restrict the prevailing principles in the interest of achieving appropriate “legitimate” objectives. The jurisprudence related to facts that fall under the scope of EU law shows that the Court of Justice of the European Union examines the legitimacy of the objectives stated by the member states as well^[47]. If an objective is unfounded (e.g., it is an economic objective or one that could be achieved without intervention), the restriction imposed by the member state is unlawful. It is nevertheless important to stress that the

A Theory of Citizenship Rights. Formal Membership in the Framework of (in)determinability of European Union Values

member states enjoy a broad margin in specifying the objectives of the policies they pursue^[48] this is especially true about regulatory issues that have remained under the purview of the member states. In response to any risks or needs, the legislator automatically assesses the necessity and extent of intervention. The legislator is to observe the principle of proportionality in the realisation of their objectives: i.e., according to Alexy's approach, besides the restrictions created by the regulations, the governing principles must prevail to the fullest possible extent or, according to Jakab's views, the restriction must be legitimate.

While the regulatory activities of the legislator of the Union are bound by the values and principles of the Union, national legislators are bound by a double obligation. The national legislator is also bound by the principles enshrined in the national constitution as well as the values of the Union. A good two fold commitment example is the verdict of the Bundesverfassungsgericht on the adoption of the European Arrest Warrant^[49].

Focusing on independently-verified leading cases globally, a combination of qualitative and quantitative analysis offered, as evidenced, the most comprehensive and systematic account of constitutional reasoning to date. "Despite substantial academic attention to the rise of judicial power, citizens know fairly little about how newly empowered courts interpret their constitutions and justify their decisions. To what extent is the language of judicial opinions responsive to the political and social context in which constitutional courts operate? Courts are reason-giving institutions, with argumentation playing a central role in constitutional adjudication. However, a cursory look at just a handful of constitutional systems suggests important differences in the practices of constitutional judges, whether in matters of form, style, or language", stated (just some month ago) Jakab, consistent with Dyevre and Itzcovich's legal approach^[50].

2.3. The mixed nature of Article 2 in the Treaty of the European Union

The 2011 congress of FIDE has pointed out another interesting aspect of the relationship between the Charter of Fundamental Rights and Article 2 of the Treaty on European Union. It is with regard to disputed human rights that are not included in the Charter, such as the rights of minorities as, Article 2 of the Treaty on European Union that could provide a basis for the protection of rights. The quite mixed nature of the values of the European Union presents an interesting problem^[51]. Certain principles that wholly correspond to those provided by the Charter - e.g., the respect for human dignity -, while others appear as horizontal values that can be associated with several fundamental rights e.g., democracy. This means that "the values or principles found in the constitutional rights apply not only to the relation between the citizen and the state but, well beyond that, to all areas of law"^[52]. This results in a radiating effect of constitutional rights over the entire legal system

constitutional rights become ubiquitous.

However, the Court of Justice of the European Union has not rendered any such judgements. This approach also coincides with the position of jurisprudence on the delimitation of the principles and rights laid down in the Chapter of Fundamental Rights: as opposed to the subjective rights provided by the Charter. Principles themselves cannot as such be invoked with direct effect before a national judge[53].

As a result of the mixed nature of Article 2 TEU (i.e., fundamental rights and constitutional principles appear alongside each other), von Bogdandy *splits* Article 2 of the European Union between fundamental rights and other constitutional fundamental principles. Breaches against the latter principles can result in infringements of the constitutional values consolidating the constitutional fundamental principles[54], rather than violations against individual fundamental rights.

From the analytical point of view, the complaints of those who deny the concept of citizenship are not very different from those, who deny the existence of rights as mere ideological constructs which is more common in the theoretical realist of law and absent in the world experience. In particular, even though it appears cryptic, the Kelsen's formula, intends to allude here that legal institutions, such as 'citizenship', offer a case of intermediate terms. It may well argue that "citizenship" is a term that means nothing and is free semantic reference. However, it serves its purpose to count as a "technique presentation".

2.4 Jürgen Habermas and his theory of "Citizenship and National Identity"

In view of the European crisis, Jürgen Habermas, acknowledged as one of the world's most outstanding sociologists and philosophers, has brought his prestige and powerful eloquence. He had a considerable influence on the EU with his views concerning citizenship and, particularly, his ideas with regard to how Union citizenship and European identity could be established beyond the boundaries of Member States. His countless public interventions have been published Europe all over in many languages. "Democracy is at stake", he has repeatedly warned, and Europe risks establishing a post-democratic regime of "executive federalism".

These drastic messages, however, are always accompanied by signals of hope and political appeals. He encourages listeners to view the crisis as an opportunity to strengthen the European project. The "strength" which he advocates is not merely Europe's managerial potential and according to Habermas, "more Europe" also means deepening Europe's

A Theory of Citizenship Rights. Formal Membership in the Framework of (in)determinability of European Union Values

democratic credentials[55].

In contrast to so many commentators on the debate regarding the financial crisis and the future of Europe, Habermas, in his passionate pronouncements, pursues a demanding and coherent agenda based upon his long-term explorations on the various facets of the European project. His work on this theoretical basis started with the essay *Citizenship and National Identity*, [56] just prior to the publication of his *magnum opus* on legal theory. Since then, Habermas has been ceaselessly devoted to the European project, both as a citizen and as a theoretician. As a theoretician, he conceives of the process of Europeanization as a challenge to his theory of the democratically constituted nation-state. From the perspective of a citizen, he views the process as a response to the catastrophes of the Twentieth century, for which Germany bears so much responsibility [57]. This intent is manifested in the project, as well as in the objective to defend democratic welfare-state accomplishments in the processes of globalization and European integration.

As a theoretician on the constitutionalization of Europe, Habermas seeks to accomplish a type of analysis that not only grasps the facility of the processes of Europeanization but also achieves a normative concept that provides criteria and identifies the institutional conditions about whether the configurations emerging in the process of Europeanization “deserve recognition.” [58]

In his more recent interventions as a citizen, Habermas has approached this aspiration again. He identifies the institutional causes for the crisis and states his polemics against the crisis management in Europe in terms that critically transform Schmitt’s affirmative observations on the steadily growing power of the executive into critical objections to the present course of the process of Europeanization. “Post-democratic executive federalism” is the term he uses to denote – and to criticize – Europe’s *praxis*. The European Union must not continue on the path it has taken due to the pressure of the crisis, but cease to coordinate the relevant policies in the governmental-bureaucratic style which has been customary until now and take the path of adequate democratic legalisation [59].

The theoretical core of Habermas’s essay is in the reasons he gives for this postulate [60], in which Habermas specifically continues deliberations by Armin von Bogdandy, Claudio Franzini, and Ulrich K. Preuß. [61] He places a dual role for Europe’s citizens alongside the recognition that these rights are equally rooted in the democratic constitutional state [62]: they remain citizens of their states, but also become citizens of the Union [63]. With this construct, Europe’s ability to be a democracy becomes more theoretically plausible. In addition, however, the construct promises to provide criteria for democratic constitutionalization of European governance and to come to terms with his

A Theory of Citizenship Rights. Formal Membership in the Framework of (in)determinability of European Union Values

functional requirements. Yet it is just at this point that it remains partially undefined. It is difficult to imagine which institutional architecture might satisfy Habermas's normative ideas. As long as extreme uncertainties as to the causes of the crisis and the possibility of its democratic cure persist, it is even more difficult to understand which kind of practical guidance they might provide[\[64\]](#).

Citizens are witnessing, instead, a reemergence of age-old animosities in Europe, the rise of populist movements and an erosion of the legitimacy of the governments in the countries that are most deeply affected by the crisis. It remains unclear how a political European leadership with secure democratic legitimation could be established. "Until these questions and problems are addressed", American political scientist John McCormick noted in much more tranquil times, "Schmitt's work and career haunts the study of European integration like a spectre"[\[65\]](#).

So far it has proved difficult, if not impossible, to have a full and inclusive debate on the lofty ideal of 'political union' while the Eurozone crisis is still in its emergency phase. As long as this state of emergency persists, European politicians and officials will continue to be heavily focused on the pragmatic, day-to-day steps that, in their opinions, are necessary to save it.

The notion of citizen is usually defined in relation to a national state's sovereignty and its borders. Conservatively, citizenship has been supposed to be a national phenomenon and has been characterised as an institution or set of rights situated within the community of the nation state. However, this hypothesis in citizenship literature has been disregarded in the last two decades. Scholars from different social science disciplines have begun to postulate that citizenship is incrementally turning to non-national forms. In this regard, Habermas sympathizes with this idea.

To summarise, in *Citizenship and National Identity: Some Reflections on the Future of Europe*, Habermas examines the relationship of Capitalism and democratic citizenship. He believes that the market has its own independent logic that is separate and independent of the intentions of its human subjects/citizens. Actual society can see the free market hasn't necessarily lead to the freedom of the people in the market, or the freedom of capital (for that matter). The economic structure, or lack thereof, created by human subjects, cannot constrain the creative and destructive power of international capital, and no person can foresee the movements of capital beyond their own control. The legislative, administrative, and judicial arms of the government become involved in the control of capital by passing laws that incorporate specific rules and regulations, whereby money becomes the basis for our interactions (have you accomplished anything today without the use of money?). This

coalescence of the government, capital, and nation state is what Habermas terms “system integration.”

3. *Civil liberties and the reciprocity principle*

If immigrants are admitted on a legal agreement basis, host states ought to give them the rights that correspond to the degree of membership that the agreement grants them[66]. This section explains briefly what this principle consists of in democratic states, like in Europe[67] or North America[68].

For example, visitors and tourists must enjoy universal human rights[69] such as security. Human rights are the necessary rights[70] given to anyone traveling in a foreign state. Strictly speaking the traveler is not contributing to the state’s affairs but in virtue of their membership to the human kind, they are recognized as belonging to the host society and as such are eligible to what the author calls the “minimal reciprocity rights” that is human rights[71].

Similarly, temporary workers must enjoy the benefits that are directly tied to their work on the top of human rights, and as just stated, are directly entitled to human rights in virtue of their membership of human race. Their membership is upgraded in the sense that they are working in and for the host state hence they contribute to the state’s economy. This supplementary contribution must be acknowledged by the host state. Temporary workers are eligible to rights concerning working conditions (health and safety regulation, minimum wages, overtime pay, paid holidays and vacations) and social programs related to their work and to their temporary domestic status (unemployment compensation, health care, education).

Generally speaking, the contributory principle works as a way to recognize immigrants’ affiliations with the host state. A visa is a conditional authorization granted by a country to a foreigner, allowing them to enter, temporarily remain within, or to leave that country. Visas typically include limits on the duration of the foreigner’s stay, territory within the country they may enter, the dates they may enter, the number of permitted visits or an individual’s right to work in the country in question. Visas are associated with the request for permission to enter a country and thus are, in some countries, distinct from actual formal permission for an alien to enter and remain in the country. In each instance, a visa is subject to entry permission by an immigration official at the time of actual entry and can be revoked at any time[72].

A Theory of Citizenship Rights. Formal Membership in the Framework of (in)determinability of European Union Values

A visa is most commonly a sticker endorsed in the applicant's passport or other travel document. The visa, when required, was historically granted by an immigration official on a visitor's arrival at the frontiers of a country, but increasingly today a traveller wishing to enter another country must apply in advance for a visa, sometimes in person at a consular office, by mail or over the internet. The actual visa may still be a sticker or a stamp in the passport or may take the form of a separate document or an electronic record of the authorisation, which the applicant can print before leaving home and produce on entry to the host country. Some countries do not require visas for short visits. In many practical contexts, forms of *proxy*, such as the *passport*, are obviously used, but citizenship should be taken strictly distinguished from what the attests. A student permit commits the immigrant to go to school as such as residing in the host state. In exchange the host state guarantees the immigrant rights tied to studying conditions and domestic ones. Rights are granted on the basis of a reciprocal relationship between the immigrant and the host state[73].

The bigger that reciprocal relationship is, the bigger the membership to the state is, the more rights the immigrant gets[74]. For instance, Ayelet Shachar, in *The Birthright Lottery: Citizenship and Global Inequality*, argues that citizenship acquired by *ius soli* in an affluent society it can be thought of as a form of inheritance: a entitlement value, transmitted by law, to a select group of recipients conditions that perpetuate the possibility of transferring the 'good' to their heirs.

For reciprocity and the theme, if immigration, Dora Kostakopoulou agrees that liberal political theory is based on the belief that individuals, irrespective of their class, caste, race, gender, nationality and so on, deserve equal respect and concern. In practice though, liberal democracies offer the right to participate in society on equal and fair terms and to profit from its goods on an equal basis only to those people who are recognized as citizens belonging to a particular nation-state. Migrants, for instance, are excluded from the benefits of reciprocity, they are expected to contribute to society by working, paying taxes and respecting the law, but they are not granted full social and political rights. They are accepted as full-fledged members of society that enjoy the rights of citizenship only after an exhausting and degrading process of integration and naturalization. Objecting to this national conception of reciprocity, Kostakopoulou pleads for a more comprehensive understanding thereof, according to which people should acquire membership (and all the rights it entails), not so much on the basis of their nationality, but due to their valuable contribution to a particular community. Diversity and pluralism should be welcomed in society and not suppressed. Community is a dull affair without disagreements, different beliefs, diverse imaginations and conflicts.

4. Citizenship, time and space from Hobbes to Rawls

A Theory of Citizenship Rights. Formal Membership in the Framework of (in)determinability of European Union Values

According to traditional political thinkers[75] (from Hobbes[76] to Rawls[77]), the state is a territory, a place, a delimited area for equal rights. In such a political space, all citizens are equal and this condition seems to be and to remain invariable in time. In such a case, the state is the privileged space for individual and social rights realized through citizenship. Citizens constitute a group of equal members[78], which share rights and duties within the political community. Indeed, Hobbes[79], Montesquieu and Locke identify the state as a form of protection and security offered to the individual through citizenship. Despite the fact that they differ in the object of this protection (life for Hobbes, family for Montesquieu, and property for Locke etc.) all of them conceived the state as a closed entity in which citizens are equal in rights and duties[80].

Recently scholars such as Cohen, Bosniak and Carens[81] redefined such a traditional approach to citizenship focusing on the permeability of state borders and the moral issues raised by the presence of different membership statuses in liberal democracies[82].

The political philosophical debate shifted from state-citizenship dualism in a closed society to flexible and uncertain plural membership in a globalized and interconnected world[83]. Such an approach raises several questions of fairness and justice related the presence of different membership statuses in liberal democracies. Nevertheless, within such a plurality of memberships, full citizenship remains traditionally considered a secure and safe membership status with a strong bundle of rights[84]: an ideal concept in which rights are protected and safe, particularly in comparison with other forms of membership in liberal democracies such as migrant membership.

Within this framework, it is argued that some citizenship statuses[85] such as naturalized or dual citizenship can be precarious and limited and the acquisition of such statuses does not represent a secure and stable ground for rights. The limits and precariousness of citizenship are discussed in the framework of space and time.

The body politic relates to time and space. It refers to time because it is a defined entity in time (it has a start and an end) and maintains itself in time. It relates to space because the state needs a particular territory in order to exist. As well as the state, citizenship refers to time and space. Indeed, if the state is a stable entity in space and time, the same consideration applies to citizenship. Citizenship could be considered an immutable, permanent given status (time) related to a certain territory (space). Thus, citizenship is a status defined by acquisition (time) and by territorial boundaries (space)[86].

Citizenship exists in time and space but it is also limited by time and space. The first

limit of citizenship is territory (space). Citizenship relates to a particular territory: a citizen is a citizen of a delimited territory and citizenship rights exist in a particular territory.

The link between citizenship and territory is well known in the philosophical debate. Political philosophers (Rawls[87], Arendt[88]) have defined citizenship as bounded by membership and territory. However, some scholars have challenged this claim. For instance, Bauböck[89] states that citizenship is a bundle of rights, which transcends national boundaries and this fact is proved by the emergence of transnational norms of international law.

On the contrary, the author believe that the relation citizenship/space is stronger than it could seem in the era of globalization[90]. Indeed, the bundle of rights[91] related to citizenship is spatially limited. Citizenship rights are linked to a certain territory. When a citizen moves from such territory, they cannot exercise their citizenship rights in the new territory (or at least not all of them) and they need to have another membership which defines her new status. Therefore, a citizen in a foreign state has to appeal to another source of right (*jus*) in order to do not find themselves rightless. An individual cannot exercise her own citizenship rights recognized in a certain territory in a different territory e.g., one cannot access the welfare system in a foreign country only because their citizenship gives them access to the welfare system in their country. Such a case is not controversial in terms of justice or fairness. It just makes clear that citizenship is linked to a territory.

The risk of citizenship revocation instead implies the loss of a full set of rights[92] in the territory in which citizenship has been acquired and thus, citizenship instead of being a secure and endless status, becomes a precarious and temporary one. Temporality refers to the second limit of citizenship: time. Indeed, the boundaries of citizenship relate not only to space (territory) but also to time. The extension of citizenship is limited by birth and death and/or by acquisition and deprivation, birth (acquisition) and death (deprivation) of citizenship do not necessarily correspond to individuals' birth and death. Some citizens have an endless citizenship status while others have a citizenship that is potentially temporally limited.

The latent risk of citizenship deprivation for naturalised citizens has divided the original political space in which all citizens are equal into a space in which some citizens potentially have a stronger and endless bundle of rights and others not.

4.1. *Citizenship and residence*

A Theory of Citizenship Rights. Formal Membership in the Framework of (in)determinability of European Union Values

Citizenship is then the political and social status that is acquired when the reciprocal relationship between the immigrant and state is maximised[93]. It is comprised of a full membership status and to the right of the associated political agency.

On the one hand, citizenship indicates dispositions and identities that define those who hold the status and, on the other hand, citizenship is a political and legal status that grants the citizen the right to participate in collective decisions[94] through voting for representatives or participating actively in the decision-making process. The two are bound together in that political participation is the right corresponding to the maximal degree of membership. If full membership is recognized by the state then political agency is given to the new citizen[95]. Only full members of a democratic society can take part to collective decision making. However, contrary to the other degrees of membership, full membership is not recognized on the basis of the reciprocity principle[96]. Full membership is recognized on the basis of permanent residence[97]; only residents can be considered as full members of a democratic society and therefore be granted with political agency and citizenship. This will be explored more in the next three paragraphs.

Full membership is defined as a profound link between an individual and a state[98]. Full members' choices are affected by the state' laws and most of the actions of the latter occur within the physical space delimited by the state's territory. Their life is organized in function of the state's structures, most of her relationships are bound to the state and her life chances depends on the opportunities given by the state. Their life is shaped by the state to the extent that they defined her identity in function of it. They identifies themselves as belonging to the state's political community and, reciprocally, they are recognized by other members as being one of them. A full member considers the state to be their home, their interests are directed towards its political community and the other members recognize their own interests as being intertwined with individual's actions and choices[99].

Only individuals having genuine interconnections with the state and its people may be recognized as full members and may apply for the status of citizenship and the right of political participation attached to it[100]. Full membership provides the normative basis for the acquisition of citizenship. When a state evaluates someone's application to citizenship the goal is then to verify their degree of membership to the democratic society[101]. This realistically cannot be made by checking all her interconnections with the state and its people. This is why the traditional democratic position rejects and accepts citizenship on the basis of permanent residence[102]. Full membership is recognized on the basis of territorial settlement because only immigrants who have lives in a state for an extended period of time can prove sufficient affiliations to the state to acquire citizenship. Indeed, profound interconnections between the immigrants and the state take time to appear[103]. Therefore,

the longer people live in the state, the stronger their connection to the state become and thus have a stronger claim to citizenship[104]. The traditional democratic reasoning is then to think that only permanent residence offers enough time to become a full member and being eligible to citizenship. It is only in conditions of residence that immigrants' interests are liable to become interlinked with other citizens' interests.

Being present for a limited period of time does not establish a strong claim to full membership. By definition, moving people do not stay in the community and therefore do not have the time to create the necessary links to become a full member of the state. The direct consequence is that temporary immigrants, that is immigrants who are not long-term residents, cannot claim for citizenship and political agency[105].

Indeed, renewing repeatedly a temporary visa is not sufficient to claim for citizenship[106], at most it reinforces immigrants' claim for citizenship as their membership to the state becomes stronger. Actual democratic states will not recognize full membership to these immigrants if they do not convert their temporary visa into a permanent one[107]. Temporary immigrants cannot claim political agency before residing on a long-term basis in the state. For example, the European Union grants immigrants with a right of permanent residence after they have been residing in an EU state for 5 years[108] and only then can they ask for citizenship.

To sum up, all immigrants who are not residents of the host state[109] are denied political agency on the basis that they are not full members of the host state society. The author questions this reasoning. By agreeing that citizenship can be granted only to full members of a democratic society and that full membership is that kind of profound connections between an individual and the state that appears with time, it can be argued that residence in the state is not necessary to become a full member of a democratic society: "Marshall's views were strongly shaped by a critical reaction to Marx and Marxism. He wanted to show also that class conflict was neither the main motor of social transformation nor a vehicle for political betterment"[110]. Therefore, residence is not a good criterion for determining immigrants' entitlement to citizenship. It will shown that some temporary immigrants can be full members of a democratic society without residing in the host state[111]. This will lead to look for a new criterion to grant immigrants with citizenship.

5. *Temporary immigrants and full membership*

The first step to find out if it makes sense not to consider temporary immigrants as full members of a democratic society. This will be done by the analysis of two types of temporary immigrants: controlled admission with return conditionality immigrants and free

admission migrants[112].

The author relies on Kant's justification of what he calls the "cosmopolitan law" (1795) to argue that this type of temporary immigrant cannot be considered as a full member of the host society. For Kant, visitors have rights to hospitality and are protected by the state during their stay, but they cannot enter in a state, settle and spread (and impose) their home culture. This law is to be understood as a restriction to colonialism: visitors can enter a state if their visit does not interfere with the host state's affairs and structure. The reason is that visitors do not belong to the host state's society so they have no rights to have a voice in the host state's affairs[113]. Indeed, visitors do not have the same interests for the community as the residents. They do not define themselves through the structure of the host state. Indeed, their presence in the host state is related to an external reason that does not concern the host country. Visitors' interests are not intertwined with the host state's interest because they are only there to visit or to spend a short time in the host state. Visitors do not build any genuine link with the state[114]. For example, a year abroad for a visiting student is essentially an international experience added to a degree from the state of origin. The year abroad has a meaning from the state of origin's perspective whereas from the host state perspective it is primarily a special treatment to host the student.

5.1. *Controlled admission with return conditionality immigrants*

Temporary immigrants[115] with return conditionality are immigrants who have a visa or a residence permit with a fixed expiration date which means that the host state expects them to leave its territory at the end of a fixed period[116]. Their visa is non-renewable e.g., student permit, or renewable after a certain time out of the state e.g., tourist visa. In both cases, it means that their time in the host state is limited and that their opportunities to integrate the society are restricted. (A prolongation of the visa is generally possible while the immigrant is still in the host state but after that prolongation an exit out of the host state is mandatory if the immigrant wants to come back).

The inventory assesses who qualifies as a "temporary migrant" in law and policy in European and international perspectives[117]. The question is raised how time frames play a role for such an assessment seeing that certain instruments envisage a specific time-lapse for the state to confer inclusion, security of residence and related rights facilitating integration, in particular in view of labour migration[118], to mobile individuals. Moreover, how is temporariness framed in respect of human mobility and which role does it play in determining a social phenomenon involving cross-border mobility as temporary migration[119]? This research takes place in times of complex transnational processes often denominated as 'globalization' in which the transnational mobility of people has taken new

A Theory of Citizenship Rights. Formal Membership in the Framework of (in)determinability of European Union Values

and unexpected dimensions with the emergence of so-called transnational social spaces. The transformative characteristics of people's transnational mobility imply increased and more diverse border-crossing connections, a growing recognition of the possibilities and challenges of activities that transcend state boundaries and normative frames controlling mobility as temporary or permanent beyond individuals' intentions and changing prospects; and the growing integration of economies, politics and social relations on a global scale[120]. What does "temporary" in the literal sense mean[121]? The Oxford English Dictionary Online defines the term as "lasting for a limited time; existing or valid for a time (only); not permanent; transient; made to supply a passing need." From this, one could conclude that temporary is defined as the opposite of permanent as literal interpretation. Yet, when bringing into the picture transnational social spaces characterizing cross-border human movements the answer to that question may not be as straight forward and clear cut divisions between what is temporary and what is permanent are far from obvious[122]. The relationship and interaction between temporary and permanent is vital for understanding of how temporary migration is framed in legal and policy terms both by supranational instruments and standards as well as by the nation-state and will be expanded below.

For instance, students outside of the European Union must request an entry visa from the Italian consulate for the purpose of study prior to arrival in Italy. Foreign Students participating in a European exchange program and who got a residence permit issued by a country member of the EU, may enter Italy for stays longer than three months without needing a visa. As long as the student is enrolled at a university or in a university course, he or she may enter Italy in order to continue studies already begun in their host county or in order to integrate themselves with a program of related study. In this case, the student must attach a document issued by their home university to their permit to stay attesting that the courses that student will take at the Italian University accord with their area of study at the home University.

EU students who plan to stay in Italy for longer than three months are not obligated to ask for a permit to stay. After three months the student must register themselves as residents of an Italian city. In order to do this, the student must present a document that attests to their enrollment at the Italian University. For stays less than three months students are not required to register as residents.

Students from outside of the EU do not require a permit for stays shorter than three months, but are required to declare their intention stay. Students coming from a country which does not apply to the Schengen Agreement must declare to the border police at the time of entry into the Italian territory. Students coming from a country that applies to the Schengen Agreement must declare at the Italian Police Station within the first eight days in

Italy. Failure to submit a declaration of presence will result in expulsion from Italy. The same penalty is enforced if the student overstays their declared time of study. For stays longer than three months, foreign students must apply for a permit to stay within eight working days of their entry into Italy[123].

5.2. *Free admission of migrants*

Temporary immigrants with free admission are, at the same time, immigrants who are free to enter or leave the host state[124]. Such immigrants are not exposed to any control with regard to their admission on the host territory. Immigrants involved in a continuous round trip between two or more countries, such as refugees returning to their home state or working migrants who live near the border of one state and work in another state, belong to this type of temporary migrations.

In a field survey on migrations in Bosnia-Herzegovina[125], Isabelle Delpla[126] studied what the “back and forth dynamics” of migrants moving between several countries[127]. Focusing on the case of returnees, she describes their identity and membership as being divided between their state of origin and their host states: they belong to two states. Indeed, the membership to the host state can be explained by the fact that refugees who are forced to flee their home states do not have any prospect of returning there in the near future, therefore they arrive at the host state looking for a new home and a new identity, even though this new identity is much harder to get than expected because of the hostility refugees have to deal with in the host state. These refugees eventually create profound connections with people and the state and when the possibility to come back to their home state arises, refugees often find that home that is no longer the home that they used to know. The territory that they used to live in is a newly born state and they do not reside in it. However, what justifies that returnees ought to be granted with the citizenship of this state is that they still belong to this territory because they are part of its history. A whole part of their life belongs to this state. It is clear that their membership has been divided between the two states. There are members without borders belonging ‘here’ and ‘there’. This double membership explains the back and forth dynamics between the two states. Instead of choosing one or the other country, the former refugees adopt a living strategy based on that double membership. They do not settle permanently in one or the other country but they constantly live in both states.

To sum up, this field survey shows that full membership is not necessarily linked to residence because it is possible that immigrants do not live permanently in a state and are full members of this state. Affiliations with a state can come from a shared history or ancestry that is not based on a current residence in the state[128]. This observation leads to

the conclusion that residence is not the only ground for determining immigrants' full membership to a state and therefore can not be the only criterion for deciding on immigrant's entitlement to citizenship and political agency. Asking immigrants to permanently settle in a state to insure that they have sufficient links with the state before granting them with citizenship is a counterproductive process that can be avoided if another criterion to judge on immigrant's full membership to the state is found[129]. In the next sections, three attempts at finding a better criterion will shown with their limits before the author offering their own criterion.

6. *Citizenship and the "Round-Trip-Principle"*

Delpla, on the basis of the results of her field survey, offered a thought experiment based on Rawls' veil of ignorance[130]. People should choose the constitutive principles of their state without knowing where they are, whether they are in their state or out of its borders[131]. In particular, the key concept of the Rawlsian justice as fairness is the idea of original position where initially self-interested parties are located behind the *veil of ignorance*. The veil of ignorance is to ensure that the individuals making decisions on the future terms of cooperation are not biased. It is an assumption that certain particular knowledge on the actual position of parties is to be "ignored": "Since all are similarly situated and no one is able to design principles to favour his particular condition, the principles of justice are the result of a fair agreement or bargain"[132].

Residence in the state would obviously be a pointless criterion to determine someone's membership to the state as it could be the case that they are living in another state[133]. Basing her analysis on the actual back and forth dynamics that characterizes migrations, Delpla suggested that citizenship should be established as what is translated as "the round-trip principle". The idea is to enable people to be citizens of a state on the possibility that they live outside of it. Delpla proposes a general principle to grant citizenship that goes against the state-based way of thinking citizenship. This means that not only does she challenges residence as a good ground for the acquisition of citizenship for immigrants but also does she challenges the fact the citizenship is automatically given to children born in the state (*jus soli*) or from citizens of the state (*jus sanguinis*). Her argument will be only used in the case of immigrants' citizenship, as the author does intend to challenge the whole concept of citizenship only to find a principle that does not unfairly exclude immigrants from citizenship.

Citizenship is immediately international instead of being fixed to permanent residence in the state. Indeed, the field survey revealed that returnees' living strategy consists in dividing tasks between the different members of the family. Some return to their

A Theory of Citizenship Rights. Formal Membership in the Framework of (in)determinability of European Union Values

former home state[134], some settle definitely in the host state and others do not settle, they move back and forth between the two countries and therefore live in both. Founding citizenship in the “round trip principle” enables immigrants to move out of their state of origin and to keep their citizenship even if they do not come back to their state. It also enables immigrants to acquire citizenship in their host state even if they do not permanently reside there.

The “round trip principle” is appealing in that it reduces the importance of the borders[135] of state in the acquisition of citizenship - one does not have to live inside that state to be citizen of the state. Full membership is not defined by residence anymore. However, the notion of full membership is based on a restrictive principle that unfairly excludes some immigrants from citizenship as full membership is still attached to territories[136]. Indeed, Delpla’s concept of full membership is attached to the refugees’ back and forth dynamics and it is unfair that the refugees are not granted with citizenship of both their host country and the newly born state where they used to live in because they are full members of the two states even if they do not reside in the two states. On one hand, they rebuilt their entire life in the host country. On the other hand, the newly born state is their former home, it is the root of their identity. What characterizes the refugees’ back and forth dynamics is that they have strong ties in each state and they are bound to the territory of these communities. Their full membership is strictly speaking linked to a *jus soli*, even if the immigrant does not live in the state anymore or if the state disappears they keeps their full membership[137] over time because they are attached to the ground of this territory before being attached to the state that sits on it. Delpla reproduces the residence principle in that full membership is still fixed to a territory of present or former residence. The immigrant does not have to live in the state but has to be connected to its territory and community. The direct consequence of the “round trip principle” is that it excludes from citizenship immigrants who have never lived in their host state such as frontier workers who reside near the border of one state but work in another state.

However, the theory of narrative identity shows that migrants’ membership is cumulative as it is built by the various experiences that they have in both their home state and their host state[138]. Their sense of belonging to one or the other country is continuous with their displacements[139]. The more time migrants spend in a territory, the more experiences they share with people and the host state results in their membership being more rooted in the host state. Membership is best described as an interactional process that refers to how migrants multiply their connections with the host state in function of their numerous displacements rather than as a fixed concept based on the territory. Residence can of course help creating links between migrants and their host state. Residing in one

state reinforces the sense of belonging to one community but, residence is not necessary to make someone a member of a society. Only multiple and repetitive experiences are necessary to enable migrants to build some connections with their host state. Bolzman and Vial[140] showed that frontiers workers who work between France and the canton of Geneva develop a cross-border way of life with double membership to both states even though they only reside in one of them. Indeed, their place of residence is dissociated from their place of work but their social activities occur in a space without borders[141].

To sum up, the example of frontiers workers shows that full membership is not necessarily linked to a territory but to degrees of connections that you share with the state. Delpla's principle is underinclusive as it excludes some immigrants who are full members from citizenship and political agency.

7. *Citizenship and the "All affected interests principle"*

An alternative approach would be to focus on immigrants' interests and to verify immigrants' membership in function of the "all affected interests principle"[142]. The reasoning is that if immigrants find their interests interlinked with some political decisions, they should be included in the making of these decisions[143]. Indeed, it was shown earlier that full membership is essentially defined as interlinked interests and that full membership is what makes someone eligible to political participation. So, every immigrant who shares reciprocal interests with some members of the democratic society[144] is defined as a member of that same democratic society and is eligible to take part in collective decision-makings that affect them. As a matter of fact, it makes sense to think that as soon as you are bound to a decision by your interest, you are part of that decision and are entitled to participate to it.

Goodin's all affected interest principle received a fair amount of scholarly discussion[145]. The discussion consists in defining who are the affected people because it was said that the principle could be both overinclusive including people whose interests are not really affected by the decision, and underinclusive, excluding people whose interests are definitely affected by the decision[146]. There is not the space to develop the different arguments so Owen's view will be taken as the most complete. He argued that "all those whose legitimate interests are actually affected by a choice between any of the range of plausible options open to the collective decision-making body should have their interests taken into account in the decision-making process" where plausible options mean "options compatible with the nexus of purposes, functions and capacities constitutive of a polity's decision-making in the given circumstances and history of its agency"[147].

A Theory of Citizenship Rights. Formal Membership in the Framework of (in)determinability of European Union Values

However, it seems that his view is still overinclusive in that it includes in the decision-making group immigrants who are clearly not full members of the society. If all immigrants whose interest is plausibly interlinked with a political decision can have a say in this decision then all immigrants, visitors included, should be granted with political agency in a democratic society[148]. Indeed, any immigrants, temporary or not, are linked to political regulations but the fact that these political decisions have effects on them and that they have to adjust their actions in function of these decisions does not make them full members of the democratic society[149]. For example, any visitor has to obey the speed limit regulation of the host country but it does not mean that she can participate in the decision-making group that decides on the speed limit of the state. Being affected by a few decisions is not sufficient to make one a full member of a democratic society[150].

The all affected interests principle take into account too many people who would be objectively affected by some political decisions. Bauböck[151] proposes to reverse the point of view of the “all affected interests” principle and to focus on how subjectively people feel affected by some political decisions and calls this view the “stakeholder citizenship”[152]. He only takes into account that full members of a democratic society can be granted with political agency: only immigrants who claim and recognize themselves as being full members of the society can be granted with citizenship. Some immigrants could be objectively granted with citizenship because of their affiliations with the state - Owen calls them the “pre-political demos”[153]. However, if they do not judge themselves as being part of the society and do not ask for political participation then they cannot be citizens of the state and be part of the demos of their host state. Full membership is a condition to political agency but only conscious and intellectual awareness of one’s full membership can grant citizenship[154].

In the case of the “all affected interests” principle, full membership is a status given by the state who judge the immigrant as being sufficiently integrated in the society. The “stakeholder” principle reverses this tendency with full membership being a status that the immigrant claims to the state. On the one hand, citizenship is a passive status that is given by the state and on the other hand, citizenship is an active status that the immigrant demands to the state[155].

Giving the voice to the immigrant to verify her full membership to the state seems ideal as the immigrant is undoubtedly the one to know her interests are intertwined with the rest of the democratic society. There are doubts regarding the practicality of Bauböck’s principle. He assumes that immigrants will recognize themselves as belonging to the democratic society. However, it could be the case that they do not perceive themselves as full members even if they are as it is not obvious that immigrants have a clear view of the

public affairs of their host state. The situation faced by denizenship subjects excluded from political participation is a thorn in the side in the forms of liberal democratic government as these political systems lack incentives to promote rights of those who have no “voice”, and not only their political rights. For example, the phrase “*denizen*” is reactivated by the Swedish scholar Thomas Hammar, where denotes the legal status reinforced (*enhanced*) of resident immigrants[156].

There are many reasons why one would not recognize themselves as being legitimate for citizenship. One was raised by Lippmann in that political decisions are often formulated by administrators in technical terms such that only politicians can understand them and that others do not feel concerned by these political decisions because they can not see themselves and their interests represented[157]. For immigrants to feel included in some political decisions to know what is at stake in these decisions requires the decision process to be made accessible to their knowledge and understanding. This operation cannot come from the immigrants themselves and they need external help to understand their membership and what to expect from it. If immigrants can not identify their interests as being affected by some decisions, they will not claim for political agency. This could result into political apathy with immigrants not asking for political participation[158].

To sum up[159], the all affected interests principle and the stakeholder principle offer a real alternative to the failure of the state-based principles to include all full members of the society into citizenship because they focus on people’s degree of affiliations with the state instead of thinking of full membership as all or nothing status[160]. However, both fail to propose a fair principle to enable immigrants to access citizenship on a fair basis with the former is overinclude whereas the latter is underinclude. The last challenge is then to look for an in-between principle that includes fairly all immigrants that are actually full members of the democratic society of their host state. For example, “although citizenship is the *lingua franca* of socialization in civic classes, as well as the cornerstone of many social movements seeking basic rights, and a key phrase in speeches by politicians on ceremonial occasions, oddly enough, citizenship has not been a central idea in social sciences”[161].

8. *Citizenship and the reciprocity principle*

The stakeholder principle is complementary to the all affected interest principle. The two views are not contradictory and their unification would solve their respective vulnerability. Indeed, both have at stake people’s intertwined interests, that is, the relationship between the immigrant and the state[162]. However, they define full membership from the perspective of only one side of that relationship. The all affected interests principle focuses on what the state recognizes as intertwined interests whereas the stakeholder principle

A Theory of Citizenship Rights. Formal Membership in the Framework of (in)determinability of European Union Values

focuses on what people recognize as intertwined interests. In both cases, the relationship is foreseen by one side without consulting the other part. Ideally, if both parts are fair they should recognize the same intertwined interests and therefore agree on who is a full member but the last section showed that it is not the case as both are easily mistaken by some parameters that they are unable to see and take into account in their analysis. The author suggests that the relationship between the immigrant and the state should be determined on the basis of their mutual agreement^[163]. Intertwined interests between the immigrant and the state can be recognized only if they together agree on being involved in a reciprocal relationship on certain affairs. John Dewey's notion of the public^[164] corresponds to such a unified view. To him, a public is a collective formation that is confronted with a social and political problem. In the course of daily life, individuals encounter problematic decisions made by others and that directly affect the course of their actions. All those who are affected by the indirect consequences of social transactions to such an extent that it is deemed necessary to have those consequences systematically cared for. The public exists as soon as individuals concerned by these decisions recognize themselves as being involved in a group decision and start to work together to find the best compromise. In the case of the immigrant's full membership, the state and its political decisions directly affect the course of the immigrants' actions. The immigrants recognizing that their interests depend on the state's political decisions constitute the public and only their political inclusion that is their contribution to the state's decisions can guarantee that they are treated fairly. The notion of the public matches the intertwined interests relationship between the immigrants and the state. On the one hand, the state's goal is to make decisions that provide equality among its citizens and, on the other the immigrants' aim is to participate to the decisions that affect them.

Dewey was aware that the prime difficulty is the discovering the means by which a scattered, mobile, and manifold public may so recognize itself as to define and express its interests. The political condition for the public to be operative is its contribution to political decisions by its awareness of its interests. Intertwined interests and mutual dependence are not sufficient, political participation is necessary for a public to be formed. The problem of the public is then to recognize itself as being part of the state's decisions. For Dewey, communication is then the precondition to political participation. Awareness cannot come from the public alone and the challenge of democracy is to make it possible for the public to have access to information about its interests. The state ought to provide means of knowledge to the public. The aim of the state is to make it possible for people to identify what kinds of decisions are being made by political bodies and how those decisions might affect their interests. Official representatives should inform the public on those decisions and organizations and various resources should improve the conditions of debate and

discussion to help the public to recognize itself. A necessary communication between the state and the people must exist so that the people understand its legitimacy to participate to political decisions and ask for this political agency. In the case of the immigrants, it means that as soon as they enter in the state, not only does the state have to grant them with the civil liberties that correspond to their visas, it must also enable them to access information about policy decisions related to their interests.

At this final step of this argument, the author returns to the reciprocity principle and notes that applying Dewey's notion of the public to a cosmopolitan view of citizenship, where the immigrant claims her citizenship on the basis that the state provides them with the means to recognize herself as a full member of the democratic society, amounts to the same as applying the reciprocity principle to the right of political participation^[165]. Indeed, the reciprocity principle states that rights are granted to immigrants on a give and take agreement between the immigrant and the state. To recall that the immigrant commits themselves to work in the state and the state guarantees them in return the rights related to working conditions. The reciprocity principle works as a recognition of the immigrant's degree of membership in the democratic society. Dewey's notion of the public rests on that same mutually beneficial agreement between the state and the immigrant; the immigrant commits themselves to participate to the public affairs if the state guarantees to provide them information about their interests and their rights. The state and the immigrant agree that citizenship is a matter of self-involvement that the immigrant can claim on the basis that the state includes the immigrant in the communication of its affairs^[166].

9. *Concluding remarks*

Migrations have existed for along time but, only now the case of immigrant's citizenship has highly weakened traditional ideas of how membership, citizenship, residence and political agency should be connected. A unique way to understand citizenship is based upon the political status attached to the right of political participation^[167]. Full membership provides a normative basis for the claim of citizenship and only full members of a democratic society can ask for citizenship^[168].

However, there are two ways to make sense of full membership for immigrants:

- 1) Full membership as an all-or-nothing status recognized on the basis of residence in the territory or attachments to the territory. A cosmopolitan view of citizenship^[169] is needed to allow migrants to access citizenship.
- 2) Full membership as a cumulative status recognized on the basis of shared interests between the state and the immigrant. A certain threshold of common interests makes

A Theory of Citizenship Rights. Formal Membership in the Framework of (in)determinability of European Union Values

the immigrant eligible to citizenship. The latter route seems more promising for correcting the political exclusion of many immigrants from citizenship.

On the basis of this argument, the 'all affected interests' principle provides a good account to know objectively which immigrants' interests are concerned by some political decisions but it fails to determine the immigrant's full membership. Full membership depends primarily on the immigrant's recognition of her entitlement to citizenship[170]. The argument leaves open the risk that the immigrant might not perceive their full membership. It has been stressed that this is especially likely unless the state provide immigrants with access to information regarding the political decisions that affect their interests[171]. The appropriate principle for the determination of the immigrants' full membership is the reciprocity principle drawn on Dewey's notion of the public[172] which holds that any immigrant whose interests are intertwined with the state's political decisions and who is able to perceive themselves as being fully part of the democratic society, thanks to the mediation of the state, is entitled to inclusion within the citizens of this state.

The direct consequence of this argument is that the acquisition of citizenship rests upon the reciprocity principle - same principle as any civil liberties that the immigrant may be granted. There is a continuity between the right of political participation and more common civil liberties[173]. Rights are what the immigrant is granted on the basis of their degree of membership in the state: the higher the degree, the immigrant get more rights. Political participation or citizenship[174] is then the right corresponding to the highest degree of membership. Where there is citizenship, the state is committed to providing the information relevant to the interests of the citizen and the citizen has recognized herself as entitled to political participation[175].

It was yet to be mentioned that a few years ago, there was a development in literature which was heavily focused on its social categories on so-called 'third-generation rights', to quote Bobbio[176], or those cosmopolitan and ecological principles which aim to regulate relationships with the natural environment[177].

It has been discussed how citizenship deprivation challenges not only the idea of equality[178] but also the approach to the state as a functional space for the protection of the individual. It has been argued that citizenship is limited by time and space. The time limit arises because citizenship is a temporary status, which can be acquired, changed or revoked and citizenship is spatially limited by territory because citizenship's bundle of rights[179] exists almost exclusively in the home country. Citizenship brings within itself a strong attachment to a certain territory and to a certain temporality. Such strengths of citizenship in time and space decrease when referring to naturalized or dual citizens. The

myth of endless citizenship collides with the possibility of citizenship revocation and in the case of citizenship deprivation the attachment to time and space is lost completely[180].

In order to analyze citizenship deprivation in liberal democracies, this work focused on some aspects of the relationship between state and nationality. It has been argued that in some cases the narrative about national identity *embodies* the idea of the state in liberal democracies and such narrative about nationality is a key factor in pursuing the possibility of citizenship deprivation[181].

[1] Aristotle, *Pol.*, I, 1259b.; III, 1283b 44-45; III, 1287a 13-19; III, 1288a 14; Manville, P.B., *The Origins of Citizenship in Ancient Athens*, 1990, p. 24, Princeton University Press, Princeton (New Jersey); Susan D. Collins, *Aristotle and The Rediscovery of Citizenship*, 2006, Cambridge University Press; Bookman, J.T., *The Wisdom of the Many: an Analysis of the Arguments of Book III and IV of Aristotle's Politics*, «History of Political Thought», XIII, 1, 1992, pp. 1 ss.; *Pol.*, III, 1282a 20-25; Barker, E., *The Vocabulary of the Politics*, cit., p. lxxvii-lxxviii; Roberts, J., *Excellences of the Citizen and of the Individual*, in G. Anagnostopoulos (ed.), *A Companion to Aristotle*, Wiley-Blackwell, Oxford 2009, pp. 555-565. See also Beitz, C.R., and Goodin, R.E., 2009, *Basic Rights and beyond*, pp. 1-24 in Beitz and Goodin, eds., *Global Basic Rights*. 1987, Oxford University Press; Collins, S., 2013, Collectives' duties and collectivization duties. *Australasian Journal of Philosophy*, 91 (#2): 231-48; Feinberg, J., 1970, Justice and personal desert. Pp. 55-94 in Feinberg, J., *Doing and Deserving*. Princeton, NJ: Princeton University Press; Goodin, R.E., 1995, The state as a moral agent. Pp. 28-44 in Goodin, *Utilitarianism as a Public Philosophy*. New York: Cambridge University Press; Goodin, R.E., 2009, Demandingness as a virtue. *Journal of Ethics*, 13: 1-13; Hart, H.L. A., 1955, Are there any natural rights? *Philosophical Review* 64: 175-91; Herman, B., 2013, Being helped and being grateful: imperfect duties, the ethics of possession and the unity of morality. *Journal of Philosophy*, 109 (5/6): 391-411; Rainbolt, G., 2000, Perfect and imperfect obligations. *Philosophical Studies*, 98 (3: Ap): 233-56; Scheffler, S., 2000, Justice and desert in liberal theory. *California Law Review*, 88: 965-90; Schroeder, S.A., 2014, Imperfect duties, group obligations and beneficence. *Journal of Moral Philosophy*, 11 (5): 557-84.

[2] Manville, P.B., *The Origins of Citizenship in Ancient Athens*, 1990, p. 24, Princeton University Press.

[3] Mindus, P., *Cittadini e no. Forme e funzioni dell'inclusione e dell'esclusione*, 2014, Firenze University Press.

[4] See Gibney, M.J. 2013, 'A Very Transcendental Power': Denaturalisation and the

A Theory of Citizenship Rights. Formal Membership in the
Framework of (in)determinability of European Union Values

Liberalisation of Citizenship in the United Kingdom. *Political Studies*, 61: 637-655; Matthew, J.G., "Should Citizenship Be Conditional? The Ethics of Denationalization," *The Journal of Politics* 75, no. 3 (July 2013); Barry, C. and Ferracioli, L. 2015, *Can Withdrawing Citizenship Be Justified?* *Political Studies*, cit.

[5] Powell, M., *The Hidden History of Social Citizenship*, «*Citizenship Studies*», VI, 3, 2002, p. 235.

[6] Ellermann, A., *States against Migrants. Deportation in Germany and the United States*, 2009, Cambridge Univ. Press, p. 19; Vogel, D., *Migration Control in Germany and the United States*, «*International Migration Review*», 34, 2, 2000, pp. 390-422; Hagan, J., Eschenbach, K., Rodriguez, N., *U.S. Deportation Policy, Family Separation, and Circular Migration*, «*International Migration Review*», 42, 1, 2008, pp. 64-88.

[7] Hammar, T., *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration*, 1990, Aldershot, Avebury.

[8] Becker, L., *Reciprocity* (London: Routledge & Kegan Paul, 1986); Komter, A., 'Gifts and Social Relations: The Mechanisms of Reciprocity,' *International Sociology* 22(1) (2007): 93-107; De Waal, F., *The Age of Empathy: Nature's Lessons for a Kinder Society* (New York: Three Rivers Press, 2009); Malinowski, B., *Argonauts of the Western Pacific* (London: Routledge and Kegan Paul, 1922); Mauss, M., *The Gift: The Form and Reason for Exchange in Archaic Societies* (London: Routledge, 1991 [1923]); Simmel, G., 'Faithfulness and gratitude,' in *The sociology of Georg Simmel*, ed. K. Wolff (New York: The Free Press, 1950 [1908]), 379-96; Komter, A., 'The Evolution of Human Generosity,' *International Sociology* 25(3) (2010): 443-64; Mead, G., *Mind, Self, and Society* (Chicago: University of Chicago Press, 1962 [1934]); Arendt, A., *The Life of the Mind* (New York: Harcourt, Brace and World, 1978); Habermas, J., 'Justice and Solidarity: On the Discussion Concerning Stage 6,' in *The Moral Domain*, ed. T.E. Wren (Cambridge, MA: MIT Press, 1990), 224-51; Honneth, A., *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge: Cambridge University Press, 1992); Komter, A., 'Reciprocity as a Principle of Exclusion: Gift Giving in the Netherlands,' *Sociology* 30(2) (1996): 299-316; De Waal, F., *Good Natured: The Origins of Right and Wrong in Humans and Other Animals* (Cambridge, MA: Harvard University Press, 1996).

[9] Benton, M., *The Tyranny of the Enfranchised Majority? The Accountability of States to Their Non-Citizen Population*, «*Res Publica*», 16, 4, 2010, pp. 397-413. See also the recent debate Bellamy, R., *Political Constitutionalism*, Cambridge University Press, Cambridge, 2007; Tomkins, A., *Republican Constitution*, Hart, Oxford, 2005; Griffith, J., *The Political*

A Theory of Citizenship Rights. Formal Membership in the
Framework of (in)determinability of European Union Values

Constitution, "Modern Law Review", 42, 1979, pp. 1-21, and finally the special issue on political constitutions by Goldoni, M.,- McCorkindale, C., in "German Law Journal," 12, 2013.

[10] "Tarello Institute for Legal Philosophy"» is one of the world's leading centres for legal research and education. The works are focused on topics in analytical legal theory and philosophy of positive law, constitutional democracy, human rights, bioethics, sociology of law and history of European legal culture. The founding father was Giovanni Tarello, Italy's foremost philosopher and historian of law.

As for the present theme cf. Barberis, M., *Metaetica del costituzionalismo*, in *Diritto e questioni pubbliche*, No. 11. (2011) 135-156; Barberis, M., (2000a). *Filosofia del diritto. Un'introduzione storica*, 2000, il Mulino, Bologna; Barberis, M., (2000b). *Neocostituzionalismo, democrazia e imperialismo della morale*, in *Ragion Pratica*, Vol. 14. (2000), 147-162; Comanducci, P., *Il positivismo giuridico: un tentativo di bilancio*, in *Sudi in onore di Franca De Marini*, 1999, Milano, Giuffrè, 125-134.; Comanducci, P., *Neo-constitutionalism: an attempt at classification*, in *Associations* (in print). See also Pozzolo, S., (1998). *Neoconstitucionalismo y especificidad de la interpretación constitucional*, in *Doxa*, Vol. 2. No. 21. 355-370; Pozzolo, S., *Neocostituzionalismo e positivismo giuridico*, 2001, Torino, Giappichelli.

[11] Cf., e.g., Ferrajoli, L., *Per una sfera pubblica del mondo*, in *Teoria politica*, Vol. 17. No. 3. (2001) 3-21. See also a paper presented by GUASTINI, R., *A Realistic View on Law and Legal Cognition*. University of Genoa, Italy, Tarello Institute for Legal Philosophy, in occasion of "First Genoa-Slavic Seminar in Legal Theory", 11-12 December, 2014.

[12] Though on the base of not always coincident arguments, a worried warning on the most recent apparent crisis of the protection of fundamental rights as a leading principle of domestic and international law has been raised, e.g., by Allegretti, U., *Diritti e stato nella mondializzazione*, 2002, Troina (En), Città aperta, 127-197; Bonanate, L., *La politica interna del mondo*, in *Teoria politica*, Vol. 17. No. 1. (2001), 3-25; Ferrajoli, L., *I fondamenti dei diritti fondamentali*, in *Teoria Politica*, Vol. 16. No. 3. (2000) 41-113; Mazzaresse, T., *Is the age of rights to a turn?* Paper presented at "Fundamental Aspects of Human Rights. A Symposium", Helsinki, 22-23 February 2002.

[13] Mazzaresse, T., *Towards a Positivist reading of Neo-constitutionalism*, in *Jura Gentium-Rivista di Filosofia del diritto internazionale e della politica globale*, 18, (2008) 345-364.

[14] Great emphasis on constitutional fundamental rights as material criteria of

A Theory of Citizenship Rights. Formal Membership in the
Framework of (in)determinability of European Union Values

identification is devoted, e.g., by Ferrajoli, L., (2002): *Lo stato di diritto fra passato e futuro*, in Costa, P., - Zolo, D., (ed.): *Lo stato di diritto. Storia, teoria, critica*, 2002, Feltrinelli, Milano, 349-386. See also Palombella, G., *L'autorità dei diritti*, 2002, Laterza, Roma-Bari, 7 and 23-29. Focusing more on the problem of the identification (and interpretation) of the constitutional rules than on the problem of the identification (and interpretation) of the statutory rules coping with the material criteria of validity, the topic is dealt with at length by the contributions to Alexander, L., (ed.): *Constitutionalism. Philosophical Foundations*, 1998, Cambridge, Cambridge University Press.

[15] With regard to domestic law, insofar as the Italian legal system is concerned, a critical overview of shortcomings and deficiencies concerning the judicial protection of fundamental rights is provided by Taruffo, M., *Diritti fondamentali, tutela giurisdizionale e alternative*, in Mazzaresse, T., (ed.): *Neocostituzionalismo e tutela (sovra)nazione dei diritti fondamentali*, 2002, Giappichelli, Torino. With regard to international law, a rich exemplification of the limits met in securing legal implementation and judicial protection of fundamental rights is offered by Cassese, A., *I diritti umani nel mondo contemporaneo*, 1994, Laterza, Roma-Bari.

[16] This can be taken to be the case, though his main concern is not the definition of the notion of constitutionalism, with Guastini, R., (1998): *La "costituzionalizzazione" dell'ordinamento italiano*, in *Ragion Pratica*, Vol. 6. No. 11. (1998), 185-206.

[17] That is the way it is, with Ferrajoli, L., (2012): *La pragmatica della teoria del diritto*, in Comanducci, P., - Guastini, R., (ed.): *Analisi e diritto 2014*, 2014, Giappichelli, Torino. Further, though not always as manifestly vindicated and purported as in Ferrajoli's works, that is also the case, e.g., with ZAGREBELSKY, G., *Il diritto mite. Legge diritti giustizia*, 1992, Einaudi, Torino; ATIENZA, M., *Legal Reasoning and Constitutional State*, in *Associations* (in print).

[18] A similar understanding of the notion occurs in Ferrajoli, L., *I fondamenti dei diritti fondamentali*, in *Teoria Politica*, Vol. 16. No. 3. (2000), 41-113, when maintaining that the new paradigm of constitutionalism "represents a completion not only of the rule of law but also of the very legal positivism since the change it has led to, has provided legitimacy with a twofold artificial and positive character: not only of the law as it is, i.e. of its conditions of existence, but also of the law as it *ought to be*, i.e. of its conditions of validity made constitutionally positive them too, as law on the law, in the forms of legal limits and constraints on its production". Further, cf. also Raz, J.: *Legal Rights*, in *Oxford Journal of Legal Studies*, Vol. 4. No. 1. (1984), 1-21, when stating: "Legal rights are legal reasons for developing the law by creating further rights and duties where doing so is desirable in order to protect the interests on which the justifying rights are based".

A Theory of Citizenship Rights. Formal Membership in the
Framework of (in)determinability of European Union Values

[19] Such a deficiency has been denounced from a variety of perspectives. From a theoretical perspective, it constitutes the main concern of those who concentrate on the difficulties of the identification and/or judicial implementation of fundamental rights because of the interpretative difficulties their formulations can give rise to: that is the case, e.g., with Bobbio, N., (1968): *Presente e avvenire dei diritti dell'uomo*, in *La comunità internazionale*, Vol. 23. 3-18. English translation by Cameron, A.: *Human Rights Now and in the Future*, in Bobbio, N., *The Age of Rights*, 1996, Polity Press, Cambridge, 12-31; Mazzaresse, T., (1993): *Judicial Implementation of Fundamental Rights: Three Sorts of Problem*, in Karlsson, M. M. - Jonsson, O. P. - Erynjarsdottir, E. M. (ed.): *Recht, Gerechtigkeit und der Staat*, 1993, Duncker und Humblot, Berlin, 203-214; Koskenniemi, M., *The Effect of Rights on Political Culture*, in Alston, Philip (ed.): *The EU and Human Rights*, 1999, Oxford University Press, Oxford, 99-116.

From a (meta)ethical perspective, it constitutes the main concern of those who doubt any alleged universality of fundamental rights because of the differing values of different cultures and/or ideologies and/or religions: that is the case, despite any distinguishing feature of different trends, with the advocates of multiculturalism and/or of (political) realism and/or of the gender theory. From a political perspective, it constitutes the main concern of those who maintain that their legal positivization deprives fundamental rights of their political innovative potentiality: that is mainly the case, e.g., with the adherents of the so called critical legal studies movement. Cf., e.g., McIlwain, C.H., *Constitutionalism: Ancient and Modern*, 1947, Cornell University Press, New York; Sartori, G., *Constitutionalism: a Preliminary Discussion*, in *American Political Science Review*, Vol. 56. No. 4. (1962), 853-864; Floridaia, G., *La costituzione dei moderni. Profili tecnici di storia costituzionale. I Dal Medioevo inglese al 1791*, 1991, Giappichelli, Torino; Dogliani, M., *Introduzione al diritto costituzionale*, 1994, il Mulino, Bologna; and Moreso, J.: *In Defense of Inclusive Legal Positivism*, in Chiassoni, P., (ed.): *The Legal Ought* (proceedings of the IVR mid-term Congress in Genoa, June 19-20, 2000), 2001, Giappichelli, Torino, 37-63.

[20] von Bogdandy, A., *A Disputed Ieda Becomes Law: Remarks on European Democracy as a Legal Principle*, in B. Koch, B. Rittberger (ed.): *Debating the Democratic Legitimacy of the European Union*, Lanham, Rowan & Littlefield Publishers, 2007, 34.

[21] Dommering, E., *European Convention on Human Rights and Fundamental Freedoms*, in O. Castendyk, E. Dommering, A. Scheuer (ed.): *European Media Law*, Alphen aan den Rijn, Wolters Kluwer, 2008, 12. (Under International Law, the term "hard law" refers to legal instruments with legally binding force, while the opposite term "soft law" is used to refer "quasi-legal instruments" which have no legally binding force or whose binding force is weaker than the binding force of traditional law).

A Theory of Citizenship Rights. Formal Membership in the
Framework of (in)determinability of European Union Values

[22] von Bogdandy, A., *Founding Principles*, in Armin von Bogdandy, Jürgen Bast (ed.): *Principles of European Constitutional Law.*, Oxford, Hart Publishing, 2009. [Hereinafter: Von Bogdandy, (2009a)], p. 22.

[23] According to Article 2 of the Treaty of the European Union as amended by the Lisbon Treaty, «the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.»

[24] Abbott K.W. and Snidal D., *Hard and Soft Law in International Governance*, in *International Organization*, Vol. 54 (3), Summer 2000, pp. 421-456; Baxter R., *International Law in "Her Infinite variety"*, in *International and Comparative Law Quarterly*, Vol. 29 (4), 1980, pp. 549-566. See also Shelton D., *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford Scholarship Online, January 2010.

[25] von Bogdandy, A.; Kottmann, M., Antpöhler, C.; Dickschen, J.; Hentrei, S.; Smrkolj, M.; *Ein Rettungsschirm für europäische Grundrechte - Grundlagen einer unionsrechtlichen Solange-Doktrin gegenüber Mitgliedstaaten*, in *ZaöR V*, 72, 2012, p. 46.

[26] Gil-Bazo, M.-T., "Refugee status and subsidiary protection under EC law: the qualification directive and the right to be granted asylum", in A. Baldaccini, E. Guild, and H. Toner (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford, Hart, 2007, 236-9.

[27] Peers, S.,; Ward, A., eds. *The EU Charter and of Fundamental Rights: politics, law and polity*. Oxford: Hart Publishing, 2004. See also Anastasios, A., *Increasing Rights' Protection in the EU: The Charter of Fundamental Rights in Trajectory of Enforcement*, in *Hellenic Review of European Law* (4) 2009, 97.

[28] Lord Goldsmith, QC, "A charter of rights, freedoms and principles", *Common Market Law Review*, Vol. 38, 2001, 1204; P. Eeckhout, "The EU charter of fundamental rights and the federal question", *Common Market Law Review*, Vol. 39, 2002, 947.

[29] Marks, G.; Nielsen, F.; Ray, L.; Salk, J.; *Competencies, Cracks and Conflicts: Regional Mobilization in the European Union*, in G. Mrks, W. Scharpf, C. Schmitter (ed.), *Governance in the European Union*, London, Sage, 1996, pages 41-42.

A Theory of Citizenship Rights. Formal Membership in the
Framework of (in)determinability of European Union Values

[30] von Bogdandy, A., *Grundprinzipien*, in von Bogdandy, A., Bast, J., (ed.), *Europäisches Verfassungsrecht*, Heidelberg, Springer, 2009. [Hereinafter: Von Bogdandy, (2009b)], p. 30.

[31] Kostakopoulou, T., *The Future Governance of EU Citizenship*, presented in *European Citizenship: Twenty Years On*, (Uppsala 2013); <http://media.medfarm.uu.se/play/kanal/121>.

[32] Bogdandy refers to the conceptual status prior to the Lisbon Treaty when he writes that the concept of fundamental principle does not include all norms or norm elements that are defined by the Treaties of the European Court of Justice as principles; only a number of provisions belong here that are usually called fundamental or structural principles by the national constitutions, too. *Cfr.* Von Bogdandy-Bast, *op. cit.*, p. 21.

[33] von Bogdandy, A., (2009b), *op. cit.*, p. 25; p. 28.

[34] von Bogdandy, A., *op. cit.*, p. 22.

[35] In the proceedings, according to Article 7 of the protocol on subsidiarity and the application of the principle of proportionality, the objections of national parliaments submitted in relation to the enforcement of the principle of subsidiarity do not automatically lead to the revocation of the legislative proposals; the decision on this remains with the legislator of the Union. Article 8 of the protocol, however, makes it possible for national parliaments, too. To initiate the annulment procedure indirectly, via the member state.

[36] Ladenburger, C., FIDE 12 - Session on “*Protection of Fundamental Rights post-Lisbon - The interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions*” (Institutional Report, Brussels, 2011), at: http://www.fide2012.eu/index.php?doc_id=88,%20at%2048%20ff; p. 13.

[37] Davis, G., *Any Place I Lay My Hat? or: Residence is the New Nationality*, in “*European Law Journal*,” 11, 1, 2005, pp. 43-56.

[38] von Bogdandy, A., et al, (2012), *op. cit.*, p. 67; for example, the following report formulates concrete requirements in respect of media freedom and pluralism: *Report of High Level Group on Media Freedom and Pluralism: A free and pluralistic media to sustain European democracy* (January 2013), p. 4.

[39] Alexy, R., *Begriff und geltung des rechts (The Concept and Validity of the Law)*, 2005, Karl Alber, Freiburg und München; and Alexy, R., On the Concept and the Nature of Law, in *Ratio Juris*, Vol. 21. Issue. 3. (2008), 281, 299. See Bulygin, E., Alexy’s Thesis of the Necessary Connection between Law and Morality, in *Ratio Juris*, Vol. 13. Issue 2. (2000),

A Theory of Citizenship Rights. Formal Membership in the
Framework of (in)determinability of European Union Values

133, 137; and Alexy, R., On the Thesis of a Necessary Connection between Law and Morality: Bulygin's Critique, in *Ratio Juris*, Vol. 13. Issue 2. (2000), 138, 147; Gardner, J., How Law Claims, What Law Claims, in Klatt, M., (ed.): *Institutionalized Reason. The Jurisprudence of Robert Alexy*, 2012, Oxford University Press, Oxford, 29-44.

[40] Cfr. von Bogdandy, A., (2009a), *op. cit.*, 22.

[41] Payandeh, M., *The Concept of International Law in the Jurisprudence of H.L.A. Hart*, in "European Journal of International Law", 21/4, 2010, pp. 967-995; Barber, N., *Legal Pluralism and the European Union*, in "European Law Journal", 12/3, 2006, pp. 306-329.

[42] Unger, S., *Das Verfassungsprinzip der Demokratie*, Tübingen, Mohr Siebeck, 2008; 133.

[43] Alexy, R., Constitutional Rights, Balancing, and Rationality, in *Ratio Juris*, 16, 2003, 2; 136.

[44] See two-element norm structure, Jakab, A., A norma szerkezetének vizsgálata. ("The Examination of the Structure of the Norm"), in *Jogelméleti Szemle*, 2001/4, <http://jesz.ajk.elte.hu/jakab8.html>.

[45] Dworkin, R., *Talking Rights Seriously*, Cambridge, Harvard University Press, 1997.

[46] Jakab, A., *Concept and Function of Principles. A Critique of Robert Alexy*, http://77papers.ssrn.com/sol3/papers.cfm?abstract_id=1918421 (28 August 2009), 5.

[47] Jakab, A.; Kochenov, D., eds., *The Enforcement of EU Law and Values*, OUP, 2017; FRA, *Opinion on the development of an integrated tool of objective fundamental rights indicators able to measure compliance with the shared values listed in the Article 2 TEU based on existing sources of information*, April 2016.

[48] See e.g. Schindler-case: Point 61 of the judgement of 24th March 1994 in case no. C-275/92. Her Majesty's Customs and Excise vs. Gerhart Schindler and Jörg Schindler that mentions a «sufficient degree of latitude» (ECR 1994, p. I1039).

[49] In their judgement the German Federal Constitutional Court expound that, according to the constitutional principle of the rule of law and legitimate expectations, the legislator must exercise "consideration": he must act proportionality when adopting the framework decision on the European Arrest Warrant. That means that the legislator must make maximum use of the margin allowed by the framework decision, with due respect to

the principles set forth in the national constitution. «The legislator, at any rate, was bound to make use of the margin allowed by the framework resolution for the member state in a manner considerate of the fundamental rights.» BverfG, 2 BvR 2236/04. Point 80. See also Pernice, I., Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited? In *Common Market Law Review*, 36, 1999, 726.

[50] The most up-to-date book (published last April), is undoubtedly: Jakab, A.; Dyevre, A.; Itzcovich, G. eds., *Comparative Constitutional Reasoning*, Cambridge University Press, 2017. This analysis is supported by the examination of eighteen legal systems around the world including the European Court of Human Rights and the European Court of Justice. Universally common aspects of constitutional reasoning are identified in this very recent book, and contributors also examine whether common law countries differ to civil law countries in this respect. This timely and impressive edited collection fills this gap by presenting qualitative and quantitative data from 18 courts and over 700 cases.

[51] von Bogdandy, A., et al., (2012), 20. Petra L., *Nyelvpolitika és nyelvi sokszínűség az Európai Unióban*. (Language policy and linguistic diversity in the European Union). Doctoral thesis, 2012, 211-216, Láncoş, G., and Orsolya, S., speak with Armin von Bogdandy, *Fundamentum*, 2011/2, 43.

[52] Alexy, R., (2005) 133.

[53] Ladenburger, C., (2011) 33.

[54] COM (2003), 606 final, 6. See Judgement of the Court No. c-34/09 of 8 March 2011 (ECR 2011, p. I-1177).

[55] Cohen, F.S., *Transcendental Nonsense and the Functional Approach*, "Columbia Law Review", 35, 1935, pp. 809-49, and Kelsen, H., *Reine Rechtslehre*, Vienna, Deuticke, 1934, p. 2. Moreover, Ross, A., *Tû-Tû*, «Harvard Law Review», 70, 1956/57, pp. 820-1; Lindahl, L., *Deduction and Justification in the Law. The Role of Legal Terms and Concepts*, «Ratio Juris», 17, 2004, pp. 182-202.

[56] Habermas, J., Citizenship and National Identity, in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* 491-516 (1999).

[57] Lindahl, L., *Deduction and Justification in the Law*, cit., p. 199.

[58] Habermas, J., *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, 23 *EURO. J. OF INT'L L.* 335, 335-348 (2012). Habermas, J., *Bringing*

the Integration of Citizens into Line with the Integration of States, 18 EURO. L. J. 485, 487 (2012). Joerges, C., *Reflections on Habermas' Postnational Constellation*, Vol. 2 XI-XXI (Camil Ungureanu, Klaus Guenther & Christian Joerges eds., 2011).

[59] See e.g.: *Rettet die Würde der Demokratie*, Frankfurter allgemeine zeitung, Nov. 4, 2011. A number of these statements are reprinted in Jürgen Habermas, *zur verfassung Europas: ein essay* 97-129 (2011); a more recent example can be found in his essay in *Le Monde* of Oct. 27, 2011 (English version available at <http://www.presseurop.eu/en/content/article/1106741-juergen-habermas-democracy-stake>). Habermas' entire work is comprehensively documented and updated weekly in the Habermas Forum: <http://www.habermasforum.dk>, the most recent being, Jürgen Habermas, *Merkel's European Failure: Germany Dozes on a Volcano*, in *Der Spiegel*, 5 (July 2013). A great number of his pertinent essays have recently been reprinted in the Journal *Blätter für deutsche und internationale Politik* 3/2014, 85-416 under the title *Drer Aufklärer Jürgen Habermas* at the occasion of his 85th birthday on June 18, 2014. They can be downloaded freely at <http://habermas-rawls.blogspot.dk/2014/06/e-book-der-aufklarere-juergen-habermas.html>.

[60] See also J. Habermas, *A Pact for or against Europe?* in *What does Germany think about Europe?* 83-89 (Ulrike Guérot & Jacqueline Hénard eds., 2011).

[61] See von Bogdandy, A., *Basic Principles*, in *Principles of European Constitutional Law* 13, 44 (Armin von Bogdandy & Jürgen Bast eds., 2010); Scicluna, N., *EU constitutionalism in flux? Is the Eurozone crisis precipitating centralisation or diffusion?*, 18 EURO. L. J. 489, 500 (2012).

[62] See Scicluna, N., *EU Constitutionalism in the Twenty-first Century: Politics and Law in Crisis* 101 (2013) (unpublished Ph.D Thesis, La Trobe University); McCormick, J., *Carl Schmitt's Europe: Cultural, Imperial and Spatial, Proposals for European Integration, 1923-1955*, in *Darker Legacies of L. in Euro.* 133, 141 (Christian Joerges & Navraj S. Ghaleigh eds., 2003).

[63] Habermas, J., *Staatsbürgerschaft und national Identität. Überlegungen zur europäischen Zukunft*, Erker Verlag, St. Gallen (Switzerland) 1991; *Faktisität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Suhrkamp, Frankfurt a.M. 1992, p. 104; Id., *The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship*, "Ratio Juris", 9, 2, 1996, pp. 125-137; Id., *Citizenship and National Identity*, "Globalization", 3, 2003, pp. 155 ss.

A Theory of Citizenship Rights. Formal Membership in the Framework of (in)determinability of European Union Values

[64] Habermas, J., *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, 23 EURO. J. OF INT'L L. 335, 335-348 (2012). One can no longer be sure about the seriousness of this distinction. In the preface to his most recent book, *Jürgen Habermas, im sog der technokratie. Kleine politische schriften*, XII 8 n. 2 (2013), Habermas expresses some discontent with the fact that his public interventions did not make it into the general academic discourses. See also Habermas, J., *Bringing the Integration of Citizens into Line with the Integration of States*, 18 EURO. L. J. 485, 487 (2012).

[65] For a reconstruction of Habermas' works, which, however, seeks to (re-) interpret the author for his own ends, see Joerges, Ch., *Reflections on Habermas' Postnational Constellation*, in JÜRGEN HABERMAS, VOL. 2 XI-XXI (Camil Ungureanu, Klaus Guenther & Christian Joerges eds., 2011).

[66] Heater, D., *World Citizenship and Government: Cosmopolitan Ideas in the History of Western Political Thought*, St. Martin's, New York 1996.

[67] Cf. Manin, B., *The Principles of Representative Government*, 1997, Cambridge, University Press Cambridge; Manin, B., On Legitimacy and Political Deliberation, in *Political Theory*, Vol. 15. No. 3. (1987), 338-368; Manin, B.,- Prezeworski, A.,- Stokes, S., Elections and representation, in Manin, B.,- Prezeworski, A.,- Stokes, S., (ed.): *Democracy, Accountability, and Representation*, 1999, Cambridge University Press, Cambridge; Preuss, U.K., *Citizenship and the German Nation*, «Citizenship studies», 7, 1, 2003, pp. 37-55; Krajewski, M., Rittstieg, H., *German Nationality Law*, in Nascimbene, B., (ed.), *Nationality Laws in the European Union*, Butterworths, London 1996, pp. 357-387.

[68] Schauer, F., *Playing by the Rules*, 2002, Clarendon Press, Oxford, 171-184; Balancing, Subsumption, and the Constraining Role of Legal Text, in *Law & Ethics of Human Rights*, Vol. 4. Issue 1. (2010), 34-45; *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*, 2013, Harvard University Press, Harvard; *The Force of Law*, 2015, Harvard, Harvard University Press. As for citizenship and American Constitution, see also L.H. Tribe, *American Constitutional Law*, The Foundation Press, Mineola (NY) 1988, p. 358.

[69] Peczenik, A., "Legal Research and Growth of Science", en Curiel, J. L., *Memorias del X congreso mundial ordinario de filosofía del derecho y filosofía social*, UNAM, México, vol. V, 1981, pp. 17-28; Nino, C.S., *Algunos modelos metodológicos de 'ciencia' jurídica*, Fontamara, México, 2003, cap. I; Kelsen, H., *Teoría Pura del Derecho*, UNAM, México, 1982, párrafos 1-4; 14-18 and 21-22; Ross, A., *Sobre el derecho y la justicia*, Eudeba, Buenos Aires, 1997, pp. 1-72; Atienza, M., Ruiz Manero, J., "Dejemos atrás el positivismo

A Theory of Citizenship Rights. Formal Membership in the Framework of (in)determinability of European Union Values

jurídico”, in *Isonomía*, 27/2007, pp. 7-28; Dworkin, R., “In Praise of Theory”, en *Arizona State Law Journal*, vol. 29, 1997, pp. 353-376; Leiter, B., “In Praise of Realism (and Against Non-Sense Jurisprudence)”, in *University of Texas Law, Public Law Research Paper*, No. 138, 2010, pp. 1-37; Cohen, F., *El método funcional en el derecho*, Abeledo Perrot, Buenos Aires, 1962, pp. 11-125.

[70] Searle, J., *Making the Social World: The Structure of Human Civilization*, 2010, Oxford University Press, Oxford. See also Searle, J., *Mind, Language, and Society: Doing Philosophy in the Real World*, 1999, Basic Books, New York. Cf. also TWINING, W., *General Jurisprudence: Understanding Law from a Global Perspective*, 2009, Cambridge University Press.

[71] Carens 2014; Bauböck 2005, 2011.

[72] Prakash, B.S., (2006-05-31). “Only an exit visa”. Retrieved 2008-05-10. See also “Visa Information”. *Timatic*. IATA. Retrieved 30 April 2017.

[73] Kostakopoulou, D., Reciprocity and Normativity in Legal Orders, in *Netherlands Journal of Legal Philosophy* 2014 (43) 2, p. 113.

[74] Shachar, A., *The Birthright Lottery: Citizenship and Global Inequality*, Harvard Univ. Press, Cambridge (Mass.) 2009. (The idea was at the center of the continuing debate about the sale and purchase of citizenship, a growing phenomenon, back in vogue in Europe as a result of the Maltese proposal of 12 in November 2013 to introduce a ‘golden passport program’ that allowed the purchase of the state of Malta citizenship for € 650,000. The debate over *birthright lottery* is grafted, as noted, the debate began in the years seventy on the topic of *moral luck* by Bernard Williams and Thomas Nagel). See also Shachar, A., *Citizenship as Inherited Property*, «Political Theory», 35, 3, 2007, pp. 253-287. A. Shachar, A., Bauböck, R., (eds.), *Should Citizenship Be for Sale?*, EUI Working Paper RSCAS 2014/01; Williams, B., *Moral Luck*, Cambridge University Press, Cambridge 1981; Nagel, T., *Mortal Questions*, Cambridge University Press, New York 1979.

[75] The idea that a reciprocal relationship is at the foundation of our normative order is central to the modern social contract tradition, from Thomas Hobbes in the seventeenth century to the present. According to that tradition, at least as it is commonly understood, our obligation of obedience to the prescriptions of our rulers stems from the consent of the governed expressed in either an actual or a hypothetical contract. Hume subjected the claim that an actual contract binds future generations to withering criticism. And the alternative claim that there is a hypothetical contract, one to which reasonable individuals would

A Theory of Citizenship Rights. Formal Membership in the
Framework of (in)determinability of European Union Values

consent, and to which one can thus infer that actual individuals do consent, has been similarly scorned.

[76] Here focus switches to Hobbes's account of reciprocity as the foundational principle of normative, political and legal order - an order that legitimately claims to be a source of obligations for legal subjects or the individuals subject to its rule. - In particular, I want to sketch the theme in political and legal thought of the law as, in Hobbes's words, 'the publique Conscience, by which the individual hath already undertaken to be guided.': Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1997).

See Joseph Raz, 'Authority, Law, and Morality,' in Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press, 1994), 194). Hart worried that Raz's argument resurrected the Hobbesian theme that there is a prior moral obligation to law. (H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: Oxford University Press, 1982), 153-61). See also Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969, revised edition); Ronald Dworkin, *Law's Empire* (London: Fontana, 1986), 108-13.

[77] Nevertheless, the idea survives and was given new life by John Rawls in the twentieth century in his essay 'Justice as Reciprocity,': John Rawls, 'Justice as Reciprocity,' in John Rawls, *Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 1999) 190-208, and more elaborately in *A Theory of Justice: John Rawls, A Theory of Justice* (Cambridge, MA : Harvard University Press, 1971).

[78] See (in alphabetic order): Arts, W., Halman, L. (2004) (eds.) *European Values at the Turn of the Millenium*, Brill Academic, Leiden; Barbalet, J.M. (1988) *Citizenship, Rights, Struggle and Class Inequality*, Open University Press, Milton Keynes; Bauböck, R. (1997) 'Citizenship and National Identities in the European Union', in *Integration durch Demokratie. Neue Impulse für europäische Union*, eds. E. Antalovsky, J. Melchior, S. Puntcher-Riemann, Metropolis, Marburg, pp. 302-20; Bauböck, R., Ersbøll, Groenendijk, K., Wadrauch, H. (eds.) (2006) *Acquisition and Loss of Nationality, Policies and Trends in 15 European States*, Vol. I *Comparative Analyses*, Vol. II *Coutry Analyses*, Amsterdam University Press, Amsterdam; Bauböck, R. (2006) 'Who are the citizens of Europe?', in Id., R., Ersbøll, Groenendijk, K., Wadrauch, H. (eds.) *Acquisition and Loss of Nationality*, Amsterdam University Press, Amsterdam; Bellamy, R., Castiglione D. (eds.) (2004) *Lineages of European Citizenship: Rights, Belonging and Participation in Eleven Nation-States*, Palgrave Macmillan, London; Bellamy, R., Castiglione D., Shaw, J. (eds.) (2006) *Making European Citizens. Civic Inclusion in a Transnational Context*, Plagrave Macmillan, London;

A Theory of Citizenship Rights. Formal Membership in the
Framework of (in)determinability of European Union Values

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A Theory of Citizenship Rights. Formal Membership in the
Framework of (in)determinability of European Union Values

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A Theory of Citizenship Rights. Formal Membership in the Framework of (in)determinability of European Union Values

n. 2, pp. 143-145; Shaw, J. (2007) *The Transformation of Citizenship in the European Union. Electoral Rights and Restructuration of Political Space*, Cambridge University Press, Cambridge; Sherwin-Withe, A.N. (1939) *The Roman Citizenship*, Clarendon Press, Oxford; Sills, D. (1968) 'Citizenship', in *International Encyclopedia of the Social Sciences*, Macmillan, New York; Turner, B.S. (ed.) (1993) *Citizenship and Social Theory*, Sage, London; Verwilghen, M. (1999) 'Conflict de nationalités. Plurinationalité et apatridie', in *Recueil des cours de l'Academie de droit international*, vol. 277, Martinus Nijhoff, Den Haag.

[79] Dyzenhaus, D., Reciprocity and Normativity in Legal Orders, in *Netherlands Journal of Legal Philosophy* 2014 (43) 2, 111. In particular, as for reciprocity and the theory of state, note that the author seeks to demonstrate that reciprocity can be seen as the foundational principle of normative, political and legal order in Hobbes's social contract theory. Hobbes is commonly understood as demanding an almost unconditional obligation of citizens to follow the commands of the sovereign. Against this authoritarian reading, Dyzenhaus offers a liberal interpretation of Hobbes's social contract according to which it establishes three kinds of reciprocal relations.

[80] It is the idea that law is a sufficient condition for individuals to have liberty in the important sense of civil liberty that liberals and others will find problematic. For example, contemporary Republican political theorists, notably Philip Pettit and Quentin Skinner, regard the passages where Hobbes expresses this thought as deliberately aimed at undermining the ideal of a 'free man,' articulated by the Republicans of his day, in order to get to the conclusion that one is just as free under the rule of a despot as one is under the rule of a democratic parliament: see Philip Pettit, 'Liberty and Leviathan,' *Politics, Philosophy, & Economics* 4 (2005): 131; Quentin Skinner, *Hobbes and Republican Liberty* (Cambridge: Cambridge University Press, 2008).

Pettit and Skinner are correct. But they do not grapple with Hobbes's actual argument for this claim, an argument that might provide a better foundation for the Republican ideal of freedom as non-domination than either that of the Republicans of Hobbes's day or of ours. A rare and better appreciation of Hobbes's achievement is to be found in Michael Oakeshott's neglected essay, 'The Rule of Law': (Michael Oakeshott, 'The Rule of Law,' in Oakeshott, *On History and Other Essays* (Indianapolis: Liberty Fund, 1999), 129).

[81] See *Semi-Citizenship in Democratic Politics* (Cambridge UP, 2009), *The Citizen and the Alien: Dilemmas of Contemporary Membership* by Linda Bosniak; *The Birthright Lottery: Citizenship and Global Inequality*. Harvard University Press, 2009 by Ayeleth Shachar; *The Ethics of Immigration*, Oxford, 2013 by Joseph Carens.

A Theory of Citizenship Rights. Formal Membership in the
Framework of (in)determinability of European Union Values

[82] Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, «Review of Politics», 49, 3, 1987, pp. 251-273; R. Bauböck, *The Rights of Others and the Boundaries of Democracy*, «European Journal of Political Theory», 6, 2007, p. 398.

See also the cases *Laval* C-341/05 and *Viking* C-438/05. A comment in A. Davis, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, «Industrial Law Journal», 37, 2008, pp. 140-144; A. Davesne, *The Laval Case and the Future of Labour Relations in Sweden*, «Cahiers européens», 1, 2009, p. 9; A. Menéndez, J. Fossum, *The Constitution's Gift. A Constitutional Theory for a Democratic European Union*, Rowman & Littlefield, Lanham, 2011, pp. 144-145. For the incidence of these cases framework on integration European and their meanings cfr. C. Joerges, S. Giubboni, *Diritto e politica nella crisi europea*, «Rivista critica del diritto privato», 31, 2013, pp. 343-367; C. Joerges, *Europe's Economic Constitution in Crisis* in P. Mindus (ed.), *European Citizenship: Twenty Years On*, monographic number of «German Law Journal», August 2014.

[83] For an updated bibliography on the issue of *open borders*, see <http://openborders.info/pro-open-borders-reading-list/>.

[84] Mindus, P., *Europeanisation of Citizenship within the EU: Perspectives and Ambiguities*, in WP SS 2008 n. 2, Jean Monnet Working Papers.

[85] See also (in alphabetic order): Abizadeh A., *Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders*, «Political Theory», 36, 1, 2008; Adorno F. (ed.), *Dialoghi politici*, II, UTET, Torino 1996; Alexander J.C., *The Paradoxes of Civil Society*, «International Sociology», XII, 2, 1997; Allan D.J., *Individual and State in the Ethics and Politics*, «Entretiens sur l'Antiquité Classique», IX (La 'Politique' d'Aristote), 1964; Allen D., *Invisible Citizens: Political Exclusion and Domination in Arendt and Ellison*, «Nomos», XLVI, 2005; Alpa G., *Status e capacità. La costruzione giuridica delle differenze individuali*, Laterza, Bari 1993; Andreski S., Review of M. Bulmer (ed.), *Essays on the History of British Sociological Research*, «Sociology», 20, 1, 1986; Ampolo C., *La politica nella Grecia*, Laterza, Bari 1981; Arangio-Ruiz G., *Istituzioni di diritto costituzionale italiano*, Fratelli Bocca, Torino 1913; Arendt H., *Origins of Totalitarianism*, Harcourt, Brace & Co, New York 1966; trad. it. *Origini del totalitarismo*, Comunità, Milano 1967; Aristotele, (ed. by Barnes J.), *The Complete Works of Aristotle*, II, Princeton Univ. Press, Princeton 1984; Id., (ed. by di Lozza G.), *La costituzione degli Ateniesi*, Mondadori, Milano 1991; Id., (ed. by Jowett B.), *Politics*, II, Clarendon Press, Oxford 1885; Id., (ed. by Barker E.), *The Politics of Aristotle*, Oxford University Press, Oxford 1946; Id., (ed. by Newman W.L.), *The Politics of Aristotle*, Oxford University Press, Oxford 1950 (ed. orig. 1902); Id., (ed. by Viano C.A.), *Politica*, Utet, Torino 1955; Id., (ed. by Aubonnet J.), *Politique*, Les belles lettres, Paris 1971; Id., (ed. by

A Theory of Citizenship Rights. Formal Membership in the
Framework of (in)determinability of European Union Values

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A Theory of Citizenship Rights. Formal Membership in the
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[86] Jacobson, D., *Rights Across Borders: Immigration and the Decline of Citizenship*, John Hopkins University Press, Baltimore 1996, p. 9; A. Shachar, *The Birthright Lottery: Citizenship and Global Inequality*, Harvard University Press, Cambridge (Mass.) 2009; C. Crouch, K. Eder, D. Tambini (eds.), *Citizenship, Markets, and the State*, Oxford University

A Theory of Citizenship Rights. Formal Membership in the
Framework of (in)determinability of European Union Values

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[87] The argument that boundaries are necessary to avoid a *tragedy of the commons*, supported by Rawls in *The Law of Peoples*, "Critical Inquiry", 20, 1, 1993, p. 39, has been the subject of much criticism by empirical studies on migration, who insisted on immigrants' contributions economy and society in general. For instance, see Legrain, P., *Immigrants: Your Country Needs Them*, Princeton University Press, Princeton 2007.

[88] In particular, Hannah Arendt is probably best known for having coined the following two phrases: 'the right to have rights' and 'the banality of evil.' She uses the first in the ninth chapter of her book *The Origins of Totalitarianism*, Schocken Books, New York, 1951.

[89] R. Bauböck, *Immigration and the boundaries of citizenship* (1991), Monographs in Ethnic Relations No. 4.

[90] As for the Arendt's theory and on this specific point I refer to H. Brunkhorst, *Are Human Rights Self-Contradictory? Critical Remarks on a Hypothesis by Hannah Arendt*, «Constellations», 3, 1996, pp.190-99; F. Michelman, *Parsing "A Right to Have Rights"*, «Constellations», 3, 1996, pp. 200 sg.; S. Benhabib, *The Right to Have Rights: Hannah Arendt on the Contradictions of the Nation-state*, in *The Rights of Others: Aliens, Residents, and Citizens*, Cambridge University Press, Cambridge 2004, pp. 49 sg.; S. Gosepath, *Hannah Arendts Kritik der Menschenrechte und ihr, Recht, Rechte zu haben*, in Heinrich-Böll-Stiftung (ed.), *Hannah Arendt: Verborgene Tradition - Unzeitgemäße Aktualität?*, Akademie Verlag, Berlin 2007, pp. 279-290; C. Menke, *The "Aporias of Human Rights" and the "One Human Right": Regarding the Coherence of Hannah Arendt's Argument*, «Social Research Paper», 74, 3, 2007, pp. 739-762, <http://findarticles.com/p/articles/mi_m2267/is_3_74/ai_n24943363/print>; P. Birmingham, *Hannah Arendt and Human Rights: The Predicament of Common Responsibility*, Morton, Bloomington 2006; S. Parekh, *Hannah Arendt and the Challenge of Modernity*, Routledge, Oxford 2008; M. Krause, *Undocumented Migrants: An Arendtian Perspective*, «European Journal of Political Theory», 7, 3, 2008, pp. 331-348; A. Schaap, *Enacting the Right to Have*

A Theory of Citizenship Rights. Formal Membership in the
Framework of (in)determinability of European Union Values

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[91] M. Zürn, *Global governance and legitimacy problems*, «Government and Opposition», 39, 2004, pp. 260-87; J.K. Schaffer, *The boundaries of transnational democracy: Alternatives to the all-affected principle of democratic inclusion*, in «Review of International Studies», 1, 2011.

[92] R. Alexy, *On Balancing and Subsumption. A Structural Comparison*, en «Ratio Juris», 16 (2003): 433-449: the relationship between constitutional rights and proportionality is one of the main themes of the contemporary constitutional debate. Two basic views are in conflict: the thesis that there exists some kind of a necessary connection between constitutional rights and proportionality analysis, and the thesis that there exists no necessary connection of whatever kind between constitutional rights and proportionality.

[93] Bauböck, R., 1994. *Transnational citizenship: membership and rights in international migration*, Aldershot, Edward Elgar.

[94] To avoid confusions, the author calls a “citizen” only someone who is both granted with the right of political participation and recognized as a full member of the democratic society. People with partial membership status and the partial rights attached to it, are not considered as citizens. Also, the author does not try to disconnect the membership status from the rights and duties of the citizen. On the contrary, rights are determined by membership. Citizenship is a unique full membership status and the recognition of it give legitimacy to participate to collective decisions.

[95] Bauböck, R., (ed.), 2006, *Migration and Citizenship. Legal Status, Rights and Political Participation*, Amsterdam University Press, IMISCOE report series, p. 128.

[96] Rubio-Marín, R., 2000, *Immigration as a democratic challenge*, Cambridge, Cambridge University Press.

[97] Torpey, J., 2000, *The Invention of the Passport: Surveillance, Citizenship and the State*, Cambridge University Press, Cambridge.

[98] Bauböck, R., 2011, *Citizenship and Freedom of Movement*, in Roger Smith (ed.), *Citizenship, Borders, and Human Needs*, Pennsylvania University Press.

[99] Schwartz, B., ‘The Social Psychology of the Gift,’ *American Journal of Sociology* 73

A Theory of Citizenship Rights. Formal Membership in the
Framework of (in)determinability of European Union Values

(1967): 1-11; Deen, C., *Encyclopedia of Global Justice*, Springer, New York 2011.

[100] Ellermann, A., *States against Migrants. Deportation in Germany and the United States*, Cambridge Univ. Press, Cambridge 2009; Dauvergne, C., *Making People Illegal. What Globalisation Means for Migration and Law*, Cambridge Univ. Press, Cambridge 2009; Price, M.E., *Rethinking Asylum. History, Purpose and Limits*, CUP, Cambridge 2009, cap. 2; Dummett, A., *The Transnational Migration of People Seen From Within a Natural Law Tradition*, in B. Barry, R. Goodin, *Free Movement: Ethical Issues in the transnational migration of people and of money*, Pennsylvania State University Press, Pennsylvania 1992, pp. 169-180; Turner, B.S., *Citizenship Studies: A General Theory*, «Citizenship Studies», I, 1, 1997.

[101] Rubio-Marín, R., 2000, *Immigration as a democratic challenge*, *cit.*, p. 178.

[102] Bauböck, R., 2009, "The rights and duties of external citizenship", in *Citizenship Studies*, 13 (5): 475-499.

[103] Carens, J., 2002, "Citizenship and civil society: what rights for residents?", R. Hansen and P. Weil, eds. *Dual nationality, social rights and federal citizenship in the US and Europe: the reinvention of citizenship*. Oxford: Berghahn Books, 100-118.

[104] Carens, J., 2013, *The ethics of immigration*. New York: Oxford University Press.

[105] Goodin, R., *What Is So Special About Our Fellow Countrymen ?*, 'Ethics', 98, 4, 1988, pp. 663-686, p. 688. His analysis is a counter example, which shows that, under international law, "We may poison our compatriots' air, stop their flow of water, deprive them of liberty by conscription, deny them legal remedies for damage to persons and their property - all in a way that we cannot do to nonresident nonnationals".

[106] Torpey, J., *The Invention of the Passport: Surveillance, Citizenship and the State*, Cambridge University press, Cambridge 2000.

[107] Held, D., *Citizenship and Autonomy*, in Id., *Political Theory and the Modern State*, Polity Press, Cambridge 1989, p. 189.

[108] Carens, J., 2014, "An overview of the ethics of immigration", *cit.*, citing the European Council 2003, European Council Directive 2003/109/EC.

[109] Dauvergne, C., *Making People Illegal. What Globalisation Means for Migration and Law*, Cambridge University Press, Cambridge 2009, p. 35. But *cfr.* *Convention Relating to*

A Theory of Citizenship Rights. Formal Membership in the Framework of (in)determinability of European Union Values

the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; UNHCR, *Asylum levels and Trends in Industrialized Countries*, 2011, available at: <<http://www.unhcr.org/4e9beaa19.html>>.

[110] Giddens, A., *T.H. Marshall, the State and Democracy*, in M. Bulmer, A.M. Rees, (eds.), *Citizenship Today*, Psychology Press, 1996, p. 65. *Contra*, cfr. Dahrendorf, R., *The Modern Social Conflict*, Transaction Publishers, 2011.

[111] Ellermann, A., *States against Migrants. Deportation in Germany and the United States*, Cambridge University Press, Cambridge 2009, p. 25; Sassen, S., *Losing control? Sovereignty in the Age of Globalization*, Columbia University Press, NY 1996.

[112] Bauböck (2011).

[113] Pitt-Rivers, J., (2012) 'The Stranger, the Guest and the Hostile Host: Introduction to the Study of the Laws of Hospitality,' in *Contributions to Mediterranean Sociology*, ed. J.G. Peristiany (The Hague: Mouton), 13-31.

[114] Komter, A., *Social Solidarity and the Gift* (New York: Cambridge University Press, 2005).

[115] The international standards, recommendations, reports and policy documents scrutinised show that the main characteristic of temporary migration is that the stay is limited in time, meaning not permanent. Various categories of migrants are usually encapsulated under a "temporary" scheme; these often include categories such as seasonal workers, project-tied workers, specific employment worker, contract workers, students, tourists, trainees, and service providers.

[116] Bauböck, R., 2011, "Temporary migrants, partial citizenship and hypermigration", *Critical Review of International Social and Political Philosophy*, Volume 14, Issue 5. Special Issue: Democratic Citizenship and its Futures.

[117] The UN has defined an international migrant as "any person who changes his or her country of usual residence." The change of country of usual residence necessary to become an international migrant must involve a period of stay in the country of destination of at least a year. This standard however presents similar methodological limitations at times of ascertaining the transformative characteristics of human mobilities and the impossibility of capturing people's intentions into law and policy. The UN differentiates between short-term migration (between three months and a year) and long-term migration (longer than a year) - both, short- and long-term migration can be temporary in nature. The

1990 UN Migrant Workers Convention does not provide definitions³⁰ of temporary migration but of the following three categories that are all temporary: “seasonal worker”, “project-tied worker” and “specific-employment worker.”

[118] A key message from ILO instruments is that these key labour standards cannot be dependent on time-bound definitions of migration. The ILO standards are inclusive in that a lot of the conventions and recommendations cover temporary migration. The 1997 ILO Report of the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration specifies that the term time-bound migrants is meant to cover “seasonal workers, project-tied workers, special purpose workers, cross-border service providers, students and trainees but no other categories.” The 2010 ILO publication on a rights-based approach to labour migration lists temporary migration as “referring to admission of workers (sometimes referred to as ‘guest workers’) for a specified time period, either to fill year-round, seasonal or project-tied jobs, or as trainees and service providers under Mode 4 (Movement of Natural Persons) of the GATS.

[119] The term “temporary migration” is normatively charged with a number of assumptions and methodological biases, e.g. temporary migration schemes allow governments to legally discriminate foreign workers and their families; temporary migration also (at least formally) excludes the phenomenon of irregular migration. In the light of this we raise the question as to whether it is still adequate to speak of temporary migration, or whether it would be actually more appropriate to use the terms “temporariness” and “(temporary) mobility” in the conceptual framework of EURA-NET on socio-economic transformative characteristics.

[120] As the European Committee on Migration of the CoE has highlighted, however, a clear-cut distinction between a temporary and permanent stay might be difficult or even impossible to make in practice. This has meant that the EU free movement of persons aimed to abolish “temporariness” from the very beginning when the EU Treaties were designed. The deregulating rules on the free movement for persons were meant to encourage EU citizens to move to another EU country for the purpose of employment. As regards third country nationals, EU migration law does not expressly provide for a definition of “temporary migration”, one could argue that it currently covers a wide range of human mobility experiences for periods of up to five years. This finding could be derived from Council Directive 2003/109/EC on EU long-term resident status for third-country nationals: after five years of legal and continuous residence in a Member State the stay of third-country nationals is considered as “permanent.” The EU Migration Directives regard students, au pairs, seasonal workers, and intra-corporate transferees explicitly as “temporary migrants.” The EU is keen that temporary migration does not become

A Theory of Citizenship Rights. Formal Membership in the Framework of (in)determinability of European Union Values

permanent and has displayed an EU policy on return and expulsion for these individuals not to become 'permanent': Directive 2014/36 on seasonal workers sets out incentives and safeguards to prevent overstaying or temporary stay from becoming permanent (direct reference is made to Return Directive 2009/52).

[121] On the international level no one single universal definition of temporary migration exists as the research on international standards, recommendations, reports and policy documents has revealed. However, different international and regional organisations have introduced a number of conceptual features and definitions of relating concepts for the purposes of calculating international migration statistics, or at times of ensuring that international labour standards apply to all migrant workers, independently of whether their mobility project can be labelled as temporary or permanent.

[122] Although the EU legal framework sets forth different rules for EU citizens (under the Citizens' Directive 2004/38) and third-country nationals (under the Schengen rules and the Long-Term Residents' Directive), interestingly the framing of temporariness is the same to both groups; namely the time period up to three months; the time period between three months and five years, which one could argue covers to the EU's framing of what is temporary for the purposes of European migration law; and the time period after five years which corresponds with the EU's understanding of permanent residence.

[123] Under the agreement signed by the Ministry of Internal Affairs and the Italian Postal Service, requests for permits to stay must be submitted to the post office by filling out the application forms (available at all post offices). Upon submission of the request, student must be prepared to show a valid form of ID and the OPEN envelope containing all of the appropriate forms.

The following documentation is required for the first issue of a permit to stay: copy of the student's entire passport; copy of a document that certifies registration at the Italian University; copy of an insurance policy that guards against the risk of illness and injury, and that is valid in the pertaining territory for the duration of the stay.

The postal employees will issue a receipt which serves as a documentation of the application's submission. In the second stage of the process, the student will be given a date to meet with the Police. During this appointment the applicant must bring 4 passport size photographs and they will be digitally fingerprinted. The student will then be given a second date during which he or she must go to the Police to withdraw his or her permit to stay.

[124] Bauböck (2011), 13.

A Theory of Citizenship Rights. Formal Membership in the
Framework of (in)determinability of European Union Values

[125] See Mindus, P., *The Contemporary Debate on Citizenship. Some Remarks on the Erased of Slovenia*, «REVUS: Revija za evropsko ustavnost», 9, 2009, <<http://sites.google.com/site/revijarevus>>, pp. 29-44; Lajh, D., Ramet, S.P., *Slovenia*, in J. Goehring (ed.), *Nations in Transit 2008*, Freedom House, Budapest & New York: 2008, pp. 535-552; <http://www.freedomhouse.hu/images/fdh_galleries/NIT2008/NT-Slovenia-final.pdf>.

[126] Delpla, I., 2014, "Cosmopolitisme ou internationalisme méthodologique", *Raisons politiques*, 2014/2 n. 54, pp. 87-102.

[127] Odmalm, P., *Migration Policies and Political Participation. Inclusion or Intrusion in Western Europe?*, Palgrave Macmillan, Basingstroke 2005; Bosniak, L., *Denationalisation of Citizenship*, in A. Aleinikoff, Klusmeyer D., (ed.), *Citizenship Today: Global Perspectives and Practices*, Carnegie Endowment for International Peace, Washington 2001; <http://eudocitizenship.eu/about/fracit>, 2013.

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[129] Buchanan, A., 'Justice as Reciprocity versus Subject-Centered Justice,' *Philosophy and Public Affairs* 30(3) (1995): 227-52; Barry, B., *Justice as Impartiality* (Oxford: Clarendon Press, 1995), 3.

[130] Rawls, J., *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1999), 118-123.

[131] Furman, J., *Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice*, «Yale Law Journal», 1, 1997, pp. 1197-1231; Mindus, P., *Sorting Out Modern Emergency Rules - A Theoretical Framework*, «Redescriptions. Finnish Yearbook for Political Philosophy», 14, 2010, pp. 109-134.

[132] Sandel, M., *Liberalism and the Limits of Justice* (New York: Cambridge University Press, 1982), 87, 179.[132]

[133] UNHCR, *Asylum Levels and Trends in Industrialized Countries*; M. Price, *Rethinking Asylum. History, Purpose and Limits*, Cambridge University Press, Cambridge 2009, p. 8.

[134] Marshall, T.H., *The Right to Welfare and Other Essays*, London, 1981, pp. 141-142.

[135] Schaffer, J.K., *Democrats Without Borders. A Critique of Transnational Democracy*,

A Theory of Citizenship Rights. Formal Membership in the
Framework of (in)determinability of European Union Values

Ph.D. diss., Gothenburg Studies in Politics, Göteborg 2008; R. Dahl, *Democracy and Its Critics*, Yale University Press, New Haven 1989, p. 122; Mapel, D., *Fairness, Political Obligation, and Benefits Across Borders*, «Polity», 37, 4, 2005, pp. 426-42. See also Abizadeh, A., *Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders*, «Political Theory», 36, 1, 2008, p. 49.

[136] Delpla, I., (2014), 97.

[137] F. G. Whelan, *Democratic Theory and the Boundary Problem*, in *Liberal Democracy*, J. Pennock, J.W. Chapman, (eds.), New York UP, New York 1983. R. Dahl refers to this principle in relation to the 'problem of unity' in *Democracy and Its Critics*, Yale UP, New Haven (Conn.) 1989; Arrhenius, G., *The Boundary Problem in Democratic Theory*, in Tersman, F., (ed.), *Democracy Unbound: Basic Explorations I*, Filosofiska institutionen - Stockholms Universitet, Stockholm 2005, pp. 14-29; Bergström, L., *Democracy and Political Boundaries*, in F. Tersman (ed.), *Democracy Unbound - Basic Explorations II*, Stockholms Universitet, Stockholm 2006, <<http://people.su.se/~folke/Bergstrom.pdf>>, pp. 1-25; Saward, M., *The Terms of Democracy*, Polity Press, Cambridge 1998; Goodin, R., *Enfranchising All Affected Interests, and its Alternatives*, «Philosophy & Public Affairs», 35, 1, 2007; Hilson, C., *EU Citizenship and the Principle of Affectedness*, in R. Bellamy, D. Castiglione, J. Shaw, (eds.), *Making European Citizens. Civic Inclusion in a Transnational Context*, Palgrave Macmillan, NY 2006, pp. 56-74; Brubaker, R., *Citizenship and Nationhood in France and Germany*, Harvard University Press, Cambridge (Mass.) 1992; Guiguet, B., *Citizenship and Nationality: Tracing the French Roots of the Distinction*, in La Torre, M., (ed.), *European Citizenship: An Institutional Challenge*, Kluwer Law International, Den Haag 1999, pp. 95-111; Miller, D., *Citizenship and National Identity*, Polity Press, Cambridge 2000; De Schutter, H., Tinnevelt, R., (eds.), *Nationalism and global justice: David Miller and His Critics*, Routledge, New York 2011.

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[141] Turner, B.S., *Contemporary Problems in the Theory of Citizenship*, in Id. (ed.),

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A large part of the debate on ecological citizenship today has shifted to issues related to global justice and the forced migration of *climate refugees*. For the state, please refer to

A Theory of Citizenship Rights. Formal Membership in the
Framework of (in)determinability of European Union Values

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A Theory of Citizenship Rights. Formal Membership in the
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[181] B.S. Turner, *Contemporary Problems in the Theory of Citizenship*, cit., p. 4: his intention in developing this particular perspective on citizenship is to avoid this opposition between the two notions of civil society and citizenship. He has already suggested one way in which this hiatus could be avoided, namely by defining citizenship as a set of social practices which define the nature of social membership.

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