

ARTICLE

Revising Citizenship within the European Union: Is a Genuine Link Requirement the Way Forward?

Martijn van den Brink¹ 

¹Hertie School of Governance, Berlin, Germany

Corresponding author: vandenbrink@hertie-school.org

(Received 11 January 2021; accepted 15 March 2021)

Abstract

EU institutions have argued on several occasions that national and EU citizenship should not be awarded without any genuine link with the Member State concerned. Some scholars have adopted the same position, justifying their position referring to the genuine link requirement established by the International Court of Justice in *Nottebohm*. This has prompted criticism from legal scholars, who point out that *Nottebohm* was wrong as a matter of international law and moral principle. This paper shows that supporters and critics have failed to recognise that they have been talking with different conceptions of the genuine link requirement in mind. The question of whether to apply a genuine link requirement for the recognition of nationality is altogether different from the question of whether to apply a genuine link requirement for the acquisition of nationality. *Nottebohm* concerns the first; the arguments of EU institutions the second. The argument of EU institutions cannot therefore be dismissed by dismissing *Nottebohm*. I subsequently explore the normative arguments for predicating the boundaries of national membership on a genuine link requirement. There are weighty moral reasons for member states to condition the acquisition of national and EU citizenship on the presence of a genuine link. Finally, moving from the normative to the practical, I argue that such a requirement would have far-reaching consequences (targeting not just investor citizenship schemes) and cannot be enforced as a requirement under EU law.

Keywords: EU citizenship; genuine links; investor citizenship; *Nottebohm*

A. Introduction

Two opposing trends have been identified regarding the evolution of rules on the acquisition of citizenship. On the one hand, the possibility of acquiring citizenship through naturalization has been restricted for most immigrants by many states in recent years. Linguistic and civic integration tests were introduced, residency requirements extended, and the financial requirements made more stringent all with the purpose of reinforcing the boundaries of national membership. On the other hand, at the same time states were fortifying the boundaries of citizenship, they were lowering the drawbridge for a lucky few—especially for those with financial resources large enough to gain citizenship by investment or for those with special ancestral ties to the state.¹ Critics of these developments highlight the growing inequalities with respect to the possibility of acquiring national citizenship. In order to tackle these inequalities, they have proposed conditioning the

Martijn van den Brink is a Postdoctoral Fellow in the Jacques Delors Centre at the Hertie School of Governance.

¹For a discussion of these contradictions, see Ayelet Shachar, *The Marketization of Citizenship in an Age of Restrictionism*, 32 ETHICS & INT'L AFF. 3–13 (2018); Liav Orgad, *Naturalization*, in OXFORD HANDBOOK OF CITIZENSHIP (Ayelet Shachar et al. eds., 2017).

© The Author(s) 2022. Published by Cambridge University Press on behalf of the *German Law Journal*. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (<https://creativecommons.org/licenses/by/4.0/>), which permits unrestricted re-use, distribution, and reproduction in any medium, provided the original work is properly cited.

acquisition of citizenship on a *genuine link requirement*, the idea being that the conferral of citizenship should be reserved for those with social membership of the conferring state.²

This idea has been taken up in recent years by European Union (EU) institutions keen on tackling investor citizenship schemes within the EU. Several EU member states grant citizenship in exchange for capital transfers or the purchase of property or government bonds.³ The main criticism of these practices relates to the fact that the EU has its own citizenship that is derived from the nationalities of the member states. According to Article 20 of the Treaty on the Functioning of the European Union, “every person holding the nationality of a Member State shall be a citizen of the Union.”⁴ By 2014, the European Parliament had already adopted a resolution which stated that the possibility of acquiring national—and thereby EU—citizenship by investment “undermines the very concept of European citizenship.”⁵ In 2019, the European Commission followed up on this resolution by adopting a report on investor citizenship and residence schemes within the EU, in which it argued that Member States must ensure “that nationality is not awarded absent any genuine link to the country or its citizens.”⁶ And on October 20, 2020, it launched legal proceedings against Cyprus and Malta regarding their investor citizenship schemes. The European Commission stated that “the granting of EU citizenship for pre-determined payments or investments without any *genuine link* with the Member States concerned, undermines the essence of EU citizenship.”⁷

However, there is growing resistance to the idea of subjecting the acquisition and loss of citizenship to a genuine link requirement. As we shall see, both the practical aspects of introducing such a requirement, and its normative foundations have been called into question. Proponents of a genuine link requirement often appeal to the *Nottebohm* case from the International Court of Justice (ICJ), where the Court decided that States were not required to recognize the grant of nationality made by another State where the individual did not enjoy a genuine link with the conferring state.⁸ Critics have cast doubt on both the legal effects of the *Nottebohm* judgment and the normative justifications for the genuine link requirement adopted therein; I will argue that they have done so for good reasons. On this basis, critics also contest the legal proceedings brought by the EU against national investor citizenship schemes. They argue that the EU should not, and cannot, demand that Member States use a genuine link requirement to determine who to grant their nationality

²See JOSEPH H. CARENS, *The Theory of Social Membership*, in ETHICS OF IMMIGRATION 158 (2013); AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY 166–70 (2009); Rainer Bauböck, *Democratic Inclusion: A Pluralist Theory of Citizenship*, in DEMOCRATIC INCLUSION: RAINER BAUBÖCK IN DIALOGUE 3, 44 (Rainer Bauböck ed., 2018).

³For an overview, see Kristin Surak, *Global Citizenship 2.0: The Growth of Citizenship by Investment Programs*, INV. MIGRATION WORKING PAPER 3/2016 (2016), https://www.academia.edu/43225143/Global_Citizenship_2_0_The_Growth_of_Citizenship_by_Investment_Programs; Jelena Džankić, *Ius Pecuniae in a Multilevel System: The European Experience*, in THE GLOBAL MARKET FOR INVESTOR CITIZENSHIP 171–222 (2019); *Commission Staff Working Document Accompanying the Report on Investor Citizenship and Residence Schemes in the European Union*, Brussels, (SWD(2019) 5 final) (Jan. 23, 2019).

⁴See Consolidated Version of the Treaty on the Functioning of the European Union art. 20, Oct. 26, 2012, 2012 O.J. (C 326) [hereinafter TFEU].

⁵See Joint Motion for a Resolution on EU Citizenship for Sale, PARL. EUR. DOC. 2013/2995(RSP) (Jan. 14, 2014), <<https://www.europarl.europa.eu/sides/getDoc.do?reference=P7-RC-2014-0015&type=MOTION&language=EN&redirect>>. See also Amandine Scherrer & Elodie Thirion, *Citizenship by Investment (CBI) and Residency by Investment (RBI) Schemes in the EU: State of Play, Issues, and Impacts*, EUR. PARL. RSCH. SERV., Oct. 2018, at 49; Resolution on EU Citizenship for Sale, 2014 O.J. (C 482), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014IP0038%2801%29>.

⁶See *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Investor Citizenship and Residence Schemes in the European Union*, Brussels, at 6, COM (2019) 12 final (Jan. 23, 2019), https://ec.europa.eu/info/sites/default/files/com_2019_12_final_report.pdf.

⁷See European Commission Press Release, *Investor Citizenship Schemes: European Commission Opens Infringements Against Cyprus and Malta for “Selling” EU Citizenship* (Oct. 20, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1925.

⁸See *Nottebohm (Liech. v. Guat.) (Second Phase)*, Judgment, 1955 I.C.J. Rep. 4 (Apr. 4).

and thereby EU citizenship. This prompts the question which this article answers: Is introducing a genuine link requirement as a condition for the acquisition of EU citizenship the way forward?

I will first attempt to clarify the terms of the debate on genuine links. Supporters and critics of this principle have often failed to recognize that they have been talking at cross-purposes and with different conceptions of the genuine link requirement in mind. Supporters want to condition the *granting* of citizenship on the existence of a genuine link, but draw on international case law that conditions the *recognition* of citizenship on the existence of a genuine link in support of this view.⁹ Critics rightly criticize the idea of conditioning the *recognition* of citizenship on a genuine link requirement. However, they wrongly assume that their criticism also undermines the arguments for conditioning the *granting* of citizenship on such a requirement.¹⁰ Subsequently, I explore the normative arguments for predicating the boundaries of national membership on a genuine link requirement and argue that there are strong moral reasons for allowing migrants with genuine links to naturalize.¹¹ Finally, moving from the theoretical to the practical, I argue that, although it may be desirable for member states to condition the acquisition of national and EU citizenship on the presence of a genuine link, it appears difficult for the EU to enforce such a requirement.¹²

B. Genuine Links: Recognizing and Allocating Nationality

Citizenship and migration theorists have debated at length what States owe to persons who are not their nationals, but who reside within their territory. Many share the view that what matters morally is social membership. They agree with Joseph Carens “that living within the territorial boundaries of a state makes one a member of society, that this social membership gives rise to moral claims in relation to the political community, and that these claims deepen over time.”¹³ Over time, residents acquire a moral claim to be included in the national citizenry. Some scholars have found support for this idea “from an unexpected source: The jurisprudence of international law.”¹⁴ They support their theories of social membership with the genuine links doctrine established by the ICJ in the *Nottebohm* decision, believing the ICJ decided the conferral of citizenship should depend on the existence of a genuine link to the conferring state.¹⁵ This judgment is also invoked by the European Commission in support of its argument that Member States must ensure that nationality is not granted absent any genuine link.¹⁶ As Viviane Reading, the former Vice-President of the Commission, said in her speech to the European Parliament: “In compliance with the criterion used under public international law, member states should only award citizenship to persons where there is a ‘genuine link’ or ‘genuine connection’ to the country in question.”¹⁷

However, it is precisely because theories of social membership, and increasingly the policies of EU institutions, build on *Nottebohm* that they have been criticized. As Audrey Macklin observes,

⁹I have drawn attention to this before in Martijn van den Brink, *A Qualified Defence of the Primacy of Nationality Over European Union Citizenship*, 69 INT’L & COMPAR. L. QUARTERLY 177–202 (2020).

¹⁰See *infra* Section B.

¹¹See *infra* Section C.

¹²See *infra* Section D.

¹³See CARENS, *supra* note 2, at 158.

¹⁴See SHACHAR, *supra* note 2, at 166.

¹⁵See Bauböck, *supra* note 2, at 44; SHACHAR, *supra* note 2, at 166–70; Samantha Besson, *Investment Citizenship and Democracy in a Global Age: Towards a Democratic Interpretation of International Nationality Law*, 29 SWISS REV. INT’L & EUR. L. 525–47 (2019). See also Džankić, *supra* note 3, at 73–76; Diane F. Orentlicher, *Citizenship and National Identity*, in INTERNATIONAL LAW AND ETHNIC CONFLICT 296 (David Wippman ed., 1998); Odile Ammann, *Passports for Sale: How (Un)Meritocratic Are Citizenship by Investment Programmes?*, 22 EUR. J. MIGRATION L. 309, 327–28 (2020).

¹⁶See Report from the Commission, *supra* note 6, at 5–6.

¹⁷See Viviane Reading, Vice-President of the Eur. Comm’n, EU Just. Comm’n, Plenary Session debate of the European Parliament on “EU citizenship for sale,” Citizenship must not be up for sale (Jan. 15, 2014). See also Sergio Carrera, *The Price of EU Citizenship: The Maltese Citizenship-for-Sale Affair and the Principle of Sincere Cooperation in Nationality Matters*, 21 MAASTRICHT J. EUR. COMP. L. 406, 417–19 (2014).

“[a]mong legal scholars who take *Nottebohm* seriously as jurisprudence, there is strong consensus that *Nottebohm* was wrong then, and may be even more wrong now.”¹⁸ The judgment was critically received from the outset and was said to be deficient in its reasoning and to be lacking a basis in international law.¹⁹ One of the main problems was ambiguity regarding its scope of application. Although the decision was framed broadly, it was directed at very specific cases of recognition of nationalities lawfully granted under national law but the scope and meaning of the decision is unclear even on this point. There has been debate about whether the chief concern of the judges was dual nationality in the context of diplomatic protection or abuses of rights.²⁰ What is clear, however, is that it was not the intention to establish general criteria of international law relating to nationality. More importantly, although *Nottebohm* has exceptionally been relied upon by some international tribunals, it was largely confined to its facts in the years following the decision. And since then, it has been largely relegated to the annals of international law history.²¹ The criterion of genuine link has been expressly rejected on different occasions by different international tribunals, including by the EU’s own Court of Justice.²² It is, in the words of Peter Spiro, little more than a “jurisprudential illusion.”²³

More problematic than the fact that the genuine link requirement is dead letter, is that its application would prove morally damaging. The facts in *Nottebohm* show how harmful the enforcement of a genuine link requirement can be. Mr. Nottebohm was a German national but a long-term resident in Guatemala, where he had significant business interests. In order to protect these interests, he became a national of Liechtenstein at the outbreak of World War II, which resulted in the automatic loss of his German nationality. By reading a principle of genuine links into international law, and by allowing Guatemala to refuse to recognize his newly acquired nationality, the ICJ rendered Mr. Nottebohm stateless for the purpose of diplomatic protection.²⁴ In his dissenting opinion, Judge Read observed that that the same fate could befall hundreds of thousands—if not millions—of citizens residing abroad.²⁵ It is easy to see how the negative consequences of *Nottebohm* would be many times worse in today’s globalized world. Dual nationality is now much more widespread and accepted than it was then, and individuals have become far more mobile, often maintaining social ties with different countries.²⁶ A genuine link requirement in the sense of *Nottebohm* would leave many mobile persons vulnerable and could have far-reaching consequences for the right to diplomatic protection. As the International Law Commission has pointed out, it would:

Exclude literally millions of persons from the benefit of diplomatic protection. In today’s world of economic globalisation and migration, there are millions of persons who have drifted away from their State of nationality and made their lives in States whose nationality they never acquire. Moreover, there are countless others who have acquired nationality by

¹⁸See Audrey Macklin, *Is it Time to Retire Nottebohm?*, 111 AM. J. INT’L L. 492, 492 (2017).

¹⁹See, e.g., Joseph L. Kunz, *The Nottebohm Judgment*, 54 AM. J. INT’L L. 536 (1960).

²⁰See also Robert Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, 50 HARV. INT’L L. J. 1 (2009); Peter Spiro, *Nottebohm and “Genuine Link”: Anatomy of a Jurisprudential Illusion*, IMC WORKING PAPER 01/2019, <https://investmentmigration.org/wp-content/uploads/2020/10/IMC-RP-2019-1-Peter-Spiro.pdf>; Dimitry Kochenov & Justin Lindeboom, *Pluralism Through Its Denial: The Success of EU Citizenship*, in RESEARCH HANDBOOK ON LEGAL PLURALISM AND EU LAW 179, 181–82 (G. T. Davies & Matej Avbelj eds., 2018).

²¹For in-depth discussion of the relevant jurisprudence, see Sloane, *supra* note 20; Spiro, *supra* note 20.

²²See Case C-369/90, Mario Vicente Micheletti et al. v. Delegación del Gobierno en Cantabria, ECLI: EU:C:1992:295 (July 7, 1992).

²³See Spiro, *supra* note 20. See also Rayner Thwaites, *The Life and Times of the Genuine Link*, 49 VICTORIA UNIV. OF WELLINGTON L. REV. 645 (2018).

²⁴See Kunz, *supra* note 19, at 566; Macklin, *supra* note 18, at 494; Sloane, *supra* note 20, at 16.

²⁵See *Nottebohm* (Liech. v. Guat.) (Second Phase), Judgment, 1955 I.C.J. Rep. 4, 44 (Apr. 4) (dissenting opinion by Read, J.).

²⁶See Spiro, *supra* note 20, at 17–18.

birth, descent or operation of law of States with which they have the most tenuous connection.²⁷

This alone gives sufficient reason to assume that it is a good thing that *Nottebohm* is no longer good law.

As far as the EU is concerned, there are even better reasons for rejecting the reasoning supporting the ICJ's conclusions in the *Nottebohm* case.²⁸ EU citizenship is the derivative status of nationals of EU Member States. It mediates the relationship of nationals of EU Member States with those Member States of which they are not nationals. The acquisition and loss of the status of EU citizenship, and thereby also the rights attached to this status, depend on the acquisition and loss of Member State nationality. These rights include the right to move and reside freely within the territory of the EU and the political rights to vote for, and stand as, candidates in municipal elections and elections to the European Parliament.²⁹ For many EU citizens, the enjoyment of these rights could be jeopardized if Member States were allowed to refuse to recognize the nationality—and with that EU citizenship—of persons who, in their view, have no genuine link with the Member State of which they are nationals. To prevent this, the EU Court of Justice (CJEU) ruled against national rules that impose additional conditions for the recognition of nationality as early as the *Micheletti* case in 1992. The CJEU stated that it is impermissible for Member States “to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality.”³⁰ More recently, in the *Lounes* case, the Court affirmed that “member states cannot restrict the effects that follow from holding the nationality of another Member State, in particular the rights which are attendant thereon under EU law and which are triggered by a citizen exercising his freedom of movement.”³¹

Is the argument for making the acquisition of citizenship conditional on a genuine link, therefore, a misleading one? Perhaps surprisingly, in light of the above conclusions, the answer should be: *No it is not*. After all—and this is where the crux of the matter begins—the question of whether to apply a genuine link requirement for the *recognition* of nationality is altogether different from the question of whether to apply a genuine link requirement for the *acquisition* of nationality. These two questions are confounded by almost everyone, both supporters and opponents of genuine links. The ICJ's opinion may have been confusing, but the *Nottebohm* case concerned the recognition, not the acquisition, of nationality. In fact, with regard to acquisition, the ICJ confirmed that it is for each “sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality.”³² Therefore, contrary to what the EU institutions and several political theorists have come to suppose, the jurisprudence of international law offers *no* support for the position that the acquisition of nationality must depend on the existence of a genuine link. Critics have been correct to point this out, and to emphasize the errors made by the ICJ in the *Nottebohm* case. However, contrary to what they assume, from the fact that the judgment was problematic as a matter of international law and normative principle, it does not follow that the argument for conditioning the acquisition of national citizenship—and thereby EU citizenship—on a genuine link is morally flawed as well. It is impossible to justify the conclusion that granting citizenship should not depend on a genuine link based on a finding that *Nottebohm* is flawed, simply because this ruling is unrelated to the acquisition of nationality. Therefore, the case

²⁷See Int'l Law Comm'n, First Report on Diplomatic Protection, U.N. Doc. A/CN.4/506, para. 117 (2000).

²⁸For an extensive argument to this effect, see Dimitry Kochenov, *Genuine Purity of Blood: The 2019 Report on Investor Citizenship and Residence in the European Union and its Litigious Progeny*, LEQS Paper No. 164/2020 (Dec. 2020).

²⁹See TFEU arts. 20–24.

³⁰See *Micheletti*, *supra* note 22, at para. 10. See also Case C-148/02, *Carlos Garcia Avello v. Belgian State*, ECLI:EU:C:2003:539, para. 28 (Oct. 2, 2003).

³¹See Case C-165/16, *Toufik Lounes v. Sec'y of State for the Home Dep't*, ECLI:EU:C:2017:862 (Nov. 11, 2017), para. 55, <http://curia.europa.eu/juris/liste.jsf?num=C-165/16>.

³²See *Liech. v. Guat.*, 1955 I.C.J. Rep. 4, at 20. See also Spiro, *supra* note 20, at 7–8.

for conditioning the conferral of national membership on a genuine link—as proposed by some political theorists and EU institutions—must be assessed on its own merits, not on the basis of international law.

C. Genuine Links as a Condition for the Acquisition of Citizenship?

In this section, I show that there are significant moral reasons for ascribing weight to the social ties of individuals in determining the boundaries of citizenship. People with genuine links to a society have a moral claim to membership of that society. However, before discussing the moral salience of genuine links, I wish to dispense with the objection that the idea of a genuine link requirement is practically unattainable.

I. Genuine Links: Proxies and Practice

While each person develops social ties with his or her place of residence, people identify differently with the society where they live and develop different sorts of social and political relations with its political institutions and their fellow residents. In other words, genuine links are subjective; they differ from person to person and are not objectively measurable. This has led to two closely related objections to conditioning the boundaries of membership on the principle of genuine links. On the one hand, because social ties are subjective, Spiro has argued that it “does not translate into a practical standard for the allocation of nationality.”³³ In my view, this is a weak objection, not because the social ties individuals have in relation to particular societies are clearly and objectively measurable, but because it is possible to devise practical standards that serve as proxies for genuine links. On the other hand, the second objection is that such practical standards will be both over-inclusive and under-inclusive and will not be able to adequately measure immigrants' social ties.³⁴ While this is partly true, the fact that such practical standards are over-inclusive and under-inclusive is not, in itself, sufficient to reject the principle of genuine links.

The following example illustrates this point. In order to determine who is entitled to cast a vote in elections, democratic societies around the world apply a minimum age which citizens must have attained by the day of the election. The reason for applying a minimum age is not that age itself is morally relevant. Rather, societies use voting age as a practical device—a proxy—for political competence. The use of a minimum age as a proxy is justified on both principled and practical grounds.³⁵ It ensures that the allocation of political rights does not depend on morally problematic characteristics such as gender or ethnicity. Moreover, it is justified in the absence of objective instruments to measure political competence. And even if a representative test could be designed to test political competence, such as a questionnaire to be completed by citizens before each election, carrying out such a test would not only be massively complex and costly, but it could also create democratically problematic obstacles to the exercise of the right to vote. Therefore—like genuine links—political competence is not an ideal that provides practical standards for its realization. Yet, we do not object to the idea that the allocation of political rights must depend on political competence on this ground. Of course, we can recognize that a voting age is an imperfect—perhaps even arbitrary—practical yardstick. It is both over-inclusive and under-inclusive; excluding young but politically competent citizens from the ballot, while granting political rights to those who have reached the minimum age but do not have the necessary competence. However—as has been amply demonstrated by others—the fact that proxies can

³³See Spiro, *supra* note 20, at 22.

³⁴For such an argument, see Kieran Oberman, *Immigration, Citizenship, and Consent: What is Wrong with Permanent Alienage?: Immigration, Citizenship & Consent*, 25 J. POL. PHIL. 91, 94 (2016).

³⁵See also Timothy Endicott, *The Value of Vagueness*, in *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW* 14, 22–23 (Andrei Marmor & Scott Soames eds., 2011).

be over-inclusive and under-inclusive does not mean that there is anything inherently wrong with the use of such standards. Rather, the relevant question to ask is: What degree of over-inclusion and/or under-inclusion is acceptable in the relevant situation?³⁶

As I believe Joseph Carens has clearly shown, the use of proxies is also the best way of measuring immigrants' social ties to their country of residence. According to his theory of social membership, the social ties of immigrants to their country of residence determine their moral claims to legal rights and to citizenship. However, instead of suggesting that the legal rights and status of these persons should depend on their particular individual relationships and the degree of identification with their country of residence, his theory of social membership depends on only two criteria: "Residence and the passage of time."³⁷ He argues the following:

If we want to institutionalize a principle that gives weight to the degree to which a person has become a member of society and if we expect to have to deal with a large number of cases, we will want to use indicators of social membership that are relevant, objective, and easy to measure. Residence and time clearly meet these requirements. Other ways of assessing social membership do not.³⁸

Some will say that language or civic integration tests are a better way of measuring the social integration of immigrants and should complement residence requirements,³⁹ but this does not detract from the point made by Carens that certain proxies provide practical standards for the allocation of legal rights and legal status. In many cases, the EU also uses the criteria of residence and time as proxies for social integration with the aim of determining the status and rights of citizens and third-country nationals. For example, the right of permanent residence for both EU citizens and third-country nationals is subject to a continuous period of residence of five years.⁴⁰ Thus, there is sufficient reason to believe that the principle of genuine links can be translated into practical standards that are not morally arbitrary.

II. Should Genuine Links Matter for the Acquisition of Citizenship?

It may be practical, but is conditioning the status of citizenship on a genuine link also desirable? In this section, I argue that critics have been too quick to dismiss the principle of genuine links. To see why this is so, it is first of all necessary to understand that the principle of genuine links serves both as a mechanism for inclusion and exclusion. In the context of the debate on the boundaries of EU citizenship, the principle of genuine links is mostly invoked to argue that certain individuals are not entitled to the status and rights of EU citizenship. I suppose that this focus on the exclusionary side of the principle of genuine links is one of the reasons why this principle has not been well received by everyone. More often, however, theories of social membership purport to determine which persons whom are currently excluded from national citizenship should be included. I will first focus on migrants with genuine links to their country of residence and argue that they have a moral claim to membership of this society. With regard to migrants without genuine links,

³⁶See Sophia Moreau, *Equality Rights and Stereotypes*, in *PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW* 283, 291 (David Dyzenhaus & Malcolm Thorburn eds., 2016). See, e.g., FREDERICK SCHAUER, *PROFILES, PROBABILITIES AND STEREOTYPES* (2006).

³⁷See CARENS, *supra* note 2, at 164.

³⁸See CARENS, *supra* note 2, at 165.

³⁹For a general discussion, see *How Liberal are Citizenship Tests?* (EUI RSCAS Working Paper 2010/41) (Rainer Bauböck & Christian Joppke eds., 2010).

⁴⁰Regarding EU citizens, see Directive 2004/38/EC, of the European Parliament and Council on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States, 2004 O.J. 158/77, art 16(1). Regarding third-country nationals, see Council Directive 2003/109/EC, art. 4, Concerning the Status of Third-Country Nationals Who are Long-Term Residents, 2003 O.J. (L 016).

I will argue that they do not have such a moral claim. However, whether it is morally impermissible to grant them citizenship depends on specific moral and empirical assumptions which require further research.

The typical point of departure for theories of social membership is that citizenship is a morally arbitrary concept for the allocation of rights and duties among persons. As Shachar has argued, “criteria for attributing membership at birth are arbitrary: one is based on the accident of birth within particular geographical borders while the other is based on the sheer luck of descent.”⁴¹ Although States may have good reasons to grant membership at birth,⁴² migrants often have the same social connections to a particular State as its citizens. They may have grown up there or have built up a relationship with their state of residence over an extended period of time. And as residents, they cooperate and participate with fellow residents in the production of collective societal goods. Theories of social membership claim that such social connections are relevant and give migrants moral claims to legal rights and ultimately to citizenship.⁴³

Few theorists disagree with the basic moral assumptions behind such claims. Moreover, despite the escalating immigration rhetoric and harsher migration policies of the last two decades, democratic states around the world have steadily incorporated considerations of social membership into their domestic laws. They have decoupled legal rights from the status of citizenship. This trend has not been linear and uniform, but as a result of the international human rights regime and the social and political pressure generated by labor migration, most civil and social rights, and sometimes even political rights, are now derived from residence rather than citizenship.⁴⁴ The EU has also felt compelled to adopt legislation recognizing the social membership of persons without EU citizenship status. In 1999, the European Council committed itself to approximating as far as possible the legal status of third-country nationals to that of EU citizens.⁴⁵ Since then, the EU has adopted an extensive legislative framework granting specific legal rights to different groups of third-country nationals.⁴⁶ I do not suggest that these measures have dealt satisfactorily with the position of third-country nationals. However, it seems to me that most would agree that it was desirable for the EU to legislate in this domain in order to give legal recognition to the social reality that third-country nationals are social members of national societies as well as the EU as a whole. It also seems to me that, in so far as these measures are considered inadequate, this view stems in large part from the assumption that the EU has not done enough to recognize the genuine links third-country nationals establish during their periods of residence in Europe.

Although migrants enjoy most of the legal rights of citizenship, due to the strict naturalization requirements applied by many states, obtaining the legal status of citizenship is difficult for many immigrants.⁴⁷ Is this morally problematic from a social membership perspective? Should naturalization requirements also be conditioned on specific principles of social membership such as genuine links? Of course, the requirements imposed by states typically guarantee that genuine links exist by the time of naturalization. Practically everyone must obtain permanent residence under

⁴¹See SHACHAR, *supra* note 2, at 7.

⁴²For a defense of birthright citizenship, see Bauböck, *supra* note 2, at § 4.2.

⁴³See CARENS, *supra* note 2, at ch. 8.

⁴⁴See DAVID JACOBSON, *RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP* (1997); Miriam Feldblum, *Reconfiguring Citizenship in Western Europe, in CHALLENGE TO THE NATION-STATE: IMMIGRATION IN WESTERN EUROPE AND THE UNITED STATES 231* (Christian Joppke ed., 1998); David Owen, *Citizenship and Human Rights, in THE OXFORD HANDBOOK OF CITIZENSHIP* (Ayelet Shachar et al. eds., 2017).

⁴⁵See Council of the European Union, *Presidency Conclusions, Tampere European Council* (Oct. 15–16, 1999).

⁴⁶See Martijn van den Brink, *EU Citizenship and (Fundamental) Rights: Empirical, Normative, and Conceptual Problems*, 25 *EUR. L. J.* 21 (2019).

⁴⁷It must be recognized that both naturalization requirements and naturalization rates vary considerably from one Member State to another. See also Samuel Schmid, *Stagnated Liberalization, Long-Term Convergence, and Index Methodology: Three Lessons from the CITRIX Citizenship Policy Dataset*, 12 *GLOB. POL'Y* 338 (2021), <https://onlinelibrary.wiley.com/doi/10.1111/1758-5899.12903>; Jeremias Stadlmair, *Which Policies Matter? Explaining Naturalisation Rates Using Disaggregated Policy Data*, 46 *ÖSTERR. Z. FÜR POLIT.* 59 (2017).

national law, and often a language or civic integration test must be passed before a person can qualify for naturalization. It may be that in an era of growing mobility and acceptance of dual nationality, the social relationship of an increasing number of people with their country of citizenship is shallow,⁴⁸ but as Sloane rightly observed—and social science research has affirmed⁴⁹—the majority of citizens still “do self-identify, to a greater or lesser degree, by their nationality in the robust sociopolitical sense described by the genuine link theory.”⁵⁰ However, the relevant question is not whether citizens have genuine social ties to their country of nationality, but whether the conditions for naturalization should be linked to criteria of genuine links.

Naturalization conditions can fail to observe the principle of genuine links in two respects. On the one hand, the conditions for naturalization are often under-inclusive. States with strict naturalization rules may deny the possibility of naturalization to large groups of migrants whose social membership cannot be in doubt. On the other hand, the conditions for naturalization can be over-inclusive. As the investor migration schemes show, some states allow a select group of individuals without any meaningful social ties to acquire citizenship. As we have seen above, the fact that the practical standards used to determine the existence of genuine links are over-inclusive or under-inclusive is not sufficient to conclude that their use is impermissible. The question is what degree of over-inclusion and under-inclusion is permissible in specific contexts. To determine this, we should first know whether naturalization conditions must be defined in accordance with the principle of genuine links. I will consider over-inclusive and under-inclusive naturalization rules in turn.

With regard to under-inclusive naturalization rules, migrants who have been residents for an extended period of time and have become social members are not only entitled to the legal rights of citizenship, but to the legal status of citizenship as well. Because political rights are a class of rights still closely tied to citizenship, the moral wrong in denying migrants with genuine links the right to obtain citizenship is in large part a democratic wrong. Migrants participate in, and contribute to, the social and political life of their country of residence, and their lives, in turn, are determined by the political decisions taken by that country. They are coercively subjected to its laws, but lack important political rights that allow them to participate in the formation of these laws on an equal basis with the citizens of the country. This is so, despite the fact that they may have an equally strong stake as citizens in being a member of this country.⁵¹ This should be recognized by giving them the opportunity to acquire citizenship and the political rights that come with this status.

Within the EU, the exclusion of migrants from third-countries with strong social ties from citizenship constitutes not only a democratic wrong at the national level,⁵² but also such failure of democratic inclusion affects the EU’s own legitimacy as well. This is because national

⁴⁸See Spiro, *supra* note 20, at 22.

⁴⁹See, e.g., Andrea Schlenker, *Divided Loyalty? Identification and Political Participation of Dual Citizens in Switzerland*, 8 EUR. POL. SCI. REV. 517 (2015); Carlos Mendez & John Bachtler, *European Identity and Citizen Attitudes to Cohesion Policy: What Do We Know?*, COHESIFY RSCH. PAPER 1, 10 (2016). For a discussion of how measuring identity faces methodological difficulties, see Richard Sinnott, *An Evaluation of the Measurement of National, Subnational and Supranational Identity in Crossnational Surveys*, 18 INT’L J. PUB. OP. RSCH. 211 (2006). But as only 3–4 percent of the world’s population are migrants, there seems to be no reason to doubt the statement by Sloane.

⁵⁰See Sloane, *supra* note 20, at 30.

⁵¹The previous sentences possibly use different criteria for democratic inclusion. For present purposes, I am not interested in the question of which of the possible criteria is most plausible. In the present context, they seem to point in the same direction, namely in favor of the democratic inclusion of migrants who are social members. For a helpful discussion of the different principles of democratic inclusion, see Bauböck, *supra* note 2, at § 3.

⁵²I do not speak of second-country national migrants here—EU citizens moving from the Member State of which they are nationals to another Member State. As this article is about the acquisition of EU and national citizenship, it ignores those who already enjoy national and EU citizenship. Yet, it should be observed that second-country nationals can also suffer a moral wrong by being denied voting rights in the state where they reside. See, e.g., Rainer Bauböck, *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, 75 FORDHAM L. REV. 2393 (2007).

representative processes are key to the legitimization of EU policies and because national citizenship goes hand in hand with EU citizenship and the right to vote for, and stand in, elections to the European Parliament. An EU committed to democratic fairness has an interest in ensuring that migrants are not excluded permanently, or for an excessively long period, from national and EU citizenship. In other words, it has an interest in ensuring that the boundaries of national membership are predicated on standards that trace the genuine links of migrants.⁵³ How then should those boundaries be drawn? Views may differ as to how exactly to determine the existence of genuine links. It seems to me that after three to five years of residence, migrants will have established genuine social links. A naturalization requirement along these lines therefore does not appear to be too under-inclusive. In any case, the above discussion suggests that it is morally desirable for migrants with genuine links to have the right to obtain citizenship.

If being a social member of a society creates a moral right to the legal rights and status of citizenship, it follows that individuals without social membership—without genuine links—do not have a moral claim to the citizenship of that society and the rights that come with this status—at least not on these grounds. However, it does not follow from the fact that it is morally permissible to deny persons without genuine links citizenship that it is morally impermissible to grant them citizenship for investment or for another reason.⁵⁴ It seems to me that—all things being equal—naturalization rules that are under-inclusive and deny citizenship to persons *with* genuine links are morally more problematic than naturalization rules that are over-inclusive and grant citizenship to persons *without* genuine links. As long as over-inclusive naturalization rules do not violate the rights of others, they do not seem morally impermissible. In light of this, it is at least noteworthy that in recent years, the debate on the boundaries of EU citizenship has been more pre-occupied with denying access to those without genuine links than ensuring access for those with such ties.⁵⁵ What is needed is a more holistic debate on the relationship between national and EU citizenship, which does not focus on specific cases and problems, but tries to provide a consistent normative vision of citizenship within the EU.⁵⁶

That being said, it may be that over-inclusive naturalization schemes, such as investor citizenship programs, are problematic for other reasons. One concern regarding naturalization requirements not predicated on the principle of genuine links is that they have potential negative consequences for other Member States. The benefits granted to EU citizens include the right to travel throughout the EU, to reside in a Member State of which the citizen is not a national, and to enjoy—with limitations—the benefits of national citizenship. Decisions on the acquisition and loss of nationality are indeed not neutral with regard to other Member States. As I will stress in the last part of this article, this cannot, in itself, be an argument for limiting the competences of the Member States with regard to nationality, because any decision to grant nationality may have repercussions for other Member States. The question is whether naturalization rules which provide for the acquisition of nationality without a genuine link aggravate the risk of negative spill-over effects. Advocate General Maduro suggested in his opinion in the *Rottmann* case that the EU might have reasons to intervene “if a Member State were to carry out, without consulting the Commission or its partners, an unjustified mass naturalization of nationals of non-member

⁵³This draws on, van den Brink, *supra* note 9.

⁵⁴For a similar argument, see Javier Hidalgo, *Selling Citizenship: A Defence*, 33 J. APPLIED PHIL. 223 (2016).

⁵⁵The exception, perhaps, is the discussion about the loss of EU citizenship of British nationals after Brexit. But this debate had its own shortcomings, as I explain in Martijn van den Brink & Dimitry Kochenov, *Against Associate EU Citizenship*, 57 J. COMMON MKT. STUD. 1366 (2019).

⁵⁶For my attempt, see van den Brink, *supra* note 9. See also Rainer Bauböck, *Why European Citizenship? Normative Approaches to Supranational Union*, 8 THEORETICAL INQUIRIES L. 453 (2007); Oliver Garner, *The Existential Crisis of Citizenship of the European Union: The Argument for an Autonomous Status*, 20 CAMBRIDGE Y.B. EUR. LEGAL STUD. 116 (2018).

States.”⁵⁷ One frequently mentioned example in this respect is the Italian policy of granting citizenship to large numbers of people with Italian ancestry but without genuine links to Italy.⁵⁸ If the ability to naturalize without having genuine links does indeed undermine the legitimate interests of other Member States, such schemes would be morally problematic and there would be reasons to make the acquisition of national and EU citizenship subject to a genuine link requirement.

One legitimate concern regarding investor citizenship programs in particular is that they facilitate money laundering, corruption, and other forms of crime.⁵⁹ Such possible negative side effects certainly need to be addressed, but the question is whether these effects are intrinsically linked to investor migration programs. More evidence is needed to establish this. If not, these consequences can in large part be tackled by means other than a genuine link requirement—such as through better enforcement or updating of existing EU anti money laundering or immigration law policies.⁶⁰ Alternatively, if these consequences are inherent in the way investor migration regimes are designed and administered, then there are good reasons to question the desirability of these regimes as a whole.

These EU-related criticisms of over-inclusive naturalization schemes focus on the possible negative side-effects that citizenship acquisition policies that are not based on the principle of genuine links may have on other Member States. In addition, normative theorists have offered two more general criticisms of investor citizenship programs, which seem applicable to all naturalization rules that are not premised on the principle of genuine links. Namely, that such rules exacerbate inequalities between different categories of migrants and that they undermine the civic bonds between citizens that enable States to flourish.⁶¹ Both arguments strike me as possibly plausible, though I believe that further normative and empirical research is needed in order to settle the question of whether it is morally problematic to grant citizenship in the absence of genuine links.

According to the argument from equality, it is unfair that naturalization has been facilitated for the privileged few, while citizenship has become more difficult to obtain for most migrants. While I agree, this is not so much an argument against naturalization in the absence of genuine links as it is an argument for treating the majority of migrants fairly. The question, which I believe is still open to discussion, is whether it would also be morally problematic to allow migrants without genuine links to naturalize if States were to recognize the moral claims of migrants with genuine links by allowing them to obtain citizenship. Would it still be problematic to award citizenship in exchange for investment if other migrants would be treated fairly? The answer, it seems to me, depends on whether inequality is intrinsically objectionable or only when it produces further injustices.⁶² This is not the place to discuss this question. Suffice it to say that in the case inequality is not intrinsically wrong, the argument from equality cannot be aimed at over-inclusive naturalization rules.

With respect to the second argument, that naturalization conditions not predicated on a genuine link would undermine valuable civic relations between citizens, it should be observed that this is first of all an empirical claim. In respect of investor citizenship schemes, Hidalgo has argued that we lack the empirical evidence to validate this claim.⁶³ Indeed, it seems difficult to prove that

⁵⁷See Opinion of Advocate General Poiares Maduro at para. 30, Case C-135/08, *Janko Rottmann v. Freistaat Bayern* (Sept. 30, 2009), ECLI:EU:C:2009:588.

⁵⁸See Costica Dumbrava, *External Citizenship in EU Countries*, 37 *ETHNIC & RACIAL STUD.* 2340 (2014); Jo Shaw, *Citizenship for Sale: Could and Should the EU Intervene?*, in *DEBATING TRANSFORMATIONS OF NATIONAL CITIZENSHIP* (Rainer Bauböck ed., 2018).

⁵⁹See Report of the Commission, *supra* note 6; Scherrer, *supra* note 5; *European Getaway: Inside the Murky World of Golden Visas*, *TRANSPARENCY INT’L & GLOB. WITNESS* (Oct. 30, 2018).

⁶⁰For a discussion of these measures see Daniel Sarmiento & Martijn van den Brink, *EU Competence and Investor Migration*, in *THE LAW OF CITIZENSHIP AND MONEY* (Dimitry Kochenov & Kristin Surak eds., forthcoming).

⁶¹See Ayelet Shachar, *Citizenship for Sale?*, in *THE OXFORD HANDBOOK OF CITIZENSHIP* (Ayelet Shachar et al. eds., 2017).

⁶²See THOMAS SCANLON, *WHY DOES INEQUALITY MATTER?* (Julian Savulescu ed., 2018).

⁶³See Hidalgo, *supra* note 54, at 233–34.

granting citizenship to a select few without substantial social ties will have a significant detrimental impact on civic relationships. At the same time, it is not only a question of the consequences of a limited number of citizenship acquisitions, but also of what would be the consequences of citizenship schemes that would allow larger numbers of people to obtain citizenship without genuine links. If it is correct that the trust necessary to promote and maintain collective goods arises mainly among citizens with sufficiently strong reciprocal social and political ties,⁶⁴ awarding citizenship in the absence of genuine links may well be morally undesirable. Further empirical research is needed in order to settle this question.

D. Genuine Links in EU Law

The previous two sections allow us to evaluate the arguments of both the Commission and the European Parliament in favor of introducing a genuine link requirement as a condition for access to national, and thereby, EU citizenship. We saw that this is a plausible moral requirement, especially with regard to under-inclusive naturalization conditions which exclude migrants with genuine links from the right to naturalize. In this section, I will zoom in on the debate on investor citizenship in the EU, and in particular on the legal proceedings launched by the Commission against the investor citizenship schemes of Malta and Cyprus. In response to its arguments, I will make three points. First, based on the distinction offered in the first section, between the application of a genuine link in the context of *recognition* and *acquisition* of nationality, it appears that the Commission cannot be criticized for ignoring established case law in launching proceedings against Cyprus and Malta. Second, on the basis of the accepted definition of genuine links provided in the previous section, it appears that the objections of the Commission against investor citizenship ought to target a much larger set of naturalization rules than only investor citizenship schemes. Third, and partly following from this second point, this raises the question of whether a requirement of genuine links can be enforced as a matter of EU law. As I will argue, existing naturalization practices may be morally suspect but are not unlawful under EU law as it currently stands.

I. Genuine Links and the Recognition and Allocation of EU Citizenship

The first point concerns the decision of the Commission to push for a genuine link requirement by reference to the *Nottebohm* judgment. Critics of a genuine link requirement have been quick to point out the flaws of this argument. As Spiro and Kochenov rightly point out, this argument flies in the face of the common view that *Nottebohm* was bad law at the time and is dead letter these days.⁶⁵ They are also right to remind us that in its *Micheletti* judgment, the CJEU rejected an application of the principles laid down in *Nottebohm* within the framework of EU law.⁶⁶ And yet, contrary to what they assume, such criticism does not demonstrate that the Commission is wrong to emphasize the importance of a genuine link requirement. The reason is that *Nottebohm* concerned principles on the *recognition* of nationality, while the Commission is concerned with national rules on the *acquisition* of nationality. Those raise very different moral issues that should not be confused. As I explained above, there are moral reasons to reject the application of a genuine link requirement in relation to the recognition of nationality and to endorse such a principle in relation to the acquisition of nationality. The Commission should simply stop

⁶⁴See also DEMOCRACY AND TRUST (Mark Warren ed., 1999); Andrea Sangiovanni, *Global Justice, Reciprocity, and the State*, 35 PHIL. & PUB. AFF. 3, 32–33 (2007); Sarah Song, *The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State*, 4 INT'L THEORY 39, 59 (2012).

⁶⁵See Spiro, *supra* note 20; Dimitry Kochenov, *Investor Citizenship and Residence: The EU Commission's Incompetent Case for Blood and Soil*, VERFASSUNGSBLOG ON MATTERS CONST. (2019), <https://verfassungsblog.de/investor-citizenship-and-residence-the-eu-commissions-incompetent-case-for-blood-and-soil/>.

⁶⁶See *supra* Section B.

mentioning *Nottebohm* when it defends genuine links. Then it can no longer be criticized for misunderstanding international law and for suggesting that it wants to overturn established—and desirable—principles of EU citizenship law.

II. The Consequences of a Genuine Link Requirement

The second point concerns the consequences that should logically result from a decision to condition the acquisition of national and EU citizenship on a genuine link requirement. Before assessing whether a genuine link requirement can and should be enforced as a principle of EU citizenship law, I would like to explore these consequences. Since the Commission is only arguing against granting national and European citizenship without a genuine link, I will only examine the consequences of this argument and not go into the question of what would be the consequences of the opposite argument, that national and European citizenship should be granted to persons with a genuine link. As we will see, it will be a watershed moment for the relationship between national and EU citizenship for the CJEU to go along with the arguments put forward by the Commission in its legal proceedings against Malta and Cyprus—assuming the dispute reaches the CJEU. Not only will it herald the end of investor citizenship, but it may also open the door for further legal challenges to national citizenship policies.

The Commission considers “the granting of EU citizenship for pre-determined payments or investments without any genuine link with the Member States concerned, undermines the essence of EU citizenship.”⁶⁷ The press release in which it sets out its legal arguments is brief and all we can go on so far. It does not clarify whether the Commission considers the absence of genuine links alone as problematic, or whether granting EU citizenship for investment combined with the absence of genuine links justifies its legal challenge. Previously, however, it has suggested that violating the principle of genuine links is problematic in itself:

Since . . . a host Member State cannot limit the rights of naturalized Union citizens on grounds that they acquired the nationality of another Member State without any link with that awarding Member State, each Member State needs to ensure that nationality is not awarded absent any genuine link to the country or its citizens.⁶⁸

For the sake of understanding the potential scope and consequences of the legal arguments put forward, let us assume that the Commission indeed intends to make the national rules on the acquisition of citizenship subject to a genuine link requirement.

In that case, the arguments of the Commission ought to target a much larger set of nationality rules than only the two that are the subject of the legal infringement proceedings. At least three other practices that are enabled by domestic naturalization rules are incompatible with the principle of genuine links. First, this concerns some forms of discretionary naturalization. States across the world have provisions allowing for discretionary nationalization and the waiving of one or more of the naturalization conditions for migrants who have made, or are expected to make, an exceptional economic, cultural, scientific or athletic contribution.⁶⁹ Twenty-two EU Member States participate in this practice.⁷⁰ It is not the case that discretionary naturalization always benefits individuals without genuine links, but, as Džankić explains, discretionary naturalization is part of a wider transformation, which “has at its core, not a direct link between one individual and one state, but rather broader global dynamics in which States compete against

⁶⁷See European Commission Press Release, *supra* note 7.

⁶⁸See Report of the Commission, *supra* note 6.

⁶⁹See Džankić, *supra* note 3, at ch. 4; Ayelet Shachar, *Picking Winners: Olympic Citizenship and the Global Race for Talent*, 120 *YALE L. J.* 2088 (2011).

⁷⁰See Jelena Džankić, *Investment-Based Citizenship and Residence Programmes in the EU*, RSCAS WORKING PAPER 2015/08, 5–6 (Jan. 2015).

each other for limited human and material resources.”⁷¹ And Shachar observes that it “represents the rise of a more calculated approach to citizenship in which a premium is placed on individuals with extraordinary ability or talent, detaching it from the conventional genuine ties interpretations.”⁷² Second, several Member States have adopted naturalization policies that seek to remedy past injustices.⁷³ The example often given in this context is that of Spain and Portugal allowing the descendants of Sephardic Jews forced into exile in the 15th and 16th centuries to be naturalized.⁷⁴ It seems evident that descendants who have never lived in Spain or Portugal lack genuine connections with these societies. Third, many Member States have adopted investor *residence* schemes.⁷⁵ Some such schemes allow beneficiaries to acquire citizenship without actually being physically present within the country.⁷⁶ For example, participants in Portugal’s Golden Visa scheme need to be present for only seven days during the first year and for fourteen days during each subsequent period of two years.⁷⁷ If a Golden Visa is maintained for five years, the holder is entitled to permanent residence and, upon passing a basic language test, to Portuguese citizenship after six years.⁷⁸ Whether having a rudimentary understanding of Portuguese is sufficient to prove the existence of genuine links seems highly questionable.

Some may suggest interpreting the principle of genuine links in such a way that it includes only those naturalization practices that they find morally problematic. If it involves investment, it is not genuine; if it serves remedial justice, it is. Of course, if granting citizenship to individuals without genuine links is morally objectionable because it exacerbates inequalities or because it undermines valuable civic bonds between citizens, granting nationality to individuals whose ancestors were expelled centuries ago hardly seems less objectionable than granting nationality to individuals with deep pockets. More to the point, however, the concept of “genuine links” cannot be plausibly interpreted in the way proposed above. As I have explained, the principle of genuine links gives expression to the ideal that the granting of citizenship should be reserved for those who have social membership of the granting State: Those who have built up a relationship with their place of residence over a certain period of time. The Commission agrees with this interpretation, having said that a genuine link is “established either by birth in the country or by effective prior residence in the country for a meaningful duration.”⁷⁹ The principle of genuine links does not distinguish between different naturalization rules based on which objectives states pursue with their rules and how desirable they are. Thus, applying this principle as a principle of EU citizenship law should have far-reaching consequences and target many other naturalization practices besides investor citizenship.

III. Genuine Links and EU Law

This brings me to the third and final point: Should the principle of genuine links be a principle of EU law, as the Commission alleges in the infringement proceedings it launched against Cyprus

⁷¹See Džankić, *supra* note 3, at 97.

⁷²See Shachar, *supra* note 69, at 2094.

⁷³See ALEKSANDRA MAATSCH, *ETHNIC CITIZENSHIP REGIMES: EUROPEANIZATION, POST-WAR MIGRATION AND REDRESSING PAST WRONGS* (2011).

⁷⁴See Hans Ulrich Jessurun d’Oliveira, *Iberian Nationality Legislation and Sephardic Jews*, 11 EUR. CONST. L. REV. 13 (2015).

⁷⁵See also Sarmiento & van den Brink, *supra* note 60.

⁷⁶See Manuela Boatcă, *Commodification of Citizenship: Global Inequalities and the Modern Transmission of Property*, in *OVERCOMING GLOBAL INEQUALITIES 3* (Immanuel Maurice Wallerstein et al. eds., 2014).

⁷⁷For a detailed discussion of the developments of the Portuguese regime, see Luuk van der Baaren & Hanwei Li, *Wealth Influx, Wealth Exodus: Investment Migration from China to Portugal* (Inv. Migration Working Papers No. 1, 2018).

⁷⁸See Portuguese Nationality Act, Law 37/81, art. 6 (2006). Acquisition of Portuguese citizenship is even easier for their children, as explained in Christian Henrik Nesheim, *Portugal to Allow Birthright Citizenship from Tomorrow: Major Win for Golden Visa*, INVESTMENT MIGRATION INSIDER (Nov. 10, 2020), <https://www.imidaily.com/editors-picks/portugal-to-allow-birthright-citizenship-from-tomorrow-major-win-for-golden-visa/>.

⁷⁹See Report of the Commission, *supra* note 6, at 5.

and Malta regarding their investor citizenship schemes? Even if naturalization rules that violate the principle of genuine links are morally problematic, I doubt that they are unlawful under EU law. The Commission considers granting EU citizenship for pre-determined payments or investments without any genuine link with the Member States concerned violates the principle of sincere cooperation enshrined in Article 4(3) of the Treaty *and* undermines the essence of EU citizenship. The only argument the Commission offers in support of this position is that because the acquisition of EU citizenship is linked to the award of nationality, “the effects of investor citizenship schemes are neither limited to the Member States operating them, nor are they neutral with regard to other Member States and the EU as a whole.”⁸⁰ Surely this cannot be an argument for limiting the powers of the Member States to lay down the rules on the acquisition of nationality. Since any acquisition of nationality leads to the acquisition of EU citizenship, *no* decision to grant nationality is limited to the Member State making that decision or neutral with regard to other Member States. Are there other legal grounds on the basis of which naturalization rules not predicated on a genuine link requirement could be outlawed?

As I believe everyone will accept, the Treaties do not attribute to the EU the competence to define who can be a citizen of the Union.⁸¹ According to Article 20 TFEU, EU citizenship is derivative of Member State nationality—“Every person holding the nationality of a Member State shall be a citizen of the Union.” Additionally, this provision provides that European citizenship does not entail the suppression or alteration of Member State nationality—“Citizenship of the Union shall be additional to and not replace national citizenship.”⁸² These provisions were joined by three Declarations that all emphasize that decisions on the attribution of nationality are for the Member States to take,⁸³ including Declaration No. 2 on nationality of a Member State, which states expressly that “the question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned.”⁸⁴ In *Rottmann*, the CJEU recognized, referring to Declaration No. 2, that “the rules on the acquisition and loss of nationality fall within the competence of the Member States.”⁸⁵

It is established case law, however, that “Member States must exercise their powers in the sphere of nationality having due regard to European Union law.”⁸⁶ Still, there is no precedent for the argument that national rules on the acquisition and loss of nationality must be compatible with a genuine link requirement. Existing case law imposes two restrictions on the powers of the Member States in the sphere of nationality.⁸⁷ The first concerns the *recognition* of nationality. As we saw above, the CJEU decided in *Micheletti* and *Garcia Avello* that it is impermissible for Member States “to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality.”⁸⁸ The second concerns the *loss* of nationality. It is established in *Rottmann* and affirmed in *Tjebbes* that a decision that places EU citizens “in a position capable of causing him to lose the status [of EU citizenship]

⁸⁰See European Commission Press Release, *supra* note 7.

⁸¹See Sarmiento & van den Brink, *supra* note 60.

⁸²See TFEU art. 20.

⁸³For a critical discussion, see Andrew C. Evans, *Nationality Law and the Free Movement of Persons in the EEC: With Special Reference to the British Nationality Act 1981*, 2 Y.B. EUR. L. 173, 177–78 (1982); Gerard-René de Groot, *Towards a European Nationality Law*, 8 ELEC. J. COMP. L. (2004); Dimitry Kochenov, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights*, 15 COLUM. J. EUR. L. 169 (2008).

⁸⁴See Declaration on Nationality of a Member State, 1992 O.J. (C 191) 98, (EU).

⁸⁵See Opinion of Advocate General Maduro, *supra* note 57, at para. 37; Case C-221/17, *Tjebbes and others v. Minister van Buitenlandse Zaken*, ECLI:EU:C:2019:189 (Mar. 12, 2019).

⁸⁶See *Tjebbes and others*, Case C-221/17 at para 32. See also *Micheletti et al.*, Case C-369/90.

⁸⁷See also Jo Shaw, *Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism*, Robert Schuman Ctr. for Advanced Stud., Working Paper No. 2020/33, 31–35 (2020).

⁸⁸See *Micheletti et al.*, Case C-369/90 at para. 10; *Garcia Avello*, Case C-148/02, at para. 28.

and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.”⁸⁹ None of these decisions concern the *acquisition* of nationality, though the CJEU has been asked in *JY v. Wiener Landesregierung* (pending) whether the situation of a person “has renounced her only nationality of a Member State of the European Union, and thus her citizenship of the Union, in order to obtain the nationality of another Member State, having been given a guarantee by the other Member State of grant of the nationality applied for, and whose possibility of recovering citizenship of the Union is subsequently eliminated by revocation of that guarantee, fall, by reason of its nature and its consequences, within the scope of EU law.”⁹⁰

It is evident from the question asked, how unusual the factual circumstances of this case are. From an affirmative answer of the CJEU that, in such circumstances, the rules on the acquisition of nationality also fall within the scope of EU law, we will therefore not be able to deduce much as to whether or not Member States must observe the principle of genuine links.

It should also be noted that, despite all their glamor and fame, the aforementioned decisions impose hardly any restrictions on national citizenship laws. *Micheletti* and *Garcia Avello* merely expect of Member States that they recognize each other’s decisions as regards the acquisition of nationality. They do not challenge national rules on the loss and acquisition of national citizenship as such. *Rottmann* and *Tjebbes* were perhaps ground-breaking in terms of legal argumentation but it is unclear how much they changed in practice. These decisions established that it is for “the national court to ascertain whether the withdrawal decision at issue in the main proceedings observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law.”⁹¹ This involves taking into account “the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union.”⁹² However, despite the proportionality requirement, the applicant in *Rottmann* became stateless on the ground of having acquired the Member State nationality fraudulently.⁹³ The decision in the *Tjebbes* case had more tangible consequences, requiring the Dutch authorities to complement the rules on the loss of nationality with an individual assessment,⁹⁴ but did not trigger an amendment of these rules.

Therefore, while the CJEU has “challenged Member State sovereignty in nationality law,”⁹⁵ none of the developments in EU citizenship law over the last decade indicates that national rules not conditioned on a genuine link violate EU law. Nevertheless, the Commission considers that a genuine link requirement must be introduced, for the most part because national schemes violating this requirement violate the essence of EU citizenship. What to make of this argument? For a start, the essence of EU citizenship itself is controversial—which is one reason why it is difficult to build a case on this argument. Perhaps the Commission objects to the instrumentalization of EU citizenship and the possible cross-border implications of citizenship by investment programs. In this respect it is essential to remember that morally unjust naturalization regimes are not by definition unlawful under EU law. After all, if one element defines the essence of EU citizenship, it is

⁸⁹See Opinion of Advocate General Maduro, *supra* note 57, at para. 42; *Tjebbes and others*, Case C-221/17 at para. 32.

⁹⁰See Case C-118/20, *JY v. Wiener Landesregierung* (pending).

⁹¹See Opinion of Advocate General Maduro, *supra* note 57, at para. 55.

⁹²See *id.* at para. 56.

⁹³See also Nathan Cambien, *Case C-135/08, Janko Rottmann v. Freistaat Bayern*, 17 COLUM. J. EUR. L. 375 (2011); Dimitry Kochenov, *Case C-135/08, Janko Rottmann v. Freistaat Bayern, Judgment of 2 March 2010 (Grand Chamber)*, 47 COMMON MKT. L. REV. 1831 (2010).

⁹⁴See Raad van State, Uitspraak 201504577/2/A3, 201507057/2/A3, 201508588/2/A3, 201601993/2/A3, 201604943/1/A3 en 201608752/1/A3 (12 February 2020) ECLI:NL:RVS:2020:423.

⁹⁵See Jo Shaw, *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, Robert Schuman Ctr. for Advanced Stud., Working Paper No. 2011/62 (Jo Shaw ed., 2011).

that it is a status derived from Member State nationality. The CJEU may believe that EU citizenship is “destined to become the fundamental status of nationals of the Member States,”⁹⁶ but as Weiler has reminded us, this understanding of EU citizenship has always been hard to square with the “text, teleology and legislative history” of the Treaties.⁹⁷ In any case, the Treaties do not support the view that EU citizenship limits the competence of the Member States with regard to the acquisition of their nationality, as proposed by the Commission in its legal challenge to the investor citizenship schemes of Malta and Cyprus.⁹⁸ Both Article 20 of the TFEU and the Declarations on nationality attached to the Treaties support the view that nationality rules not predicated on a genuine link are compatible with the essence of EU citizenship.

In its press release announcing the launch of infringement proceedings against Cyprus and Malta, the Commission also mentions the principle of sincere cooperation as a reason to outlaw naturalization conditions not compatible with the principle of genuine links—or at least investor citizenship.⁹⁹ It is not entirely clear from this statement whether it considers the principle to be a self-standing or secondary argument. In the past, the Commission has always used it as a secondary argument in support of genuine links,¹⁰⁰ in which case it adds little to the argument concerning the essence of EU citizenship. Others have suggested that the principle can work as an independent argument against domestic citizenship programs that violate the principle of genuine links, or at least against investor citizenship programs.¹⁰¹ The principle of sincere cooperation has been interpreted in different ways, but generally includes an obligation to actively contribute to compliance with EU law and an obligation to abstain from conduct contrary to the objectives of the EU.¹⁰² As we have just seen, nationality rules that are incompatible with the principle of genuine links do not appear to violate EU law. Could it be said, however, that such rules contravene any other EU objective? It could perhaps be argued that this is the case where naturalization schemes encourage significant malpractices that undermine the interests of other Member States and the EU as a whole. For example, if investor citizenship schemes structurally facilitate money laundering and other criminal practices, there may be a moment where they indeed undermine the objectives the EU pursues and, with that, the principle of sincere cooperation. However, this argument would relate only to the side effects of such schemes and not to the practice as such. It is therefore unlikely—or at least unclear—that the introduction of the principle of genuine links into domestic nationality laws is necessary in order to comply with the principle of sincere cooperation.

Elsewhere I have argued that it is time to reconsider the current relationship between EU and national citizenship. I offered a qualified defence of the primacy of nationality over EU citizenship, which supports certain EU minimum standards which rules on the acquisition and loss of national citizenship must satisfy.¹⁰³ Others disagree and hold a different conception of what this relationship ought to be.¹⁰⁴ However, I believe that we should all be able to agree that the decision as to whether, and how, to alter this relationship should not be left to the CJEU. The revision of this relationship requires, first and foremost, an amendment of the Treaties, followed, if necessary, by

⁹⁶See Case C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, ECLI:EU:C:2001:458 (Sept. 20, 2001); Case C-34/09, *Ruiz Zambrano v. Office national d'emploi (ONEm)*, ECLI:EU:C:2011:124 (Mar. 8, 2011).

⁹⁷For more general criticism of the “destined to be the fundamental status” slogan, see J.H.H. Weiler, *Epilogue: Judging the Judges—Apology and Critique*, in *JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE* 235, 248 (Maurice Adams et al. eds., 2013).

⁹⁸For more general criticism of the “destined to be the fundamental status” slogan, see *id.* at 248.

⁹⁹See European Commission Press Release, *supra* note 7.

¹⁰⁰See Report from the Commission, *supra* note 6, at n. 35; European Parliament, Answer given by Mrs. Reading on behalf of the Commission (Mar. 28, 2014).

¹⁰¹See Carrera, *supra* note 17.

¹⁰²See MARCUS KLAMERT, *THE PRINCIPLE OF LOYALTY IN EU LAW* (1st ed. 2014).

¹⁰³See Van den Brink, *supra* note 9.

¹⁰⁴See Garner, *supra* note 56; Dora Kostakopoulou, *European Union Citizenship: Writing the Future*, 13 EUR. L. J. 623, 644 (2007).

the adoption of Europe-wide standards that further determine this relationship. Therefore, it is unlikely that the relationship between EU and national citizenship will undergo any significant changes in the near future. Unless the CJEU is prepared to ignore the limits laid down in the Treaties, the acquisition of national and EU citizenship will not be made conditional on the presence of a genuine link. Supporters of a genuine link requirement may dislike this conclusion, but alas, not everything that is immoral is also illegal.

E. Conclusion

This article seeks to distinguish a number of questions concerning the application of a genuine link requirement under EU citizenship law which are often confused both by supporters and critics of the principle of genuine links. I believe it is useful to distinguish four questions:

1. Should the principle of genuine links determine the *recognition* of nationality?
2. Should the principle of genuine links determine the *allocation* of nationality?
3. Should the principle of genuine links determine the *allocation* of EU citizenship?
4. Should the principle of genuine links be legally enforced as a principle of EU citizenship?

As EU citizenship is derived from the nationalities of the Member States, the second and third questions are closely related. With regard to the first question, I argued that it is morally unacceptable to make the recognition of nationality conditional on a genuine link. Such a condition would generate unacceptable uncertainty for mobile citizens. However, I explained that it does not follow that the allocation of nationality should not be made subject to a genuine link requirement. To the contrary, we saw that migrants with genuine links to a particular society have a moral claim to be included as full members of that society. Furthermore, I suggest that in certain circumstances it may be morally justifiable to exclude people without genuine links. These considerations apply also to the acquisition of EU citizenship. The answers to questions 2 and 3 are thus positive. On the other hand, I have explained why the answer to question 4 should be negative. The application of a genuine link requirement may be desirable but is unenforceable as a principle of EU law.