DYNAMINT

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FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW

Towards a value-based Union citizenship:

Trust, Democracy, and Solidarity

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Seminar | Centre for European Legal Scholarship | University of Cambridge

Programme

1. Premises
2. Commission v Malta
3. Abstract Step: Why EU requirements?
4. Concrete Step: Why a Genuine Link?
5. Outlook



Premises

Premises

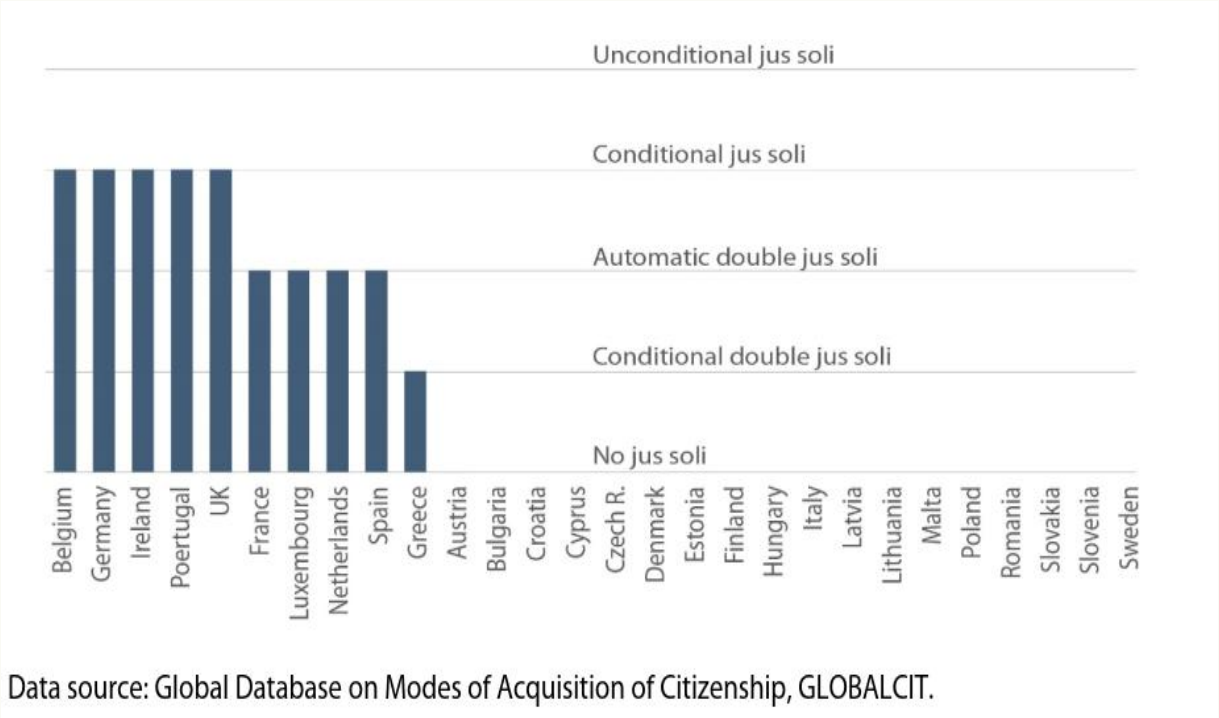
Member State diversity

Birth: jus soli

Birth: jus sanguinis

Naturalisation: ius nexi?

Naturalisation: jus doni?



Data source: Global Database on Modes of Acquisition of Citizenship, GLOBALCIT.

Premises

Member State diversity

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Naturalisation: jus doni?



Discretionary attribution of citizenship (national interests, exceptional achievements, …)

Source: Dzankic, Mantha-Hollands & Bauböck, Acquisition and loss of citizenship in 27 Member States of the European Union, 2020

Premises

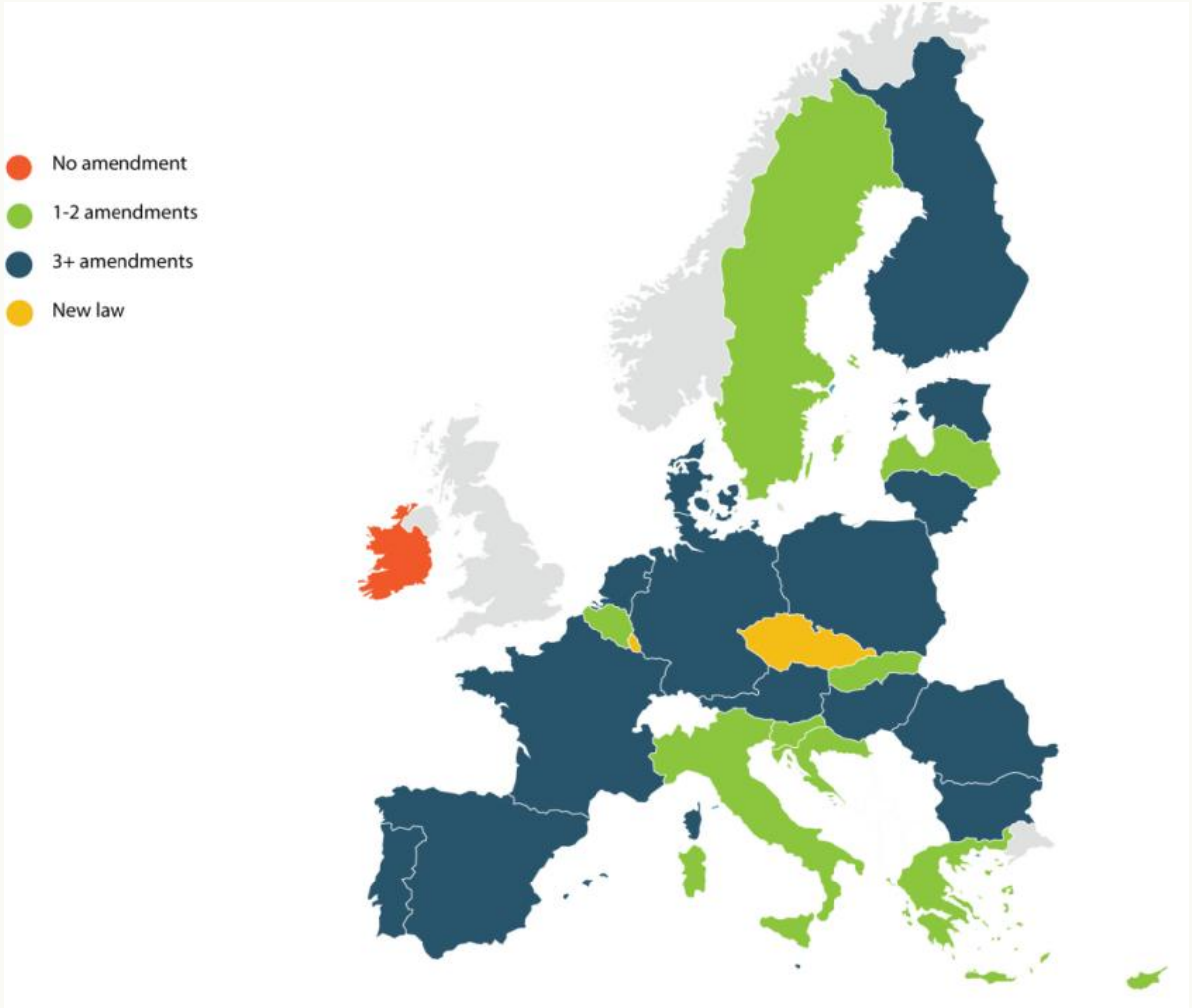
Member State diversity

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Frequency of amendments (2013-2017)

Source: Dzankic, Mantha-Hollands & Bauböck, Acquisition and loss of citizenship in 27 Member States of the European Union, 2020

Premises

Member State diversity



Birth: jus soli



Birth: jus sanguinis



Naturalisation: ius nexi?



Naturalisation: jus doni?

Thin EU standards

Thin framework

Article 20(1) TFEU: "*Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*"

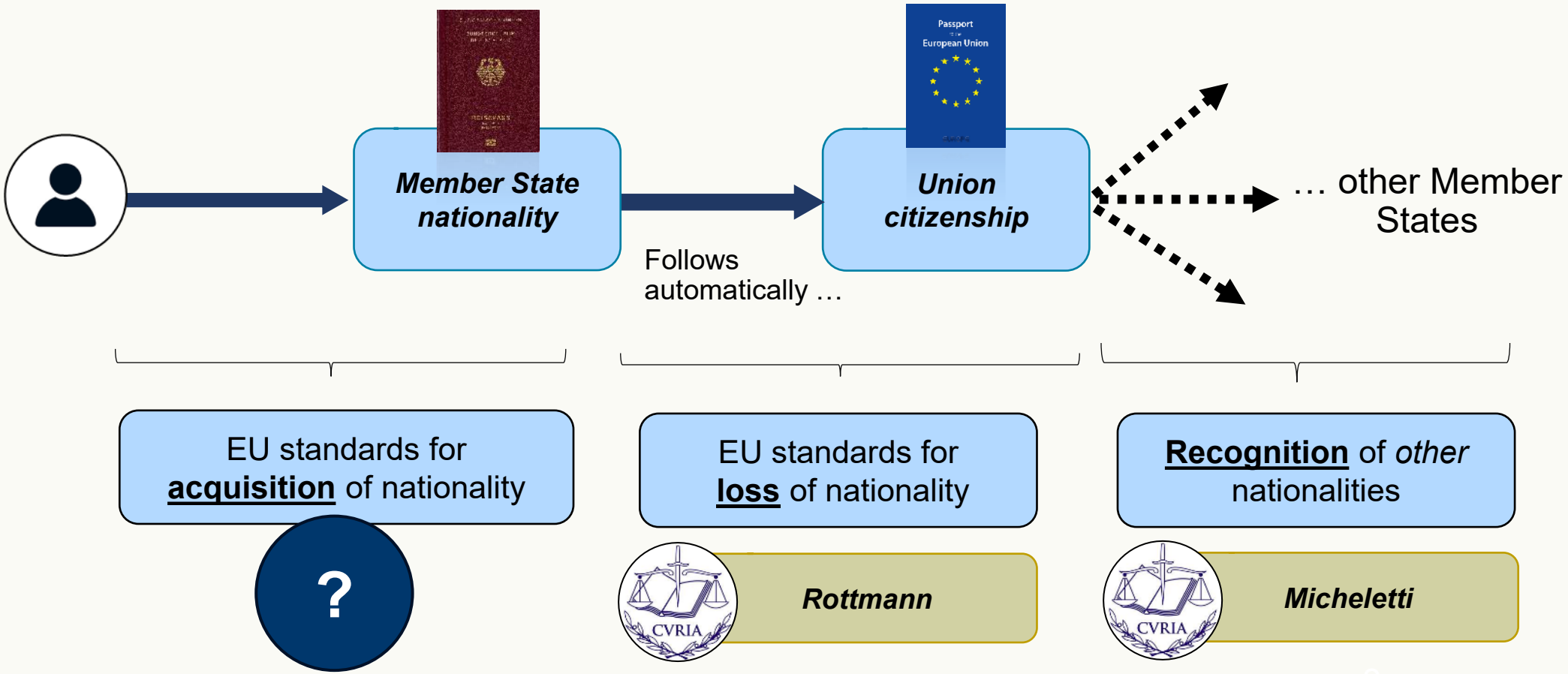
Scarce legislation

Article 25(2) TFEU:

- Council may unanimously expand rights under Article 20(2) TFEU
- but ratification in Member States required

Premises

→ Judicial development of the law!



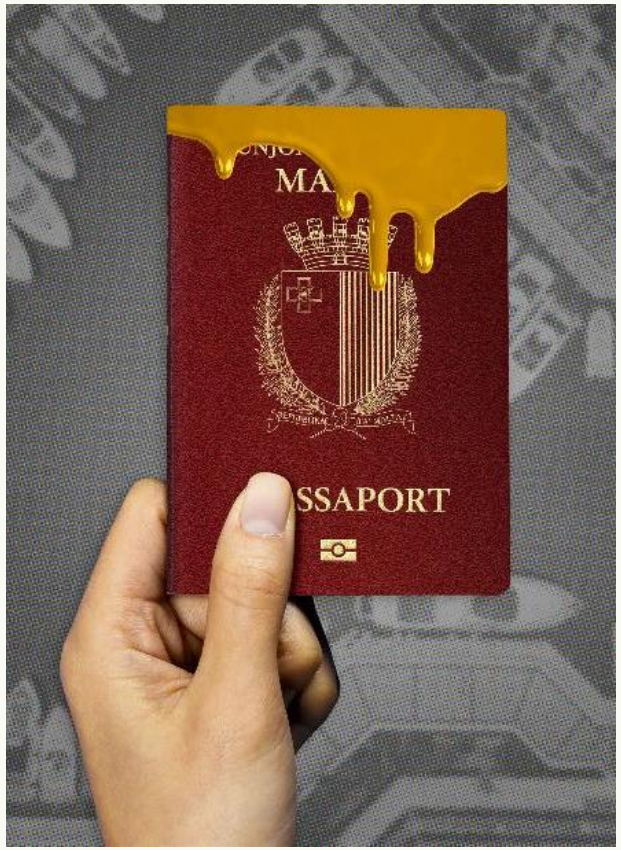
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Commission v Malta

Commission v Malta



PRESS RELEASE | 6 April 2022 | Brussels

'Golden passport' schemes: Commission proceeds with infringement case against MALTA

"Union law precludes national citizenship investor schemes that allow for the systematic granting of nationality … in the absence of a requirement for a genuine link between the State and the individuals concerned."

Abstract **question:** Are there EU requirements for the acquisition of Member State nationality?

Concrete **questions:** What are the EU requirements for the acquisition of Member State nationality?

Commission v Malta

"The exercise of the Member States' power to lay down the conditions for granting the nationality … is not … unlimited. Union citizenship is based on the common values contained in Article 2 TEU and on the mutual trust between the Member States as regards the fact that none of them is to exercise that power in a way that is manifestly incompatible with the ***very nature of Union citizenship****."* (para. 95)

"In that regard, … the bond of ***nationality*** *of a Member State is formed by the* ***special relationship of solidarity and good faith*** *between that State and its nationals"* (para. 96)

"by establishing and operating an institutionalised citizenship investment scheme … the Republic of Malta has failed to fulfil its obligations under ***Article 20 TFEU****"* (operative part)

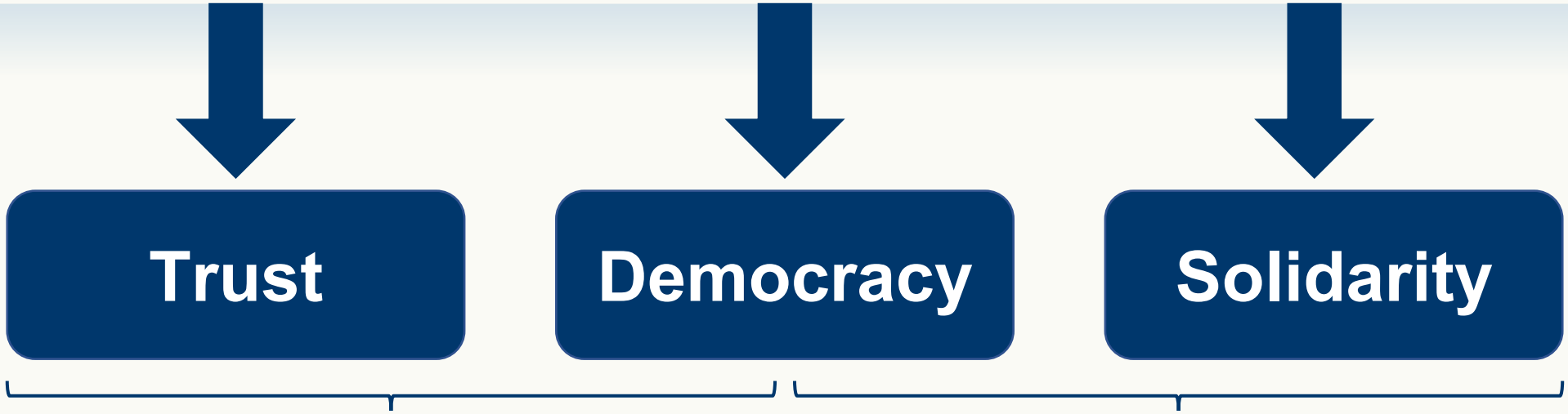
Abstract Step: Article 20(1) TFEU contains a **shared EU concept of Member State nationality**

Concrete Step: shared concept consists of a "**special relationship of solidarity and good faith**"

Genuine link!

Commission v Malta

"Union citizenship is based on the common values contained in Article 2 TEU and on the mutual trust between the Member States … " (para. 95)



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Abstract Step: Why EU Requirements?

Abstract Step: Why EU Requirements?

Trust

Protecting Member State interests

Micheletti: mutual recognition of conferral of nationality

"*In a spirit of mutual respect and trust, Member States have unconditionally agreed to abide by the decisions of other Member States*" (AG Collins)

"*rare example of absolute mutual trust*" (Merijn Chamon)

Compare EAW!



"*mutual trust must not be confused with blind trust*" (Koen Lenaerts)

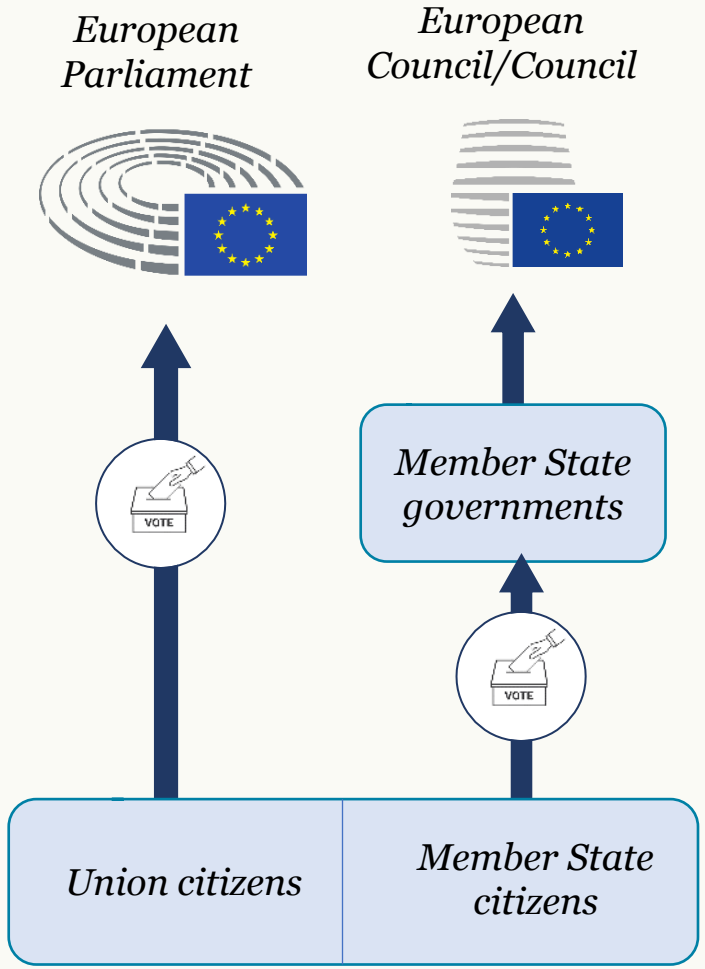
Abstract Step: Why EU Requirements?

Democracy

Protecting EU interests

"Union citizens participate directly in the democratic life of the European Union. Its functioning is founded on representative democracy …. It follows that the exercise by the Member States of their power to lay down the conditions for granting their nationality has consequences for the functioning of the European Union as a common legal order" (para. 89)

Certain minimum EU standards for who is part of EU electorate?



Abstract Step: Why EU Requirements?

Democracy

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Certain minimum EU standards for who is part of EU electorate?

Compare Delvigne!

EU electoral law governed by national law (Art. 7(2) 1976 Electoral Act)

"the Member States remain competent, in principle, to regulate the electoral procedure"
(Junqueras Vies, para. 69)

"the Member States are bound, when exercising that competence, by the obligation … to ensure that the election of Members of the European Parliament is by direct universal suffrage and free and secret."
(Delvigne, para. 32)

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Concrete Step: Why the Genuine Link?

Concrete Step: Democracy

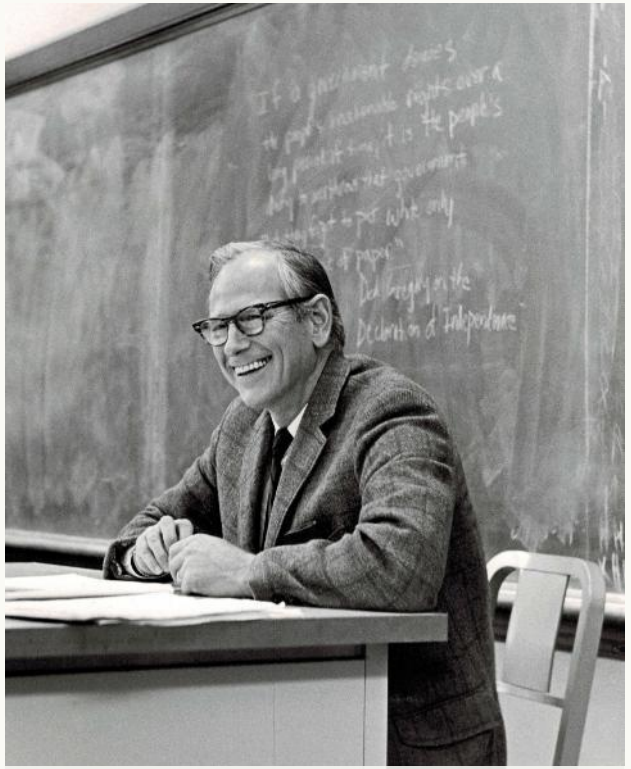
→ How to define membership in the electorate?

Conception 1: "all-affected principle"

- those affected by certain decisions should be able to participate in their adoption
- those not affected, should be excluded

"[d]eficits in democratic legitimation arise whenever the set of those involved in making democratic decisions fails to coincide with the set of those affected by them"
Jürgen Habermas, Time of Transitions (2006), p. 78

→ When are you *not* affected? If you have no stakes in the respective society!



Robert Dahl, After the Revolution? (1990), p. 46

Concrete Step: Democracy

→ How to define membership in the electorate?

Conception 2: democratic equality

"the commodification of rights violates Union values, in particular equality" (European Parliament, 2022).

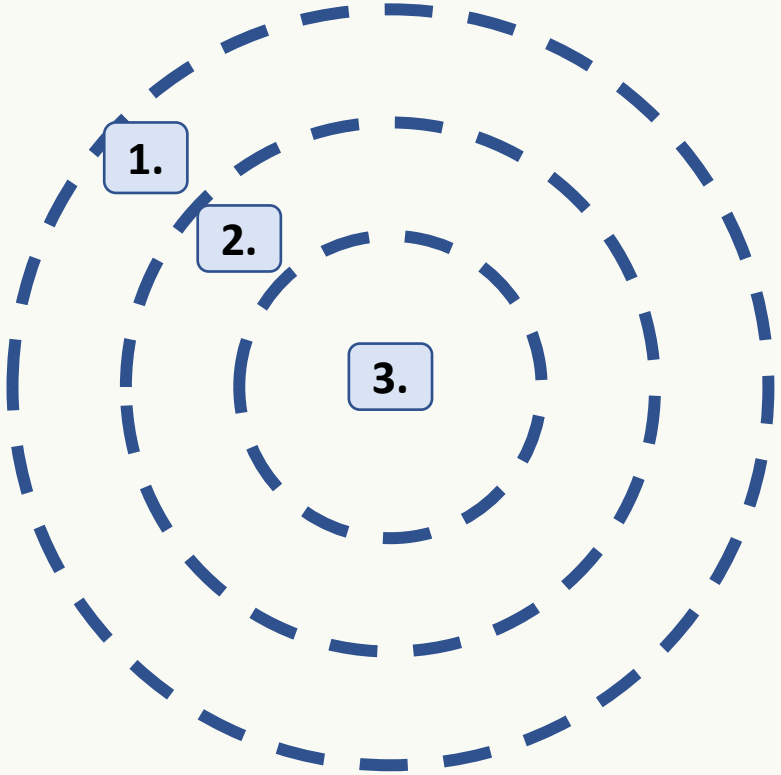
Article 9 TEU: "In all its activities, the Union shall observe the principle of the ***equality of its citizens*** … Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."

Article 21 CFR: "Any discrimination based on any ground such as … social origin … shall be prohibited."



Concrete Step: Solidarity

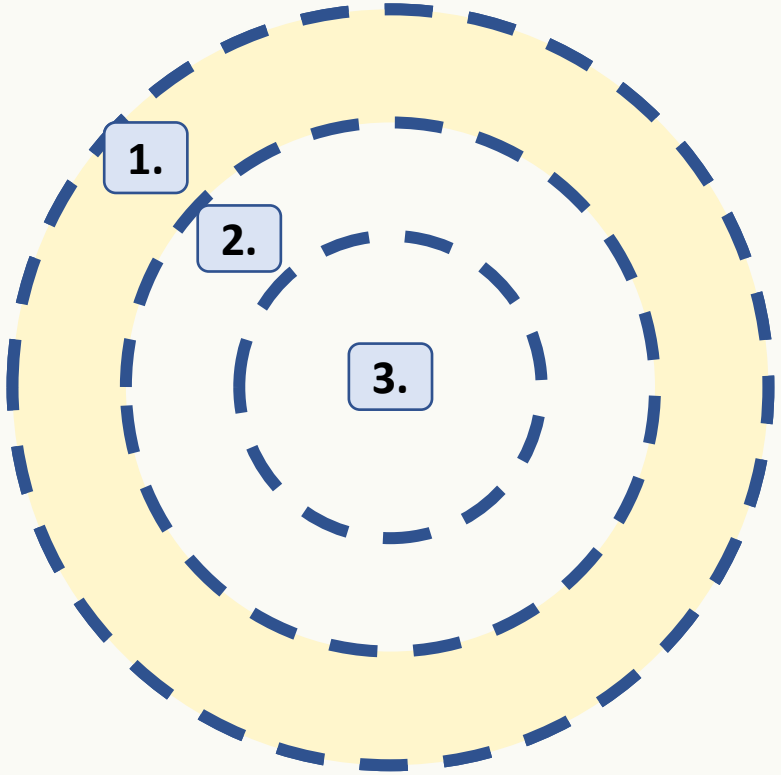
→ **Reconstruction**





Concrete Step: Solidarity

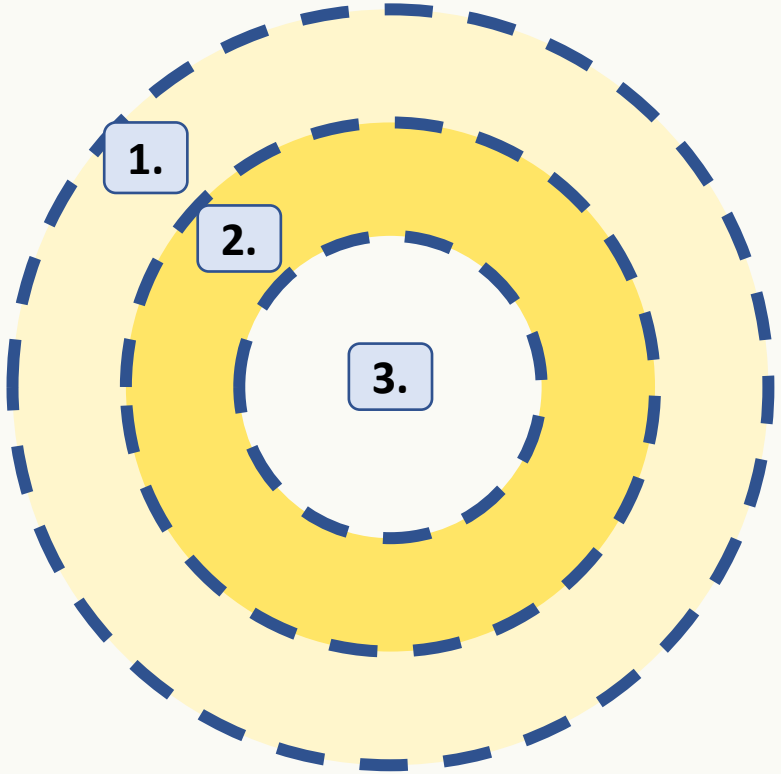
→ **Reconstruction**



Layer 1: EU citizenship rights (para. 84-90)

Concrete Step: Solidarity

→ Reconstruction



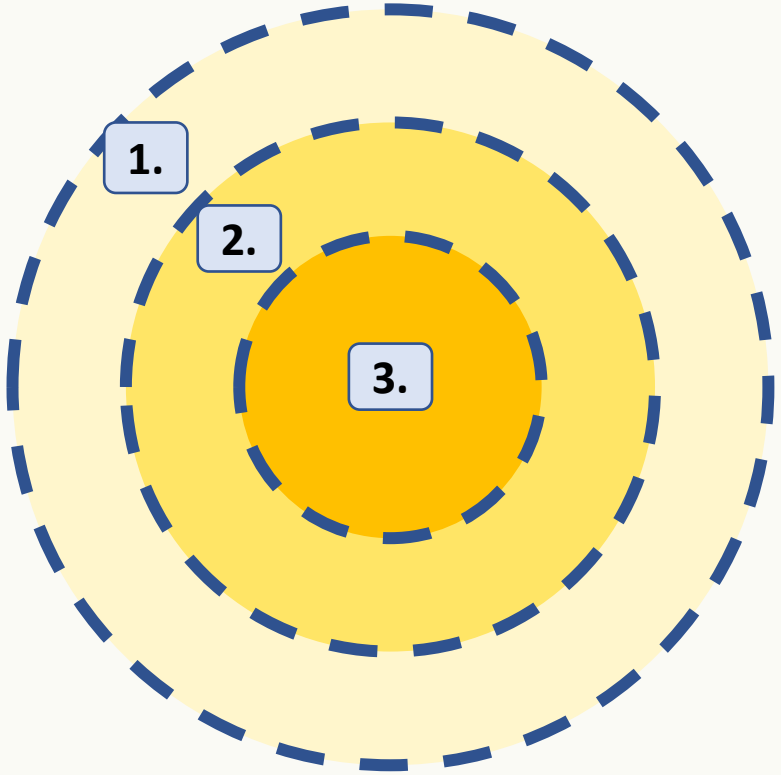
Layer 1: EU citizenship rights (para. 84-90)

Layer 2: … requires mutual solidarity

> *"Union citizenship is thus one of the principal concrete expressions of the solidarity which forms the very basis of the process of integration"* (para. 93)

Concrete Step: Solidarity

→ Reconstruction



Layer 1: EU citizenship rights (para. 84-90)

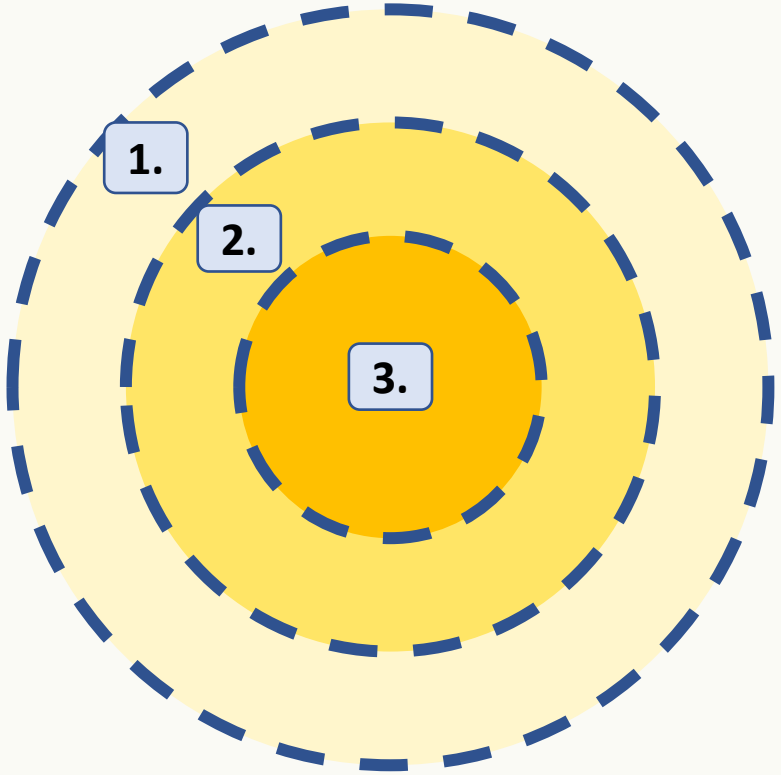
Layer 2: … requires mutual solidarity

Layer 3: … requires a genuine link to a society

> "the special relationship of solidarity and good faith between each Member State and its nationals … ***forms the basis*** of the rights and obligations reserved to Union citizens by the Treaties". (para. 97)
>
> "special relationship of solidarity and good faith" is "***justifying*** the grant of rights resulting, in particular, from Union citizenship." (para. 101)

Concrete Step: Solidarity

→ Criticism

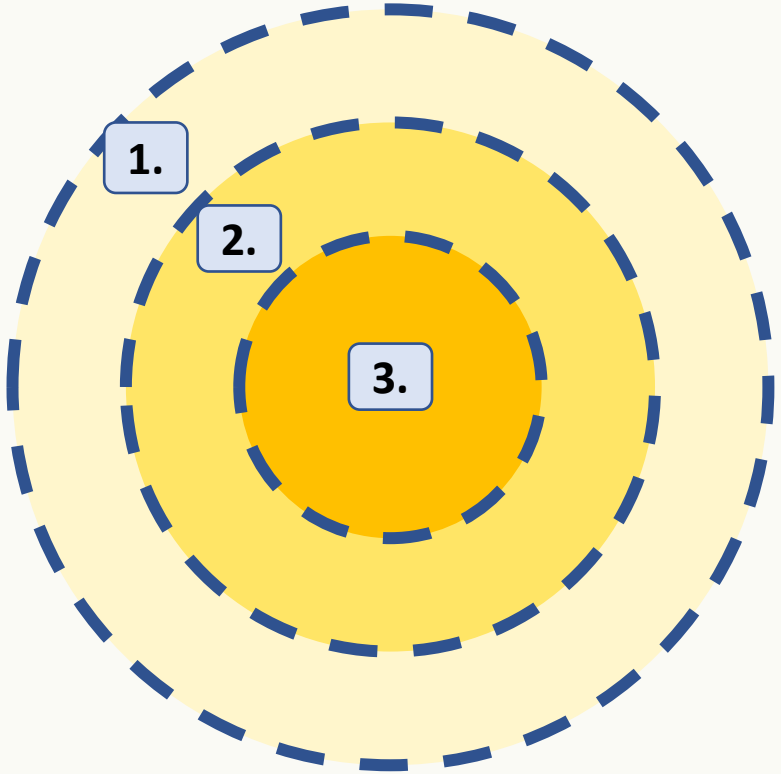




"EU is at the service of an illiberal ideal. … The Union is now there to replicate and reinforce … the petty nationalisms of (some) of its Member States at the supranational level" (Dimitry Kochenov)

Concrete Step: Solidarity

→ Theory: Conditions for solidarity



Types of solidarity:

- solidarity *with* a group of people
  = asymmetric, unilateral forms of aid

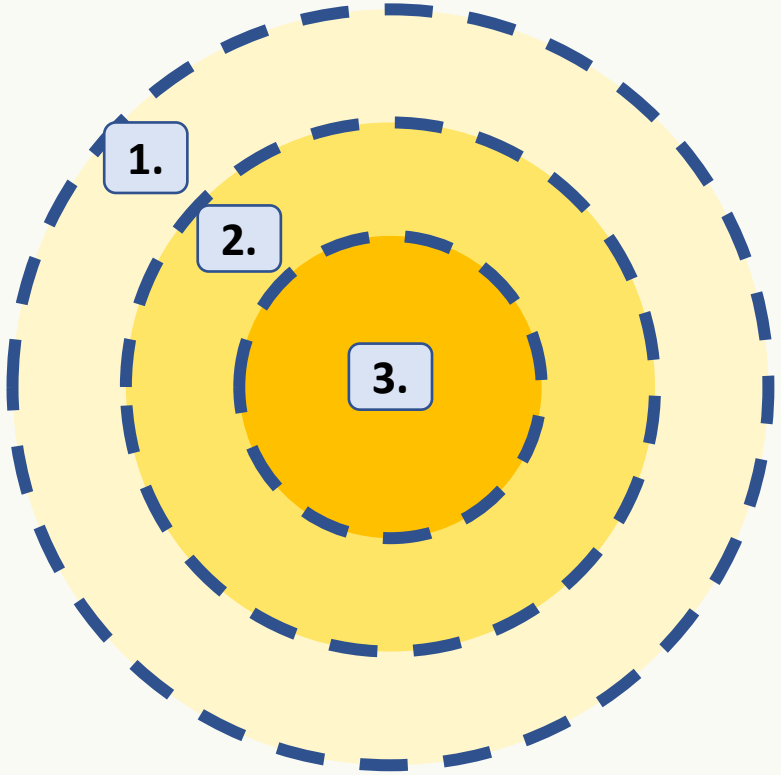
- solidarity *among* a group of people



→ Onora O'Neill

Concrete Step: Solidarity

→ Theory: Conditions for solidarity

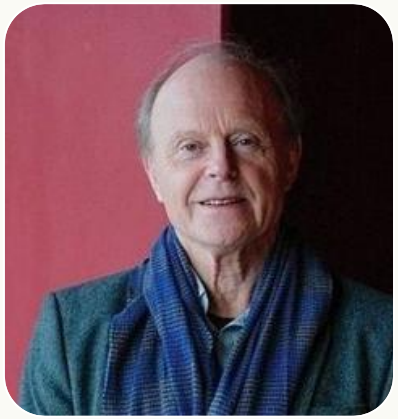


Sources of solidarity:

- **„expanding circle theory“:** solidarity depends on the „closeness“ of other persons
- **„interdependence theory“:** solidarity depends on extent to which members of society depend upon one another
- **„identity theory“:** solidarity depends on shared identity (a common ‘we’)

≠

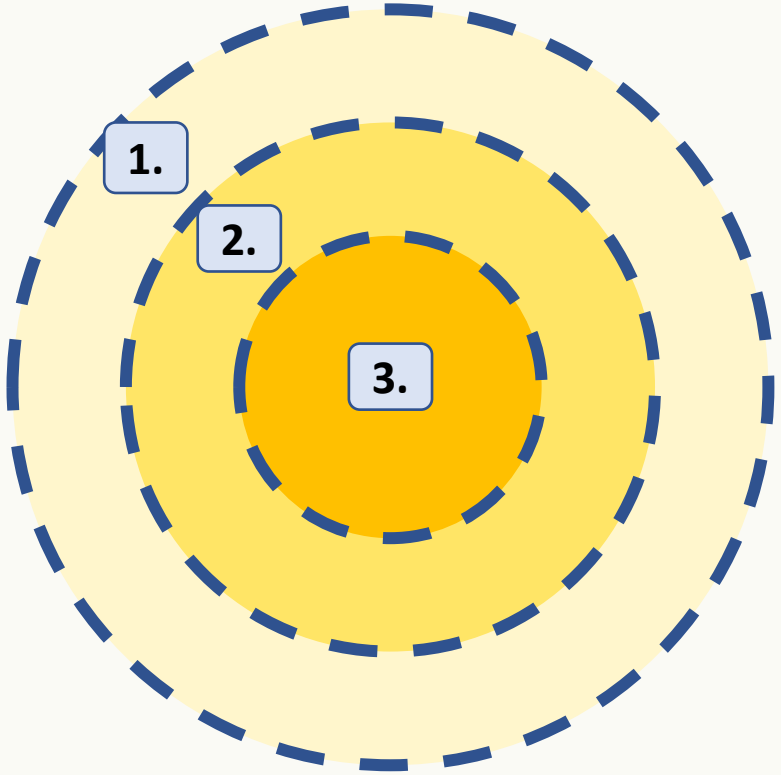
- **„associational theory“:** solidarity *effect* of people’s participation in polity/enjoyment of rights



→ David Miller

Concrete Step: Solidarity

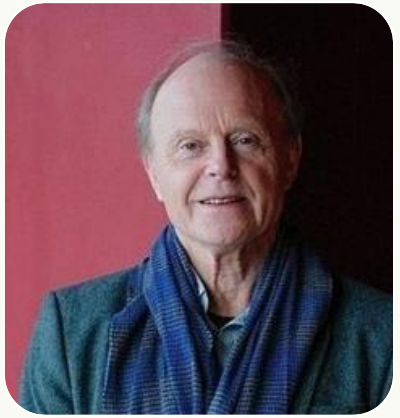
→ Theory: Conditions for solidarity



Sources of solidarity:

"some … sense of ***belonging*** together seems essential…"
(Keith Banting & Will Kymlicka)

"essentially ***partitive***: it involves treating some as 'us', belonging to an in-group, and others as 'them', excluded"
(Munoz-Dardé)

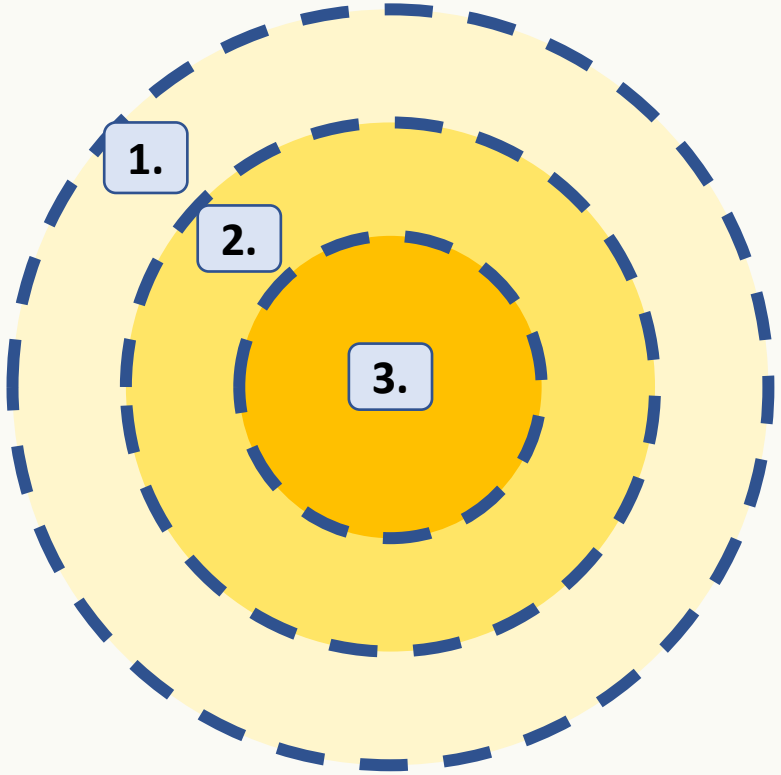


→ David Miller

- **„associational theory":** solidarity *effect* of people's participation in polity/enjoyment of rights

Concrete Step: Solidarity

→ Theory: Conditions for solidarity



Stratifications of solidarity:

Different intensities of belonging?

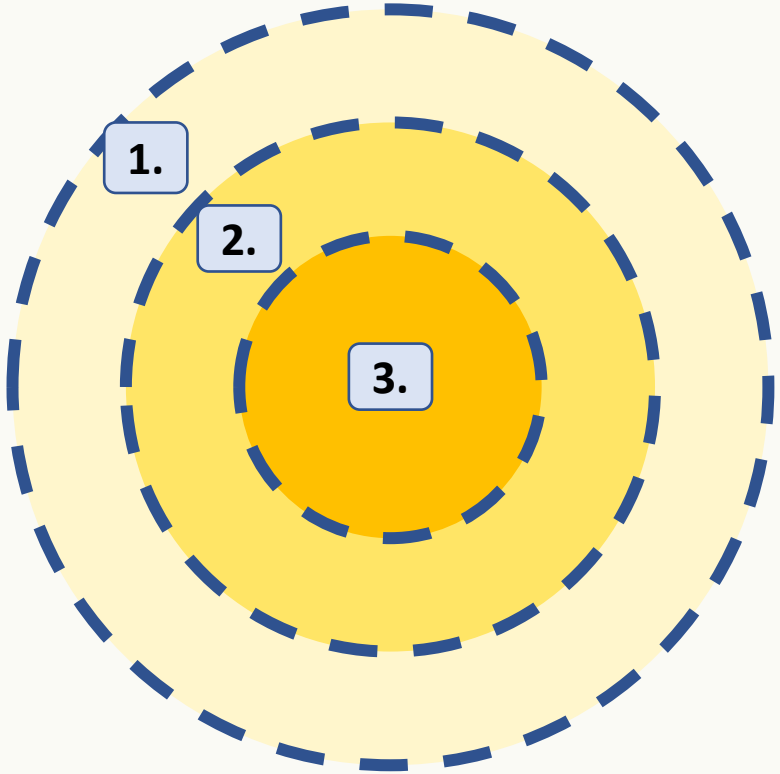
- **Local level**: civic solidarity
- **National level**: redistributive solidarity
- **Regional level**: democratic solidarity
- **Global level:** universal solidarity?



→ Rainer Bauböck

Concrete Step: Solidarity

→ Application: belonging in the EU?



Step 1: Belonging as basis of solidarity?

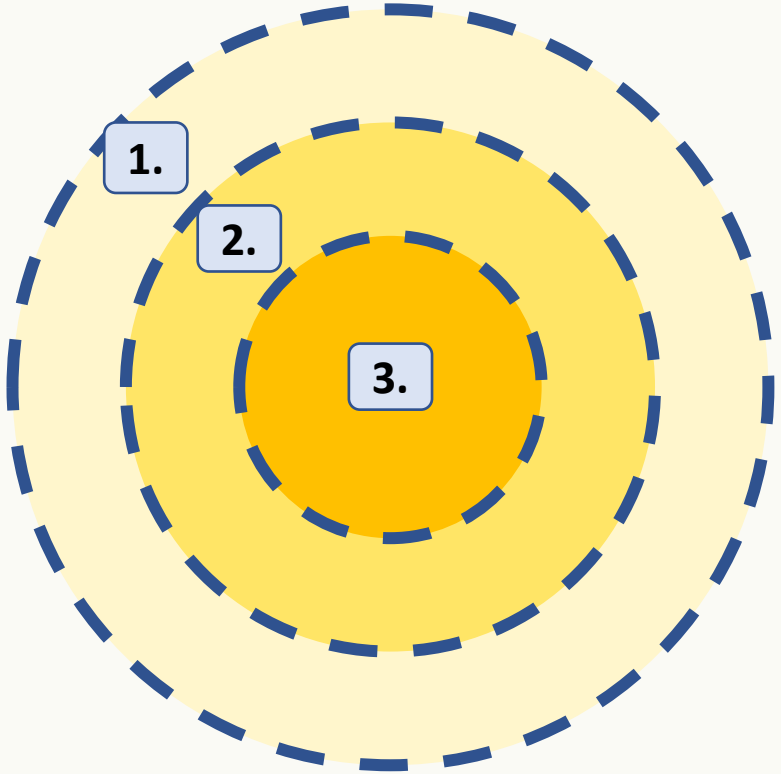
Deeply rooted in EU law!

"genuine" or a "real link" (integration requirements) as condition for residence rights/social assistance
→ Collins, C-138/02, paras. 67-69.
→ D'Hoop, C-224/98, paras. 38 ff.

"*solidarity is usually based on* ***belonging to a community****, be it national, professional, family or European, which allows for the exclusion of those who are not members of the community, given that burden sharing with them is perceived as unreasonable.*"
(AG Capeta, Chief Appeals Officer, para. 134)

Concrete Step: Solidarity

→ Application: belonging in the EU?



Step 1: Belonging as basis of solidarity?

Step 2: Belonging to what?

> "ties Member State nationals to a wider European society based on common values"
> (AG Capeta, Safi, para. 80)

Belonging to ***a Member State*** society = proxy for belonging to ***European society***?

Step 3: Belonging of what kind?

Member States retain "broad discretion" (para 95)!

Is purchasing enough? → Democratic equality?!

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Outlook

Impact on Union Citizenship

Ideal types:

- Liberal: citizenship as rights
- Republican: citizenship as participation
- Communitarian: citizenship as belonging

Citizenship first, belonging second?

"EU citizenship is a novel status whose objective is to create a sense of belonging"

(Lenaerts and Guttiérez-Fons, p 779)

"European citizenship was to help define the European identity by giving its people the sense of belonging to a collective endeavour but it was also about legitimizing that endeavour"
(Barnard and Leinarte)

→ Associational theories

Belonging first, citizenship second?

*"nationality is a legal bond having as its basis a **social fact** of attachment, a genuine connection of existence, interests and sentiments"*

ICJ, judgment of 6 April 1955, *Nottebohm*, ICJ Reports 1955, p. 4, p. 23

→ Communitarian or republican theories

Impact on Union Citizenship

Ideal types:

- Liberal: citizenship as rights
- Republican: citizenship as participation
- Communitarian: citizenship as belonging

→*"republican notions of participation remain the Achilles heel of EU citizenship"*
(Richard Bellamy, Dario Castiglione & Jo Shaw)

Article 20(2) TFEU: *"Citizens of the Union shall enjoy the rights and be subject to the* ***duties*** *provided for in the Treaties."*

Maria Haag, *EU Citizenship and Responsibility* (Hart 2026)

Sarah Ganty, 'Integration duties in the European Union: Four models' (2021) 28 MJ 784

vs

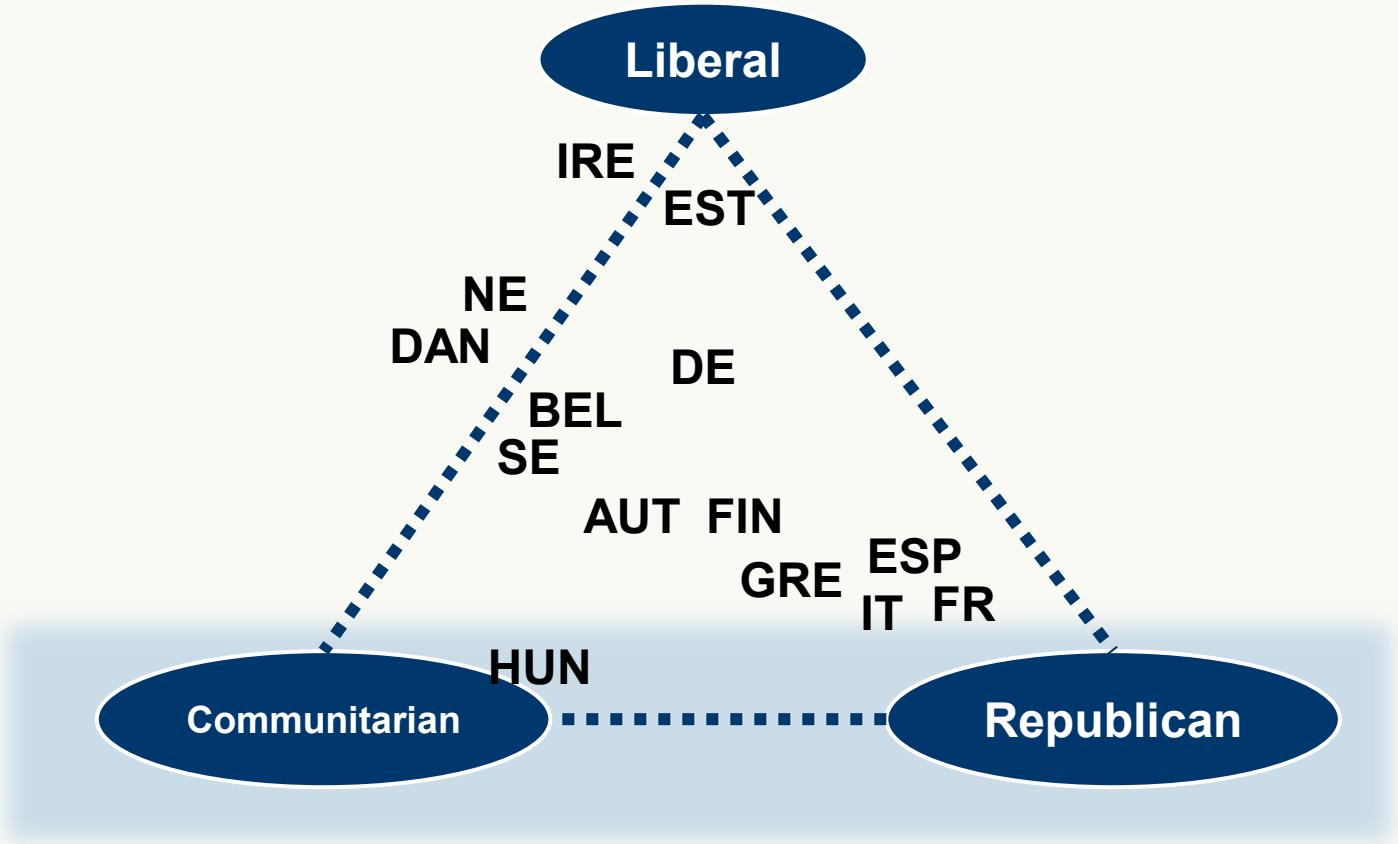
Richard Bellamy, 'A Duty-Free Europe?' (2015) 21 ELJ 558

Dimitry Kochenov, ' EU Citizenship without Duties' (2014) 20 ELJ 482

Impact on Member State Nationality

Ideal types:

- Liberal: citizenship as rights
- Republican: citizenship as participation
- Communitarian: citizenship as belonging



Source: Hoskins et al., Analytic Report. Participatory Citizenship in the European Union, European Commission, 2012

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