

**THE NATURE OF UNION CITIZENSHIP BETWEEN  
AUTONOMY AND DEPENDENCY ON (MEMBER) STATE  
CITIZENSHIP - A COMPARATIVE ANALYSIS OF THE  
ROTTMANN RULING, OR: HOW TO AVOID A  
EUROPEAN *DRED SCOTT* DECISION?\***

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**ABSTRACT**

The legal nature of EU citizenship remains a hotly debated issue, in particular in regards to its relationship with Member State citizenship/nationality. To this end, we comparatively analyze the ECJ's *Rottmann v. Freistaat Bayern* ruling on the withdrawal of EU citizenship and the US Supreme Court's infamous *Dred Scott v. Sandford* decision. The paper begins with a critical analysis of the relevant EU case law and literature. In *Rottmann*, the ECJ, for the first time, had to deal with an inherent tension between the *autonomous* EU legal order and EU citizenship's *dependency* on Member State nationality in case of EU citizenship withdrawal. We show that the ECJ took a rather cautious approach, leaving it mainly to the Member States and their courts to determine the "appropriateness" of EU citizenship withdrawal. While the ECJ's *Rottmann* approach has been criticized for being too cautious, we argue that the ECJ – wittingly or unwittingly – was well advised to take such cautious steps with regard to European citizenship. On the basis of an in-depth analysis of *Dred Scott*, we are able to demonstrate some of the chal-

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\* Section 3 of this article has been written by Dennis-Jonathan Mann. Kai P. Purnhagen has written section 2. Sections 1, 4 and 5 have been jointly written. We would like to thank an anonymous reviewer for helpful comments. We furthermore like to thank Julius Goldmann, Alexander Seitz and Nikolaos Simantiras for valuable editing support. © retained by the authors.

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lenges of shaping the boundaries of Union Citizenship. The separate opinions delivered in that decision provide interesting insight into the possible effects of overemphasizing either the dependency or autonomy element of citizenship in multi-level systems. Seen in that light, the ECJ may have been well advised to use a cautious, ‘middle-of the-road’ approach. Based on the comparative evidence from *Dred Scott*, we, however, find that the procedural implementation of the ECJ’s “*Rottmann* test” lacks teeth. As a result, Member States that seek to neglect the autonomous feature of European law can easily use it as a *carte blanche*. We conclude our paper by proposing a refined “*Rottmann* test” that avoids *Dred Scott*-style “all or nothing” excesses and yet can help to strengthen EU citizenship. Under such a refined test, withdrawal of Member State citizenship has to be justified by arguments from European law as well, which means that Member States may only withdraw European citizenship when their reasoning is soundly justified also by this standard. Given the lack of primary and secondary law in this respect *de lege lata*, these minimum legal requirements need to be defined by the ECJ. Unfortunately, in *Rottmann*, the ECJ missed the opportunity to do so in a coherent way.

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## 1. INTRODUCTION

When European citizenship was formally introduced into European primary law through the Treaty of Maastricht, it attracted considerable attention from European scholarship, especially with regard to its theoretical foundation.<sup>1</sup> Its subsequent development has also attracted considerable attention, particularly in the post-Maastricht and post-Amsterdam period.<sup>2</sup> Both, the Maastricht Treaty and the Amsterdam

<sup>1</sup> See for early studies on European citizenship in light of its introduction in the Maastricht Treaty see generally: Monographs and edited books: SILKE BENTJES, *DIE PERSONENVERKEHRSFREIHEITEN DES EWG-VERTRAGES UND IHRE AUSWIRKUNGEN AUF DAS DEUTSCHE VERFASSUNGSRECHT* (1992) (Ger.); PASCAL FONTAINE, *EUROPA DER BÜRGER* (2d ed. 1993) (Eur. Comm NIKOLAOS KOTALAKIDIS, *VON DER NATIONALEN STAATSANGEHÖRIGKEIT ZUR UNIONSBÜRGERSCHAFT* (2000) (Ger.); EPAMINODAS A. MARIAS, *EUR. INST. OF PUB. ADMIN., EUROPEAN CITIZENSHIP* (1994) (Neth.); ELIZABETH MEEHAN, *CITIZENSHIP AND THE EUROPEAN COMMUNITY* (1993). Articles in journals and edited books: Roberto Adam, *Prime Riflessioni sulla Cittadinanza dell'Unione*, 75 *RIVISTA DI DIRITTO INTERNAZIONALE* 622 (1992) (It.); Claude Blumann, *L'Europe des citoyens*, 34 *REVUE DU MARCHÉ COMMUN* 283 (1991) (Fr.); Kl.-D. Borchardt, *Der sozialrechtliche Gehalt der Unionsbürgerschaft*, 29 *NEUE JURISTISCHE WOCHENSCHRIFT* 2057 (2000) (Ger.); Jacques Bourrinet, *Vers une citoyenneté européenne – aspects économiques*, 35 *REVUE DU MARCHÉ COMMUN* 772 (1992) (Fr.); Carlos Clo-sa, *The Concept of Citizenship in the Treaty on European Union*, 29 *COMMON MKT. L. REV.* 1137 (1992) (Neth.); Gerard-René de Groot, *Auf dem Wege zu einer europäischen Staatsangehörigkeit*, in *EUROPA '93 – AUF DEM WEG ZUR EUROPÄISCHEN UNION* 87, 103 (Albert Bleckmann et al., eds., 1993) (Ger.); Ulrich Everling, *Von der Freizügigkeit der Arbeitnehmer zum Europäischen Bürgerrecht?*, 1 *EUROPARECHT: BEIHEFT S. 81* (1990) (Ger.); Hans-Georg Fischer, *Die Unionsbürgerschaft*, 1992 *EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT* 566 (Ger.); Yves Gautier, *Citoyenneté européenne*, in *DICTIONNAIRE JURIDIQUE DES COMMUNAUTÉS EUROPÉENNES* 161, 161–69 (Ami Barav et al. eds., 1993) (Fr.); Stephan Hobe, *Die Unionsbürgerschaft nach dem Vertrag von Maastricht*, 32 *DER STAAT* 245 (1993) (Ger.); Siegfried Magiera, *Die neuen Entwicklungen der Freizügigkeit für Personen: Auf dem Wege zu einem europäischen Bürgerstatut*, 27 *EUROPARECHT* 434 (1992) Ger.); David O'Keefe, *Union Citizenship*, in *LEGAL ISSUES OF THE MAASTRICHT TREATY* 87 (David O'Keefe & Patrick Twomey eds., 1994); Síofra O'Leary, *Nationality Law and Community Citizenship: A Tale of Two Uneasy Bedfellows*, 12 *Y.B. EUR. L.* 353 (1992); Joe Verhoeven, *Les citoyens de l'Europe*, 1993 *ANNALES DE DROIT DE LOUVAIN* 165 (Fr.).

<sup>2</sup> For more comprehensive studies within this period, see generally: Monographs and edited books: Malcolm Anderson, Monica den Boer & Gary Miller, *European Citizenship and Cooperation in Justice and Home Affairs*, in *MAASTRICHT AND BEYOND: BUILDING THE EUROPEAN UNION* 104, 104–22 (Andrew Duff, John Pinder & Roy Pryce eds., 1994); PAUL CLOSE, *CITIZENSHIP, EUROPE AND CHANGE* (1995); MARIE-JOSÉ GAROT, *LA CITOYENNETÉ DE L'UNION EUROPÉENNE*

Treaty triggered fundamental institutional changes to European law. The Maastricht Treaty established the EU as an umbrella organization for the different European communities and introduced European citizenship. The Amsterdam Treaty started the “democratization”-process of the EU by providing the EU parliament with more power. The increasing amount of recent scholarly work not only continues the tradition of inter-linking EU citizenship with the theoretical foundation of the EU,<sup>3</sup> but also investigates special issues of citizenship as such<sup>4</sup> and the similarly in-

(1999); ELLEN BRINCH JØRGENSEN, UNION CITIZENS: FREE MOVEMENT AND NON-DISCRIMINATION (1996); SÍOFRA O’LEARY, EUROPEAN UNION CITIZENSHIP: THE OPTIONS FOR REFORM (1996); SÍOFRA O’LEARY, THE EVOLVING CONCEPT OF COMMUNITY CITIZENSHIP: FROM THE FREE MOVEMENT OF PERSONS TO UNION CITIZENSHIP (1996); EUROPEAN CITIZENSHIP (Massimo La Torre ed., 1998); VINCENZO LIPPOLIS, LA CITTADINANZA EUROPEA (1994) (It.); PAUL MAGNETTE, LA CITOYENNETÉ EUROPÉENNE: DROITS, POLITIQUES, INSTITUTIONS (1999) (Belg.); NORBERT REICH, BÜRGERRECHTE IN DER EUROPÄISCHEN UNION (1999) (Ger.); A CITIZENS’ EUROPE: IN SEARCH OF A NEW ORDER (Allan Rosas & Esko Antola eds., 1995); CITIZENSHIP AND NATIONALITY STATUS IN THE NEW EUROPE (Síofra O’Leary & Teijja Tiilikainen eds., 1998); CHRISTOPH SCHÖNBERGER, UNIONSBÜRGER (Mohr Siebeck 2005) (F.R.G.); Articles in journals and edited books: Marianne Dony, *La citoyenneté européenne après Amsterdam*, in *LE TRAITÉ D’AMSTERDAM: ESPOIRS ET DÉCEPTIONS* 147 (Yves Lejeune ed., 1998) (Belg.); Stephen Hall, *Loss of Union Citizenship in Breach of Fundamental Rights*, 1996 EUR. L. REV. 129, 129–43; Meinhard Hilf, *Die Union und die Bürger: Nicht viel Neues, aber immerhin*, 24 INTEGRATION 247 (1997) (Ger.); Rey Koslowski, *Intra-EU Migration, Citizenship, and Political Union*, 32 J. COMMON MKT. STUD. 369 (1994).

<sup>3</sup> For recent examples, see *inter alia*, PETER M. HUBER, EUROPARECHT BEIHEFT 1: UNIONSBÜRGERSCHAFT UND SOZIALE RECHTE (Armin Hatje ed., 2007) (Ger.); Rainer Bauböck, *Why European Citizenship? Normative Approaches to Supranational Union*, 8 THEORETICAL INQUIRIES L. 453 (2007); Yuri Borgmann-Prebil, *The Rule of Reason in European Citizenship*, 14 EUR. L. J. 328 (2008); Alexander Somek, *Solidarity Decomposed: Being and Time in European Citizenship*, 32 EUR. L. REV. 787 (2007); Nigel Foster, *From Persons to Citizens and Beyond: The Evolution of Personal Free Movement in the European Union*, in ANNUAL OF GERMAN & EUROPEAN LAW 239 (vol. II/III 2006); Dimitry Kochenov, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights*, 15 COLUM. J. EUR. L. 169 (2009); Dora Kostakopoulou, *European Union Citizenship: Writing the Future*, 13 EUR. L.J. 623 (2007) (U.K.); Francis G. Jacobs, *Citizenship of the European Union—A Legal Analysis*, 13 EUR. L.J. 591 (2007); Samantha Besson & André Utzinger, *Introduction: Future Challenges of European Citizenship—Facing a Wide-Open Pandora’s Box*, 13 EUR. L. J. 573 (2007); Martijn W. Hesselink, *European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?*, 15 EUR. REV. PRIV. L. 323 (2007); Annette Schrauwen, *European Union Citizenship in the Treaty of Lisbon: Any Change at All?*, 15 MAASTRICHT J. EUR. COMP. L. 55 (2008); Eleanor Spaventa, *The Constitutional Impact of Union Citizenship*, in THE ROLE OF COURTS IN DEVELOPING A EUROPEAN SOCIAL MODEL 141–67 (Ulla Neergaard, Ruth Nielsen & Lynn Roseberry eds., 2010); Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law*, 31 EUR. L. REV. 276 (2006) (book review); FERDINAND WOLLENSCHLÄGER, GRUNDFREIHEIT OHNE MARKT (2007) (Ger.).

<sup>4</sup> *Inter alia* Sionaidh Douglas-Scott, *In Search of Union Citizenship*, 18 Y.B. EUR. L. 29 (1998) (U.K.); Astrid Epiney, *The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship*, 13 EUR. L. J. 611 (2007); Stephen Hall, *Determining the Scope Ratione Personae of European Citizenship: Customary International Law Prevails for Now*, 28 LEGAL ISSUES ECON. INTEGRATION 355, 355–60 (2001); Thomas C. Fischer, *European ‘Citizenship’: In Its Own Right*

creasing number of European court decisions on European citizenship<sup>5</sup> pay witness to the fact that questions regarding EU citizenship remain highly important.<sup>6</sup> Surprisingly, the developments of EU citizenship are seldom compared to the role citizenship played in the United States during its time of unification.<sup>7</sup> Using the questions the Court of Justice of the European Union (ECJ) had to solve in the *Janko Rottmann v. Freistaat Bayern* (hereinafter *Rottmann*) case,<sup>8</sup> this article will show that a glance

*and in Comparison with the United States*, 5 CAMBRIDGE Y.B. EUR. L. STUD. 357 (2003); Eleanor Spaventa, *Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects*, 45 COMMON MKT. L. REV. 13 (2008); Helen Stalford, *The Citizenship Status of Children in the European Union*, 8 INT'L J. CHILD. RTS. 101 (2000); Constanze Semmelmann, *Die Grenzen der Unionsbürgerschaft im Urteil Förster*, 44 EUROPARECHT 683 (2009).

<sup>5</sup> The most influential cases were Case C-293/83, *Gravier v. City of Liège*, 1985 E.C.R. 593 ¶ 21 et seq.; Case C-147/03, *Comm'n v. Austria*, 2005 E.C.R. I-5969 ¶ 31 et seq.; Case C-357/89, *Raulin v. Minister van Onder-wijs en Wetenschappen*, 1992 E.C.R. I-1027 ¶ 25 et seq.; Case C-47/93, *Comm'n v. Belg.*, 1994 E.C.R. I-1593 ¶ 13 et seq.; Case C-65/03, *Comm'n v. Belg.*, 2004 E.C.R. I-6427 ¶ 25; Case C-186/87, *Cowan v. Trésor public*, 1989 E.C.R. 195 ¶ 17; Case C-323/95, *Hayes v. Kronenberger GmbH*, 1997 E.C.R. I-1711 ¶ 17; Case C-274/96, *Criminal proceedings against Bickel and Franz*, 1998 E.C.R. I-7637 ¶ 15 et seq.; Case C-43/95, *Data Delecta Aktiebolag and Forsberg v. MSL Dynamics Ltd*, 1996 E.C.R. I-4661 ¶ 13 et seq.; Joined Cases C-92/92 and C-326/92, *Collins v. Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Kraul v. EMI Electrola GmbH*, 1993 E.C.R. I-5145 ¶ 20 et seq.; Case C-28/04, *Tod's and Tod's Fr. v. Heyraud*, 2005 E.C.R. I-5781; Case C-85/96, *Martinez Sala*, 1998 E.C.R. I-2691 ¶ 63 et seq.; Case C-184/99, *Grzelczyk v. Centre Public d'Aide Sociale d'Ottignes-Louvain-la-Neuve*, 2001 E.C.R. I-6193 ¶ 30 et seq.; Case C-456/02, *Trojani v. Centre publique d'aide sociale de Bruxelles*, 2004 E.C.R. I-7573 ¶ 37 et seq.; Case C-224/98, *D'Hoop v. Office national de l'emploi*, 2002 E.C.R. I-6191 ¶ 29 et seq.; Case C-209/03, *R (Dany Bidar) v. London Borough of Ealing and Sec'y of State for Educ. and Skills*, 2005 E.C.R. I-2119 ¶ 31 et seq.; Case C-148/02, *Garcia Avello v. Belgian State*, 2003 E.C.R. I-11613 ¶ 21 et seq.; Case C-158/07, *Förster*, 2008 E.C.R. I-8507.

<sup>6</sup> For a comprehensive overview of publications and case law on European citizenship, see EUDO CITIZENSHIP, <http://eudo-citizenship.eu> (last visited May 15, 2012).

<sup>7</sup> Fortunate exceptions are, *inter alia*, Larry Catá Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173 (2001); Case C-228/07, *Petersen v. Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich*, Opinion of AG Colomer, 2008 E.C.R. I-6989; Denis Lacorne, *European Citizenship: The Relevance of the American Model*, in THE FEDERAL VISION 427, 428 et seq. (Kalypso Nicolaïdis & Robert Howse eds., 2001); Elizabeth M. Meehan, *European Integration and Citizens' Rights: A Comparative Perspective*, J. FEDERALISM, Fall 1996 at 99 et seq.; and several works, where the comparison with the US concept is one aspect of their analysis, such as *inter alia* Closa, *supra* note 1, at 1140 et seq.; Epamiondas Marias, *From Market Citizen to Union Citizen*, in EUROPEAN CITIZENSHIP 13 (Epamiondas A. Marias ed., 1994); LIPPOLIS, *supra* note 2, at 61 et seq.; SCHÖNBERGER, *supra* note 2, at 54 et seq.; Federico Fabbrini, *La Corte di giustizia europea e la cittadinanza dell'Unione*, Il commento, 2010 GIORNALE DI DIRITTO AMMINISTRATIVO 702 (2010).

<sup>8</sup> Case C-135/08, *Rottmann v. Bayern*, 2010 E.C.R. I-1449, *available at* <http://curia.europa.eu/juris/document/document.jsf?text=&docid=75336&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=168115>. For extensive discussion of the case, see Jo Shaw et al., *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, EUR. UNION DEMOCRACY OBSERVATORY ON CITIZENSHIP, <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member->

over the Atlantic may help to shed light on some of the issues at stake. The fundamental question of the *Rottmann* case was whether, and to what extent, the autonomy of European citizenship affects its dependency on Member State nationality with regards to the withdrawal of EU citizenship. The ECJ left this question open in principle as it has not been necessary to decide this issue. The ECJ, however, intimated that there is a certain autonomous element in European citizenship that might affect Member State nationality (see section 2). Interestingly, the United States also faced a heated debate about the “nature” of federal citizenship that, roughly 150 years ago, culminated in the infamous *Dred Scott v. Sandford*<sup>9</sup> (hereinafter *Dred Scott*) decision. Eventually, the Fourteenth Amendment to the US Constitution would establish a unified *national citizenship* and thereby established most (but by no means all) of the tensions that had existed in the *antebellum* United States. Although the historic and societal settings in the United States prior to the Civil War were, of course, quite different compared to those of contemporary Europe, a comparative analysis of *Dred Scott* can offer valuable insights into the challenges of shaping the borders of European citizenship. The “all or nothing” approach of the US Supreme Court at that time did have a massive, even revolutionary impact on the United States, as this judgment is today perceived as the catalyst for the American Civil War.<sup>10</sup> The opinions delivered with this judgment provide an interesting insight on the possible effects of overemphasizing either the dependency or autonomy element of citizenship in federal systems. Seen in that light, the ECJ’s very cautious and yet definite approach may highlight the positive effects of the often criticized *Rottmann*-case.<sup>11</sup> Although the impact of the *Dred Scott* judgment might hence serve as one explanation for the ECJ’s ruling, it may not be misinterpreted as a *carte blanche* for Member States to neglect the autonomous feature of European law. European citi-

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state-sovereignty-in-nationality-law (last visited Apr. 26, 2012); Hanneke van Eijken, *European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of Their Nationals*, 27 MERKOURIOS-UTRECHT J. INT’L & EUR. L. no. 72, 2011 at 65, 69; Dimitry Kochenov, *Case C-135/08, Janko Rottmann v. Freistaat Bayern, Judgment of the Court (Grand Chamber) of 2 March 2010 Not Yet Reported*, 47 COMMON MKT. L. REV. 1831 (2010); See Theodore Konstadinides, *La Fraternité Européenne? The Extent of National Competence to Condition the Acquisition and Loss of Nationality from the Perspective of EU Citizenship*, 35 EUR. L. REV. 401 (2010).

<sup>9</sup> The correct spelling of the appellee’s name would actually be “Sanford.” For a possible explanation for the error, see John S. Vishneski III, *What the Court Decided in Dred Scott v. Sandford*, 32 AM. J. LEGAL HIST. 373, 373 n.1 (1988).

<sup>10</sup> *Infra* section 3.

<sup>11</sup> *Infra* section 4.

zanship has indeed an autonomous value. Hence, as the withdrawal of Member State citizenship has to be justified by arguments from European law also, Member States may only withdraw the European citizenship when their reasoning is soundly justified by arguments from European law. According to the lack of primary and secondary law in this respect *de lege lata*, these minimum legal requirements need to be defined by the ECJ. Unfortunately, in *Rottmann*, the ECJ missed the opportunity to do so in a coherent way.<sup>12</sup>

## 2. EUROPEAN CITIZENSHIP – BETWEEN AUTONOMY AND DEPENDENCE?

The *Rottmann* case to be discussed here concerns a fundamental question of European citizenship. Can European citizenship persist with the legal withdrawal of a Member State nationality? The question touches upon an exciting contrast: that between the dependency of the European citizenship on Member State nationality and its autonomous character stemming from the autonomy of the European legal order (which European citizenship is part of).<sup>13</sup>

Towards this end, Art. 20 (1) Treaty of the Functioning of the European Union (TFEU) stipulates:

*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.*

Furthermore, Art. 9 Treaty of the European Union (TEU) stipulates the additional character of EU citizenship.<sup>14</sup> According to this wording, European citizenship indeed depends on the “holding” of a nationality of a Member State. Other language versions of Art. 20 (1) sentence 2 TFEU stipulate a prerequisite that is comparable to the English “holding.”<sup>15</sup> As European citizenship is therefore an accessory to Member

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<sup>12</sup> *Infra* section 5.

<sup>13</sup> Christian Calliess, *Der Unionsbürger: Status, Dogmatik, Dynamik*, in *EUROPARECHT BEIHEFT 1: UNIONSBÜRGERSCHAFT UND SOZIALE RECHTE*, *supra* note 3, at 19 et seq. (describing this phenomenon as “Der im Verbund geteilte Bürger”).

<sup>14</sup> For matters of practicability, we will only use Art. 20 TFEU in the remaining part of this paper when we refer to regulations on EU citizenship in EU primary law.

<sup>15</sup> *E.g., inter alia*, German: “besitzt”; French: “ayant”; Italian: “abbia”; Spanish: “ostente.”

State nationality, its existence always depends on the existence of a Member State nationality. As a consequence, and according to the different conceptions of nationality such as *ius soli* and *ius sanguinis* in Europe, the conditions for acquiring and losing European citizenship depend on the conditions for acquiring and losing the nationality of the respective Member State.<sup>16</sup> The existence of a European citizenship is therefore dependent on the existence of Member State nationality.

However, according to established and well-known case law, European law forms an autonomous legal order.<sup>17</sup> As European citizenship is, according to Art. 20 TFEU, part of this legal order, it is also autonomous.<sup>18</sup> As we hence may take the autonomy of European citizenship for granted, it is still not clear what effect this autonomy has, especially seen in the light of its dependency. In fact, the crucial question that the ECJ also had to deal with in the *Rottmann* case is how these two decisive features of the European citizenship, *dependence* and *autonomy*, are interrelated.

Before we move on with the substantial analysis, we need to clarify the terminology of “independence” and “autonomy.” Although these words are often used synonymously,<sup>19</sup> they inherit a fundamentally different meaning. The concept of an *independent* legal order describes a system that is not linked to, and thus is not *dependent* on another legal system. By definition in Art. 20 (1) TFEU, European citizenship depends on the existence of a Member State nationality; therefore, it can hardly

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<sup>16</sup> Case C-369/90, *Micheletti v. Delegación del Gobierno en Cantabria*, 1992 E.C.R. I-4239, ¶ 10; *Marias*, *supra* note 7, at 15.

<sup>17</sup> Case 6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 587. For recent developments on the autonomy question in EU law, see Bruno de Witte, *European Union Law: How Autonomous is its Legal Order?*, 65 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 141 (2010); Ramses A. Wessel, *The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation*, 5 EUR. CONST. L. REV. 117 (2009).

<sup>18</sup> See Case C-135/08, *Rottmann v. Bayern* 2010 E.C.R. I-1449, Opinion of AG Maduro, ¶ 23 (highlighting in the French original of the Opinion that both Member State nationality and European citizenship are “autonomes”). Please note, that in the English translation “autonomes” is incorrectly translated with “independent.” See *id.*

<sup>19</sup> Most crucial in the English translation of AG Maduro’s opinion on Case C-135/08, *Rottmann v. Bayern* 2010 E.C.R. I-1449, is ¶ 23, where, in the French original he strongly emphasized that both European citizenship and Member State nationality were concepts of “autonomes.” Although this passage was accurately translated in most other language versions such as in the German version as “autonom,” in the Italian version “autonome,” and in the Spanish version “autónomos,” the English version, which is probably read the most, it was translated with “independent.” This inaccurate translation has already yielded fruits in the case review of Konstantinides, *supra* note 8, at 401 (who on p. 406, in good tradition with the inaccurate translation, treats the concepts of autonomy and dependence as exclusionary).



be recognized as being independent. *Autonomous* legal systems refer to the Greek words α•τόνομος (α•τός “self” and νόμος “legal act”; νέμειν “to separate, to distribute”). *Autonomous* legal systems are hence those which have a *self-legislating* character. Although they may still be inter-linked with other legal systems, they develop their own life, their own identity and thereby their own, independent normativity.

Regarding the question – “What actual effect does the autonomy of European citizenship have vis-à-vis its dependency on national citizenship?” – there is still debate. The most radical scholars simply deny any autonomous value due to the accessory character of European citizenship.<sup>20</sup> However, such a view would establish an exception to the general autonomy of the European legal order, of which European citizenship is a part, justified solely on the ground that European citizenship is dependent. Others assign an autonomous content to European citizenship but deny that it holds any individual rights: “The preservation of Member State sovereignty, rather than the promotion of individual rights or democratic legitimacy,” would “be central to the determination of the scope and content of Union citizenship” according to such a view.<sup>21</sup> It would hence form a solely “symbolic plaything” which does not have “substantive content.”<sup>22</sup> However, as has been highlighted elsewhere, the identification of the European citizenship’s accessory character alone does not provide any explanation as to its content.<sup>23</sup> In fact, the TFEU equips the European citizen with several individual rights enlisted in Art. 20 (2) - 25

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<sup>20</sup> Bruno Nascimbene, *Towards a European Law on Citizenship and Nationality?*, in CITIZENSHIP AND NATIONALITY STATUS IN THE NEW EUROPE 64, 64–65 (Síofra O’Leary & Teija Tiilikainen, eds., 1998) (admitting that this statement is relative and in fact very much depends on the stage of the integration process); Konstadinides, *supra* note 8, at 406 (using two arguments: First he equates federalism and autonomy and hence denies EU citizenship any autonomous value. Second, he argues with the wording of Art. 17 EC, which required EU citizenship to be *complementary* to national citizenship. Such a wording “implied absolute dependency upon national citizenship” and needed to be used also to interpret the wording of Art. 20 TFEU). For a discussion against a transferability of the meaning of the wording of Art. 17 EC to Art. 20 TFEU, see Michael Dougan, *Some Comments on Rottmann and the ‘Personal Circumstances’ Assessment in the Union Citizenship Case Law*, EUR. UNION DEMOCRACY OBSERVATORY ON CITIZENSHIP, <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=3>, page 4 (last visited Apr. 26, 2012) (arguing with the different wording of the two provisions).

<sup>21</sup> Síofra O’Leary, *The Options for the Reform of European Union Citizenship*, in CITIZENSHIP AND NATIONALITY STATUS IN THE NEW EUROPE 81, 88 (Síofra O’Leary & Teija Tiilikainen, eds., 1998) et seq.; Ian Ward, *(Pre)conceptions in European Law*, 23 J.L. & SOC’Y 198, 198 (1996).

<sup>22</sup> Hans Ulrich Jessurun d’Oliveira, *European Citizenship: Its Meaning, Its Potential*, in EUROPE AFTER MAASTRICHT 126, 147 (Renaud Dehousse, ed., 1994).

<sup>23</sup> See REICH, *supra* note 2, at 425 (highlighting this aspect with reference to a similar formulation of the German constitutional court in its Maastricht-decision).

TFEU, thereby already shaping its substantial content. Other scholars support the autonomy of European citizenship and also grant it its own normative content. However, they highlight that the normative content of European citizenship goes no further than the rights that have already been provided elsewhere in European law. In their view, the content of European citizenship is in principle synonymous with the content of what has previously been perceived as a “market citizen.”<sup>24</sup> Some of these authors also add an evolutionary feature to the content of European citizenship, which may ultimately even lead to an independency of European citizenship from Member State nationality.<sup>25</sup> As Advocate General (AG) Léger pointed out, this citizenship in the making “should lead to citizens of the Union being treated absolutely equally, irrespective of their nationality.”<sup>26</sup> He also foresaw a major role for the ECJ in raising the content of EU citizenship.<sup>27</sup>

The ECJ in fact took the opportunity to give weight to the concept of EU citizenship, arguably taking it beyond what had been granted by European law, however, not necessarily beyond market-rational arguments. In doing so, it also often touched on the fine line between dependence and autonomy. Given its dependent character, one might assume that the grant and loss of European citizenship would depend on individual Member State law about the procedure to acquire or lose nationality. However, as the ECJ held in *Mario Vicente Micheletti and Others v. Delegación del Gobierno en Cantabria* (hereinafter *Micheletti*), “it is for each Member State, *having due regard to Community law*, to lay down the conditions for the acquisition and loss of nationality.”<sup>28</sup> This passage of the judgment has been interpreted as a general duty of the Member States to also acknowledge the effects on European law when establishing the conditions for acquiring or losing Member State

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<sup>24</sup> See, *inter alia*, Jo Shaw, *Citizenship of the Union: Towards Post-National Membership?*, in COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 237, 330 (1998); HANS-W. MICKLITZ ET AL., UNDERSTANDING EU CONSUMER LAW 48 (2009).

<sup>25</sup> Case C-214/94, *Boukhalfa v. Bundesrepublik Deutschland*, Opinion of AG Léger, 1996 E.C.R. I-2253, ¶ 63.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Case C-369/90, *Micheletti v. Delegación del Gobierno en Cantabria*, 1992 E.C.R. I-4239, ¶ 10 (emphasis added); confirmed by Case C-179/98, *Belgian State v. Mesbah*, 1999 E.C.R. I-7955, ¶ 29; Case C-192/99, *The Queen v. Sec’y of State for the Home Dep’t, ex parte Kaur*, 2001 E.C.R. I-1237, ¶ 19; and Case C-200/02, *Zhu v. Sec’y of State for the Home Dep’t*, 2004 E.C.R. I-9925, ¶ 37.

nationality.<sup>29</sup> It has been referred to as “administrivisation” of national law, so that the effect of European citizenship “might be to prevent Member States to apply [sic] blanket rules in relation to Union citizens.”<sup>30</sup>

After the *Micheletti* judgment, the ECJ had several occasions to shape the content of European citizenship. It did so mainly by defining the provision of antidiscrimination in ex-Art. 12 Treaty establishing the European Community (hereinafter TEC).<sup>31</sup> In *Rudy Grzelczyk v. Centre Public d’Aide Sociale d’Ottignies-Louvain-la-Neuve*,<sup>32</sup> the court held that a student who lawfully resided in a host Member State was entitled to claim equal treatment according to all matters covered by the Treaty, whereas secondary law might limit this right. In *Baumbast and R v. Secretary of State for the Home Department*<sup>33</sup> and *Trojani v. Centre public d’aide sociale de Bruxelles*,<sup>34</sup> the ECJ went even further, conditioning the limiting value of secondary law on whether such a limitation meets the requirements of the principle of proportionality. Another framing of Union citizenship was established by the doctrine of “real link” in *M N D’Hoop v. Office national d’emploi*,<sup>35</sup> which was further substantiated in *Brian Francis Collins v. Secretary of State for Work and Pensions*<sup>36</sup> and then in *Jacqueline Förster v. Hoofddirectie van de Informatie Beheer Groep* (hereinafter *Förster*).<sup>37</sup> In *Förster*, it was further widened in order to achieve a general application to European citizens who had resided for five years in the host Member State. Within these cases, the ECJ expressly allowed Member States to limit the granting of certain benefits relating to European citizenship according to whether the Union citizen had established a “real link” with the host Member State. We will not go into

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<sup>29</sup> Calliess, *supra* note 3, at 19; van Eijken, *supra* note 8, at 69.

<sup>30</sup> Spaventa, *supra* note 3, at 151.

<sup>31</sup> See Calliess, *supra* note 9, at 30 et seq. (describes ex-Art. 12 TEC as “Schleuse” [Watergate] of the European citizen).

<sup>32</sup> Case C-184/99, *Grzelczyk v. Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*, 2001 E.C.R. I-6193, 6249.

<sup>33</sup> Case C-413/99, *Baumbast and R v. Sec’y of State for the Home Dep’t*, 2002 E.C.R. I-7091, 7170–71.

<sup>34</sup> Case C-456/02, *Trojani v. Centre public d’aide sociale de Bruxelles*, 2004 E.C.R. I-7573, 7612.

<sup>35</sup> Case C-224/98, *D’Hoop v. Office national d’emploi*, 2002 E.C.R. I-6191, ¶ 38.

<sup>36</sup> Case C-138/02, *Collins v. Sec’y of State for Work and Pensions*, 2004 E.C.R. I-2703, ¶¶ 69–70.

<sup>37</sup> Case C-158/07, *Förster v. Hoofddirectie van de Informatie Beheer Groep*, 2008 E.C.R. I-8507, ¶¶ 38–41.

detail regarding the interesting implications of these cases,<sup>38</sup> particularly as they do not reflect exhaustively the rulings of the Court on the scope of European citizenship.<sup>39</sup> However, what we may already see from these few cases is that the ECJ constantly defines the limits of Member State nationality and thereby the contents of European citizenship according to European law. Hence, European citizenship has indeed acquired its own “European shape” through the ECJ’s case law, as AG Léger had already foreseen in 1996.<sup>40</sup> Recently, in *Gerardo Ruiz Zambrano v. Office national de l’emploi*<sup>41</sup> the ECJ has once again pushed the boundaries of EU citizenship. As previously mentioned, we will focus here on the earlier *Rottmann* decision, the importance of which has not yet been fully recognized in the literature.<sup>42</sup>

## 2.1. THE ROTTMANN CASE

In the *Rottmann* case,<sup>43</sup> the ECJ was faced for the first time with the fundamental question of whether the autonomy of European citizenship could affect the dependency on Member State nationality to the extent that it obliges Member States to refrain from withdrawing a naturalization obtained by deception or actually re-grant a formerly withdrawn nationality.

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<sup>38</sup> See *instead*, Semmelmann, *supra* note 4; Spaventa, *supra* note 3, at 141–67. For assorted questions on the scope of Union citizenship that have been left out by the court, see Epiney, *supra* note 4, at 611–22.

<sup>39</sup> For a well, although currently not up-to-date overview of the most influential cases, see Epiney, *supra* note 4, at 611–22. For a comprehensive overview of publications and case law on European citizenship, see EUDO CITIZENSHIP, <http://eudo-citizenship.eu/> (last visited May 15, 2012).

<sup>40</sup> Case C-214/94, Boukhalfa v. Bundesrepublik Deutschland, Opinion of AG Léger, 1996 E.C.R. I-2253, ¶ 63.

<sup>41</sup> The Court held that Art. 20 TFEU grants a right of residence to a minor child “on the territory of the Member State of which that child is a national, *irrespective* (emphasis added) of the previous exercise by him of his right of free movement in the territory of the Member States” as well as, “in the same circumstances, of a derived right of residence, to an ascendant relative, a third country national, upon whom the minor child is dependent.” Case C-34/09, *Zambrano v. Office national de l’emploi*, 2011, <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-34/09&td=ALL>.

<sup>42</sup> Martin Nettesheim, *Unionsbürgerschaft*, in *EUROPARECHT* 259 (Thomas Oppermann et al. eds., 5th ed. 2011).

<sup>43</sup> Case C-135/08, *Rottmann v. Bayern*, 2010 E.C.R. I-1449.

## 2.1.1. FACTS

Mr. Rottmann, who had originally acquired nationality from the Republic of Austria by birth, transferred his residence to Munich (Germany, Bavaria) in 1995.<sup>44</sup> Before moving, he was being investigated by the Landesgericht für Strafsachen Graz for suspected serious fraud.<sup>45</sup> He had denied the accusations.<sup>46</sup> In February 1997, the Landesgericht für Strafsachen Graz issued a national warrant for his arrest.<sup>47</sup> When Mr. Rottmann applied for German nationality in 1998, he failed to mention the proceedings against him in Austria.<sup>48</sup> The naturalizations document, dated January 25, 1999, was issued to him on February 5, 1999.<sup>49</sup> According to Austrian law, the naturalization in Germany caused him to lose his Austrian nationality.<sup>50</sup> In September and October of 1999, the city of Munich became aware of the proceedings against Mr. Rottmann in Austria.<sup>51</sup> The Freistaat Bayern consequently withdrew the naturalization with retroactive effect, on the grounds that the applicant had not disclosed the fact that he was the subject of a judicial investigation in Austria and that he had, in consequence, obtained German nationality by deception.<sup>52</sup> When the case was brought before the ECJ, the withdrawal of his naturalization obtained in Germany had not yet become definitive, because the action for annulment of that decision had been brought by the applicant in the main proceedings.<sup>53</sup> Sitting as the court of second instance, the Bayerische Verwaltungsgerichtshof held that the withdrawal of the applicant's naturalization on the basis of the first sentence of Article 48 (1) of the Code of Administrative Procedure of the Land of Bavaria was compatible with German law, even though the effect of that withdrawal, once definitive, would be to render the person concerned stateless.<sup>54</sup> Art. 16 (1) of the German Basic Law prohibits any withdrawal of naturalization if this results in the statelessness of this person. The applicant brought an appeal on a point of law ("Revision"), which was

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<sup>44</sup> *Id.* ¶¶ 22–23.

<sup>45</sup> *Id.* ¶ 23.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* ¶ 24.

<sup>48</sup> *Id.* ¶ 25.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* ¶ 26.

<sup>51</sup> *Id.* ¶ 27.

<sup>52</sup> *Id.* ¶ 28.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* ¶ 29.

pending before the Bundesverwaltungsgericht when the case was brought before the ECJ.<sup>55</sup>

The Bundesverwaltungsgericht stated that the naturalization acquired by deception in the main proceedings was unlawful *ab initio* and could therefore be withdrawn by the competent German authorities at their discretion.<sup>56</sup> It states that, by virtue of the relevant provisions of Austrian law, the Federal Act on Austrian Citizenship (StbG), the applicant in the main proceedings does not at present satisfy the conditions for immediate recovery of Austrian nationality.<sup>57</sup> The Bayerische Verwaltungsgerichtshof noted that, according to the impact on European citizenship – which would also automatically be completely withdrawn if Mr. Rottmann became stateless – it sufficed with reference to *Micheletti*, that the importance of the rights conferred through EU citizenship would be taken into consideration by the competent German authority when exercising its discretion.<sup>58</sup> The effect of assuming that there existed an obligation in EU law to refrain from withdrawing naturalization obtained by deception would strike at the heart of the sovereign power of the Member States, recognized by Article 17(1) EC (now: Art. 20 TFEU), to define the detailed rules for the application of their nationality law.<sup>59</sup> On the contrary the Bundesverwaltungsgericht stated that the *Micheletti* judgment only clarified that Member States may not impose an additional condition for the recognition of a nationality.<sup>60</sup> It would not be sufficiently clear whether the status of being stateless and the loss of citizenship of the Union validly acquired previously, and linked to the withdrawal of naturalization, is compatible with EU law, in particular, with Article 17(1) EC (now: Art. 20 TFEU).<sup>61</sup>

The Bundesverwaltungsgericht considered that it is possible at least that the Republic of Austria, as the Member State of Mr. Rottmann's original nationality, might be bound, by virtue of the duty to cooperate with the Union in good faith and having regard to the values enshrined in the Convention on the reduction of statelessness and in Article 7(1)(b) of the European Convention on nationality, to interpret and apply its national law or to adapt it so as to prevent the person concerned

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<sup>55</sup> *Id.* ¶ 30.

<sup>56</sup> *Id.* ¶ 31.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* ¶ 32.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* ¶ 33.

<sup>61</sup> *Id.*

from becoming stateless when, as in the case in the main proceedings, that person has not been given the right to keep his nationality of origin following the acquisition of a foreign nationality.<sup>62</sup> They hence submitted the following questions:

1. Is it contrary to Community law for Union citizenship (and the rights and fundamental freedoms attaching thereto) to be lost as the legal consequence of the fact that the withdrawal in one Member State (the Federal Republic of Germany), lawful as such under national (German) law, of a naturalization acquired by intentional deception, has the effect of causing the person concerned to become stateless because, as in the case of the applicant [in the main proceedings], he does not recover the nationality of another Member State (the Republic of Austria) which he originally possessed, by reason of the applicable provisions of the law of that other Member State?<sup>63</sup>

2. [If so,] must the Member State. . . which has naturalized a citizen of the Union and now intends to withdraw the naturalization obtained by deception, having due regard to Community law, refrain altogether or temporarily from withdrawing the naturalization if or so long as that withdrawal would have the legal consequence of loss of citizenship of the Union (and of the associated rights and fundamental freedoms). . . , or is the Member State. . . of the former nationality obliged, having due regard to Community law, to interpret and apply, or even adjust, its national law so as to avoid that legal consequence?<sup>64</sup>

#### 2.1.2. THE SOLUTION OF THE COURT

The ECJ first very clearly confirmed that the autonomy of European citizenship may indeed affect its dependency. The fact that a matter falls within the competence of the Member States did not alter the fact

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<sup>62</sup> *Id.* ¶ 34.

<sup>63</sup> *Id.* ¶ 35.

<sup>64</sup> *Id.*

that, in situations covered by EU law, the national rules concerned must have due regard to the latter.<sup>65</sup> This also held true for situations such as in the case at issue, where the withdrawal of naturalization by a Member State would also lead to the loss of European citizenship.<sup>66</sup> After reference to judgments of the ECJ, which underline the fundamental character of European citizenship and to the duties of Member States established by *Micheletti*,<sup>67</sup> the Court plunges into the core analysis of the question.

The first question, in essence, was whether European law prohibits a Member State from withdrawing naturalization if this results in the loss of European citizenship. The ECJ first discussed the legitimacy of a decision which withdraws naturalization to the effect that the person in question becomes stateless or loses European citizenship with regard to international law.<sup>68</sup> The Court came to the conclusion that it is “legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality.”<sup>69</sup> Hence, the withdrawal of both Member State nationality and European citizenship is legitimate in principle, even if the person in question became stateless.<sup>70</sup> Having thereby established the ECJ’s authority to review issues of European citizenship and especially frame Member States’ decision processes on grant and loss of nationality, it then assigned Member State courts with the authority to review whether the respective individual decisions meet the requirements of European law.<sup>71</sup> In order to ensure the effectiveness of the enforcement of European law through Member State courts, it then provided paradigms for the court on how to exercise its decision review process. It stated that every Member State court needs to conduct a proportionality test, which also takes into account “where appropriate . . . the consequences [the decision] entails for the situation of the person concerned in the light of European Union law.”<sup>72</sup> In a case such as the one at issue where the person in question may become stateless, however, it was important to “take into account the consequences that the decision entails for the person concerned and,

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<sup>65</sup> *Id.* ¶ 41.

<sup>66</sup> *Id.* ¶ 42.

<sup>67</sup> *Id.* ¶ 43–45.

<sup>68</sup> *Id.* ¶ 43–45.

<sup>69</sup> *Id.* ¶ 51.

<sup>70</sup> *Id.* ¶ 51–54.

<sup>71</sup> *Id.* ¶ 55.

<sup>72</sup> *Id.* ¶ 55.



if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union.”<sup>73</sup> In particular, it would be necessary to establish “whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalization decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.”<sup>74</sup> The ECJ then came to the conclusion that it is not contrary to European law “for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalization when that nationality has been obtained by deception, on condition that the decision to withdraw observes the principle of proportionality.”<sup>75</sup>

The second question, whether a Member State might be required by European law to reissue its original nationality, was unanswered by the ECJ, as Austria has not yet decided on this issue. However, it clearly emphasized the principles established by this judgment with regards to the State of naturalization and the State of origin.

## 2.2. PUTTING THE JUDGMENT INTO CONTEXT: ANSWERED AND OPEN QUESTIONS REGARDING THE DEPENDENCE/AUTONOMY RELATIONSHIP

As may be deduced from several ECJ judgments, the autonomous value of European citizenship is reflected *de lege lata* in certain European legal requirements Member States have to follow when issuing European citizenship, so-called the *Micheletti* proviso. As European citizenship is built on European law in order to safeguard the rights granted by the European legal order to the individual, the criteria for the withdrawal of citizenship must also be defined by European law. Having already dealt with questions of which criteria to follow when Member State nationality is granted,<sup>76</sup> the ECJ in *Rottman* then identified some criteria for the withdrawal of a nationality. It first highlighted that the locus of the *Micheletti* proviso is the national proportionality test that needs to be conducted when the withdrawal of the respective nationality is at stake. It then introduced a three-step test that needs to be conducted

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<sup>73</sup> *Id.* ¶ 56.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* ¶ 59.

<sup>76</sup> Case C-369/90, *Micheletti v. Delegación del Gobierno en Cantabria*, 1992 E.C.R. I-4239, ¶ 10.

within this proportionality test.<sup>77</sup> This “*Rottmann* test” mainly reflects the issues of the case. However, it is also possible to generalize this test in order to be able to transfer it to other cases of withdrawal of nationality:

1. The respective authority needs to test whether it needs to take European law into account at all. This depends on whether it is “appropriate” to do so.
2. Where appropriate, national authorities need to identify the consequences of the decision for the individual person and his or her affected family; and
3. Where relevant, authorities need to balance this with the gravity of the reason for withdrawal. The following cases need special attention:
  - a. If the reason for withdrawal is an offence conducted by that person, the authorities need to balance the consequences against the gravity of the offense.
  - b. If the nationality was granted upon naturalization, the lapse of time between the naturalization decision and the withdrawal decision should be considered.
  - c. When the consequence would be the total loss of European citizenship, whether it is possible for that person to recover European citizenship should be considered.

According to step 1 of the test, the ECJ unfortunately refrains from providing a straightforward definition, or general guidance of what it means by “appropriateness.” It just indicates that cases, such as the one at issue, where the person at question may become stateless because of the withdrawal of naturalization, forms such an “appropriate” case. As a general definition of “appropriateness” is still lacking, this will require national courts, where there is doubt, to ask the ECJ in a preliminary ruling procedure whether the respective case fulfills the requirements of “appropriateness” according to the *Rottmann* test.

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<sup>77</sup> Case C-135/08, *Rottmann v. Bayern*, 2010 E.C.R. I-1449, ¶ 55 et seq.

Steps 2 and 3 form regular steps of the proportionality principle that do not need special explanations here.<sup>78</sup> The bottom line of the judgment is that;

1. Withdrawal of European Citizenship by one Member State is possible, even if the person in question becomes stateless; and
2. Member States only need to take into account European law within their proportionality test when it is “appropriate.”

Whether and how autonomy of European citizenship affects its dependency on Member State nationality is subject to a proportionality test that needs to be conducted by Member State authorities.

The ECJ only hinted at which factors need to be taken into account when conducting this test in the case at issue. It refrained from providing general guidelines, i.e. a general framework that reflects the autonomy and thereby safeguards the rights and privileges the individual gains from being a citizen of the EU. The ECJ did not take the opportunity in *Rottmann* to give European citizenship the means it needs to be enforced effectively. Most surprisingly, it also tied the applicability of European law to “where it seems appropriate.” Such a modest approach to making general decisions on Member State nationality is generally plausible, as a large number of these decisions – namely the ones where an EU citizen acquires nationality from another EU Member State – do not touch at all on European law. However, in cases where the granting or withdrawal of the Member State nationality also directly grants or withdraws the rights and privileges of European citizenship, the ECJ arguably has the duty to review issues of EU citizenship from the perspective of EU law. Although this argument from European law seems to be evident, the ECJ conditioned the applicability of European law also in these cases to its “appropriateness.” Moreover, even if European law is applicable, it refers only to the well-known criteria of the proportionality principle rather than substantiating the issue. So, why does the ECJ take such a reluctant approach? Has it, as so often in recent times, lost its teeth? Why doesn't the Court stand up to defend a stronger conception of European

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<sup>78</sup> For a general discussion on the ECJ's proportionality test, see Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, 1995 E.C.R. I-4165, ¶ 37. For a discussion of its conceptual application, see Peter Szegalla, *Grundrechtliche Schutzbereiche und Schrankensystematik*, in *HANDBUCH DER EUROPÄISCHEN GRUNDRECHTE* 255 (F. Sebastian Heselhaus et al. eds., 2006) with further reference.

citizenship, one in which an autonomous EU citizenship contains its own set of rights and privileges and thereby transforms it into a fully-fledged subjective right?<sup>79</sup>

There are probably a number of reasons in favor of the ECJ's reluctant approach. Cautious judgments in sensitive areas that first give Member States room to establish their own policies in light of European law, reluctance to interfere in highly political processes, and a general weakening of the European judiciary might be some of the reasons. The Court might be well aware of the risk that a central view on European citizenship might become a ship under a "flag which fails to cover its cargo."<sup>80</sup> We would, however, like to widen the view, providing a possible explanation that comes from looking across the Atlantic.<sup>81</sup> In fact, the decision *Dred Scott* had to deal with comparable issues at a time when the United States was still in the making. The decision had a massive influence on American society. In the following, we argue that avoidance of such a decision may also explain why the ECJ is well advised to take such cautious steps with regard to European citizenship.

### 3. CITIZENSHIP IN THE ANTEBELLUM UNITED STATES

From the 1980s onwards,<sup>82</sup> the European Union (and its predecessors) have been increasingly compared to other "federal" or "multile-

<sup>79</sup> See Reich, *supra* note 2; Philipp Kubicki, *Die subjektivrechtliche Komponente der Unionsbürgerschaft*, 2006 EUROPARECHT 489.

<sup>80</sup> See Norbert Reich, *Union Citizenship – Yesterday, Today and Tomorrow!* 5 (RGSL Working Paper No. 3, 2001).

<sup>81</sup> In this respect, also see Case C-228/07, *Petersen v. Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich*, Opinion of AG Colomer, 2008 E.C.R. I-6989, 7008 n. 34, which draws a direct parallel between European citizenship and the *Dred Scott v. Sandford* decision.

<sup>82</sup> The idea of a "United States of Europe" is, of course, much older and can in fact be traced back to the 19th century. After the Second World War, federalist thought was again promoted by a federalist movement to which many of the founding fathers of the European Union belonged and which was also promoted by the US, by then the "protecting power" of the continent. See Eduardo Tortarolo, *Europa: Zur Geschichte eines umstrittenen Begriffs*, in *DIE EUROPÄISCHE OPTION: EINE INTERDISZIPLINÄRE ANALYSE ÜBER HERKUNFT, STAND UND PERSPEKTIVEN DER EUROPÄISCHEN INTEGRATION* 21, 28 et seq. (Armin von Bogdandy ed., 1993). What united these early scholars and politicians was the fact that they subscribed to a *normative* understanding of federalism as a tool in order to *replace* the European nation states with a (state-like) federation. Another shared assumption was that a federal Europe had to start out with a Constitution by the people of Europe, which – based on a misinterpretation of the genesis of US federalism as Glencross demonstrates – was seen as a *prerequisite* rather than the end of a gradual process. See Andrew Glencross, *Altiero Spinelli and the Idea of the US Constitution as a Model for Europe: The Promises and Pitfalls of an Analogy*, 47 J. COMMON MKT. STUD. 287 (2009). From the 1980s onwards however, it was through a new understanding of the EU polity as a (legal) multi-

vel” systems,<sup>83</sup> above all the United States.<sup>84</sup> Given the difficulties scholars and courts face in dealing with European citizenship, it is tempting to look into other cases of what could be referred to as “Union citizenship.”

However, the *modern* concept of US citizenship bears little resemblance to that of the EU citizen.<sup>85</sup> Looking solely at the texts of the respective provisions, one could come to the conclusion that the two concepts rather are the opposite: While EU citizenship is *prima facie* dependent on “being national of a Member State,” the wording of the US Constitution appears to make state citizenship derivative from federal citizenship.<sup>86</sup> Amendment XIV, Section 1, Clause 1 of the US Constitution explicitly establishes that:

*“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”*

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level system that federal theory made a return – no longer as a normative concept but as an *analytical and theoretical framework* for a comparative structural analyses of the EU. See Mark Pollack, *Theorizing EU Policy-Making*, in POLICY-MAKING IN THE EUROPEAN UNION 28 (Helen Wallace et al. eds., 5<sup>th</sup> ed. 2005).

<sup>83</sup> While the US by far seems to be the preferred object of comparison, studies are no longer confined to the more canonical cases of federalism (Switzerland, Germany, Canada) but now include cases like India. See Shivadev Shastri, *Lessons for the European Community from the Indian Experience with Federalism*, 17 HASTINGS INT’L & COMP. L. REV. 633, 634 (1994); John Fossum, *The Transformation of the Nation-State: Why Compare the EU and Canada?* (ARENA Working Paper No. 28 2002); JAN ERK, EXPLAINING FEDERALISM. STATE, SOCIETY AND CONGRUENCE IN AUSTRIA, BELGIUM, CANADA, GERMANY AND SWITZERLAND (2008); HANS KRISTOFERITSCH, VOM STAATENBUND ZUM BUNDESSTAAT? DIE EUROPÄISCHE UNION IM VERGLEICH MIT DEN USA, DEUTSCHLAND UND DER SCHWEIZ (2007); Fritz Scharpf, *The Joint-Decision Trap: Lessons from German Federalism and European Integration*, 66 PUB. ADMIN. 239 (1988).

<sup>84</sup> See, *inter alia*, the voluminous study INTEGRATION THROUGH LAW – EUROPE AND THE AMERICAN FEDERAL EXPERIENCE, A POLITICAL, LEGAL AND ECONOMIC OVERVIEW (Mauro Cappelletti et al. eds., Vol. 1, Bk. 1 1986). For an overview of the changing perspective on the functions of the EU from functionalism and neo-functionalism over neo-realism to neo-federalism and multi-level or network-governance, see PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW 2–6 (5<sup>th</sup> ed. 2011); Paul Craig, *Integration, Democracy, and Legitimacy*, in THE EVOLUTION OF EU LAW 13 et seq. (Paul Craig & Gráinne de Búrca, eds., 2<sup>nd</sup> ed. 2011).

<sup>85</sup> For an example of a rejection of the explanatory power of the US case for the EU through a (mis-) understanding of the United States “as the paradigm case of national federalism” (a federation based on a single nation), see Brendan O’Leary, *An Iron Law of Nationalism and Federation? A (Neo-Diceyan) Theory of the Necessity of a Federal Staatsvolk, and of Consociational Rescue*, 7 NATIONS & NATIONALISM 273, 280 (2001).

<sup>86</sup> For such a reading of *today’s* US citizenship, see Lacorne, *supra* note 7, at 428.

Some authors<sup>87</sup> have gone as far as to suggest that – with the adoption of the Fourteenth Amendment in 1868 – US state citizenship has lost all of its legal and political content. It is argued that “a citizen of any State [could] acquire citizenship in any other State simply by changing residence. There are no interstate naturalization procedures and no eligibility criteria, other than the change of residence itself”<sup>88</sup> and that, therefore, “State citizenship . . . in the United States . . . has become a non-issue.”<sup>89</sup>

However, one need only take into account the US Supreme Court’s struggle to balance US citizens’ right of free movement with the tight *residence requirements* states often use to limit social benefits to state citizens<sup>90</sup> – or that of the locus of sovereignty<sup>91</sup> – to realize that such an assessment of the US case not only greatly exaggerates the differences between the United States and EU but also ignores the crucial role state citizenship continues to play (at least from a legal perspective).

At the same time, some of the very same authors that too hastily deny the relevance of modern US citizenship for the European Union make a valid point nonetheless in bringing to our attention citizenship concepts in the *antebellum* United States. Surveying different federal cases, Delaney and Barani conclude that “[t]he early US and the EU are two entities that provide the best examples of conflicted or stalled federative attempts. Issues of citizenship, allegiance and even the nature of the constitutional contract were not defined, and the attitudes of early Amer-

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<sup>87</sup> See, e.g., Gerald L. Neuman, *European Citizenship and Modern U.S. Federal Citizenship, Conference U.S. Federalism and its Implications for Europe*, CERI-SCIENCES-PO, Dec. 10–11, 1998, at 2 (cited in Lacorne, *supra* note 7).

<sup>88</sup> *Id.* at 4 (as cited in Lacorne, *supra* note 7, at 430).

<sup>89</sup> Lacorne, *supra* note 7, at 428.

<sup>90</sup> In many ways, the US Supreme Court’s struggle to balance the freedom of movement under the US Constitution and the States’ so-called *police powers* to regulate public welfare, security, morality and safety resembles the challenges faced by the ECJ in various cases. For the Supreme Court, see, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969); Case Comment, *Residence Requirements after Shapiro v. Thompson*, 70 COLUM. L. REV. 134, 134–155 (1970). For the ECJ, see, *inter alia*, the cases Case 186/87, *Cowan v. Trésor public*, 1989 E.C.R. 195; Case C-184/99, *Grzelczyk v. Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*, 2001 E.C.R. I-6193; Case C-200/02, *Zhu v. Sec’y of State for the Home Dep’t*, 2004 E.C.R. I-9925, ¶ 37; Case C-138/02, *Collins v. Sec’y of State for Work and Pensions*, 2004 E.C.R. I-2703.

<sup>91</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); DANIEL FARBER, LINCOLN’S CONSTITUTION 27 et seq. (2003); Dennis-Jonathan Mann, *Ein Gebilde sui generis? Die Debatte um das Wesen der Europäischen Union im Spiegel der “Nature of the Union”-Kontroverse in den USA*, in DIE VERFASSUNG EUROPAS: PERSPEKTIVEN DES INTEGRATIONSPROJEKTS 319, 328 (Frank Decker & Markus Höreth eds., 2009).

icans towards these fundamental problems were often diametrically opposed.<sup>92</sup>

While we would agree with those who assert that the *antebellum* US citizenship can serve as a powerful analogy for the European debate – and we, thus, base our analysis on it – there are some key differences between our approach and that typically found in the literature:

1. Unlike authors holding that the evolution of US citizenship – or other forms of “advanced” federal citizenship – provides the EU with an “image of our future,”<sup>93</sup> our use of the *antebellum* US example is a purely analytical one. While we do not preclude the possibility that European Citizenship will develop in way comparable to that of the United States or other federations, we do *not* hold an automatism or teleology to be at work that would eventually lead to a “Fourteenth Amendment” for the EU. Also, our argument that *antebellum* US citizenship is comparable to today’s European Citizenship does in no way imply a (normative) assertion about whether or not the EU ought to follow this example by becoming more “federalized” (or more centralized in the strict sense).<sup>94</sup>

2. We would like to emphasize that drawing such normative conclusions resulting from a direct comparison of federal/multi-level systems disregards the risks involved in such a comparison. Each legal system is unique and embedded in its respective socio-historical setting. This especially needs to be considered when comparing the development of the EU legal system to the past development of federal systems such as the US, as the EU integration process is influenced by different features such as the one of mass-communication, a different understanding of democracy, and new forms of administration.<sup>95</sup> Hence, we also do

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<sup>92</sup> Erin Delaney & Luca Barani, *The Promotion of ‘Symmetrical’ European Citizenship: A Federal Perspective*, 25 EUR. INTEGRATION 95, 98–99 (2003); Meehan, *supra* note 7, 99–121; see Schönberger, *supra* note 2 (comparing this notion of citizenship with other historic citizenship concepts including the Germanic Confederation).

<sup>93</sup> Lacorne, *supra* note 7, at 428.

<sup>94</sup> For arguments on further “federalization” of the EU, see generally Alexander H. Trechsel, *How to Federalize the European Union... and Why Bother*, 12 J. EUR. PUB. POL’Y 401 (2005).

<sup>95</sup> Alberta M. Sbragia, *Thinking About the European Future: The Uses of Comparison*, in EURO-POLITICS: INSTITUTIONS AND POLICYMAKING IN THE ‘NEW’ EUROPEAN COMMUNITY 265 (Alberta M. Sbragia ed., 1992).

not believe that a comparison of contemporary EU citizenship with the American models discussed 150 years ago will result in any kind of “model” for EU citizenship. However, we are convinced of the fact that a purely internal look into EU scholarship results in isolation of EU scholarship from other solutions outside of the EU. Such an EU-centered perspective runs the risk of ignoring solutions to comparable problems from other jurisdictions unconsidered, much to the EU’s disadvantage.<sup>96</sup> Moreover, comparative analysis of EU citizenship with citizenship concepts of federal states allows for a better understanding of the problems brought about by the peculiar structures of the multi-level dimension of EU citizenship.<sup>97</sup>

3. Finally, deviating somewhat from conventional references to *antebellum* US citizenship in the literature, we do not claim to start from an *a priori* definition of what exactly the content of citizenship was in the United States prior to the Civil War. Not only do we hold that it is simply impossible to identify a single, objective meaning of the concept of “US citizenship” at that time,<sup>98</sup> we also argue that it is the ambiguity and contestedness of *antebellum* US citizenship and the (legal) struggle to define its content which makes it such a revealing object of comparison. Put differently, in comparing the historic US case to that of the EU, our point of departure is not a particular character of *antebellum* US citizenship but rather the debate over its content and character – a legal debate that we hold to be in many respects analogous to the one we currently see in Europe.

Still, we also do not claim to (be able to) give an exhaustive depiction of all the concepts of *antebellum* US citizenship – rather, we use the opinions delivered by the United States Supreme Court in *Dred Scott*

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<sup>96</sup> Renaud Dehousse, *Comparing National and EC Law: The Problem of the Level of Analysis*, 42 AM. J. COMP. L. 761, 764 (1994); BRUNO THÉRET, PROTECTION SOCIALE ET FÉDÉRALISME: L’EUROPE DANS LE MIROIR DE L’AMÉRIQUE DU NORD 64 et seq. (2002).

<sup>97</sup> See Schönberger, *supra* note 2, at 60 (providing an elaborate discussion of the methodological implications of what is usually referred to as a “diachronic comparison”).

<sup>98</sup> Not only prior to the Civil War, even in the modern literature there seems to be little agreement as to what would have to be regarded as the mainstream view of federal citizenship in the *antebellum* period. See, *inter alia*, AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 381 (2006).



v. *Sandford*<sup>99</sup> as a proxy for essential US citizenship theories before the Civil War.

### 3.1. THE US SUPREME COURT'S DRED SCOTT V. SANDFORD

It would be an understatement to call *Dred Scott* a landmark decision. It is, after all, widely characterized as one of the “most discussed legal contests in American history.”<sup>100</sup> On the face of it, this assessment is somewhat surprising, since *Dred Scott* – while being widely regarded as “the worst decision ever handed down by the Supreme Court and [as being] the worst failure of the US judicial system”<sup>101</sup> – has had little or no precedential effect at all.<sup>102</sup> If *Dred Scott* rather quickly led to a “jurisprudential dead end,” there must be other reasons for its prominence. Indeed, this case had an enormous legal and political impact in practical terms rather than any long-term influence on American Constitutional thought; *Dred Scott* immediately provoked a heated discussion among scholars as well as among the general public.<sup>103</sup> While no scholar would go as far as to argue that it was the *Dred Scott* decision alone that ultimately caused the Civil War, it is, however, generally agreed that the ruling greatly contributed to the tensions that would ultimately lead to Southern secession.<sup>104</sup>

*Dred Scott* can be looked at – and has been looked at – from many different angles. The heated debate about slavery,<sup>105</sup> which had become a central political issue from the 1830s onwards, is, naturally, the context within which *Dred Scott* is usually analyzed. Even looked at from this angle however, scholars are just as divided in their opinions as

<sup>99</sup> Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

<sup>100</sup> Vishneski, *supra* note 9, at 373.

<sup>101</sup> CORINNE J. NADEN & ROSE BLUE, DRED SCOTT: PERSON OR PROPERTY? 111 (2005). For references of further denunciations of the judgment see Keith E. Whittington, *The Road Not Taken: Dred Scott, Judicial Authority, and Political Questions*, 63 J. POL. 365, 366 (2001).

<sup>102</sup> PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS 7 (1997) (“[i]n contrast to *Marbury [v. Madison, Supreme Court: 5 U.S. 137, 1803]*, *Dred Scott* has virtually no precedential value; actions by Congress, the executive branch, and state governments during and after the Civil War effectively reversed [the] decision. Justices rarely cite the case, except as an example of a ‘bad’ decision [...].”).

<sup>103</sup> *Id.* at 7.

<sup>104</sup> See, *inter alia*, AUSTIN ALLEN, ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT 1837-1857, at 1 et seq. (2006).

<sup>105</sup> See, *inter alia*, WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS (1996).

were the judges of the Supreme Court; all nine Justices gave separate opinions, totaling 240 pages.<sup>106</sup> While some scholars have examined the methodology and the *factual* conclusions of the Supreme Court and have come to agree with it or to refute it,<sup>107</sup> others have focused on whether the issues in *Dred Scott* were to be decided *legally* in the first place or whether the Court ought to have “exercised the ‘passive virtues.’”<sup>108</sup> Others have gone far beyond studying the *Dred Scott* ruling – or, rather, the various different opinions the Judges delivered. These scholars have not only looked into what the Supreme Court decided but also into *how* the Court came to do so.<sup>109</sup>

Given the enormous body of literature *Dred Scott* has sparked over the centuries, including entire books like Fehrenbacher’s classic study,<sup>110</sup> it would go far beyond the scope of this paper to provide an exhaustive overview.<sup>111</sup> Departing from the context of slavery against which *Dred Scott* is usually – and historically correctly so – examined, we attempt a fresh look at the case: we will focus on those details of the ruling and the literature that focus on concepts of *antebellum* US citizenship and its relation to state citizenship.

### 3.1.1. FACTS

Contrary to the *Rottmann* case in which at least the facts can be seen as uncontested, stating the “facts” for *Dred Scott* is an approximation at best. Apart from the scarce facts given in the judgment and despite all scholarly efforts, many details about the person of Dred Scott,

<sup>106</sup> Vishneski, *supra* note 9, at 373.

<sup>107</sup> Chief Justice Taney’s opinion (which, notwithstanding the fact that each of the Justices handed in a separate opinion or dissent, technically also is the opinion of the Court) heavily draws from *originalism* and has, by and large, been denounced on both grounds.

<sup>108</sup> Whittington, *supra* note 101, at 366 (this is largely what Justice Samuel Nelson did in his concurrence).

<sup>109</sup> See Vishneski, *supra* note 9, at 383 et seq. (given the fact that the Justices voted separately on the different legal questions at stake, questions have been raised as to whether or not Justice Taney’s opinion actually commanded a majority of the Court).

<sup>110</sup> DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978). An abridged version has also been issued: DON E. FEHRENBACHER, *SLAVERY, LAW, AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE* (1981).

<sup>111</sup> This list should be a starting point for readers seeking further information: THE DRED SCOTT DECISION: LAW OR POLITICS? (1967); FINKELMAN, *supra* note 102; FEHRENBACHER, *supra* note 110; ALLEN, *supra* note 104; MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006); Christopher L. Eisgruber, *Dred Again: Originalism’s Forgotten Past*, 10 CONST. COMMENT. 37 (1993); Cass R. Sunstein, *Dred Scott v. Sandford and Its Legacy*, in *GREAT CASES IN CONSTITUTIONAL LAW* 64–89 (Robert P. George, ed., 2000).

his background and motives in taking legal action remain unclear. For instance, historians are divided on whether or not “Dred Scott” had always been the plaintiff’s name (or whether his real name had not actually been “Sam”) and when and where exactly he was born (most likely in Virginia at the end of the eighteenth century).<sup>112</sup> Even the facts given in the judgment should be taken with a grain of salt. For instance, the defendant’s name was actually John F. A. Sanford and not Sandford.<sup>113</sup> However, these questions go well beyond the scope of this paper and would – as far as can be seen – be of little relevance to the aspects of *Dred Scott* to be dealt with in this paper.

Mr. Dred Scott, a black slave who had originally belonged to a person named Peter Blow, was purchased by John Emerson, a US Army Major stationed outside of St. Louis.<sup>114</sup> Emerson took Scott along as he went from Missouri to his new assignment in the free state<sup>115</sup> of Illinois in 1834. In 1836, Emerson took Dred Scott to a military post in the free territory then known as Upper Louisiana<sup>116</sup> before both eventually returned to Missouri in 1838. In the meantime (in either 1836 or 1837) Scott had been allowed to officially<sup>117</sup> marry a slave named Harriet Robinson with whom he would later have two daughters. In 1840, John Emerson’s wife Eliza Emerson (born: Sanford), Dred Scott, and Harriet returned to St. Louis (Missouri). Emerson died in 1843 and his widow Eliza inherited<sup>118</sup> his estate, including his slaves. Scott attempted to purchase his freedom

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<sup>112</sup> Cf. FEHRENBACHER, *supra* note 110, at 239 et seq.; see Sunstein, *supra* note 111, at 68.

<sup>113</sup> See Vishneski, *supra* note 9, at 373.

<sup>114</sup> FEHRENBACHER, *supra* note 110, at 240. In the 1830 census, Peter Blow appeared as the owner of as many as five male slaves one of which he sold before his death while another others was sold after his death. While, in the words of Fehrenbacher, historians as well as the evidence are divided on which of the two Dred Scott actually was, the fact is “indisputable [that] John Emerson bought one of the Peter Blow’s slaves, and that slave [this] slave was the plaintiff in *Dred Scott v. Sandford*.” *Id.*

<sup>115</sup> In the *antebellum* United States, a ‘slave state’ was a US state in which slavery was legal, whereas a ‘free state’ was one in which slavery was either prohibited or eliminated over time.

<sup>116</sup> Upper Louisiana – also referred to as Illinois Country – had been acquired by the United States from France and was situated north of 36 degrees, 39 minutes and, thus, was a ‘free territory’ under the Missouri Compromise. Cf. ROBERT PIERCE FORBES, *THE MISSOURI COMPROMISE AND ITS AFTERMATH: SLAVERY AND THE MEANING OF AMERICA* (2007).

<sup>117</sup> Cf. FINKELMAN, *supra* note 102, at 15. The fact that Dred Scott was allowed to marry is notable for two reasons. Firstly, slaves were usually seen as having no right to enter into legal contracts. Secondly, the fact that a formal wedding ceremony was performed by Major Lawrence Taliaferro for Scott and his wife was later used to argue that Dred Scott and his Harriet had actually been regarded as ‘free people’ by both, Mr. Emerson and the Major.

<sup>118</sup> FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS*, *supra* note 110, at 248 (arguing that there is some “confusion” in the literature as to the exactness of the legal status of Mrs. Emerson and her daughter under the will of John Emerson).

but Eliza Emerson refused. In 1846 – with the help of abolitionist legal advisers – Scott sued Emerson for his freedom. Scott’s legal argument was primarily based on precedents<sup>119</sup> that had established the doctrine of “once free, always free” in Missouri. According to this concept, a slave was freed by, literally, setting foot in a free state or territory and would remain free even upon return to a slave state or territory.<sup>120</sup> Given that “once free, always free” was the established principle in Missouri at that time, Dred Scott could have been emancipated when his suit came to trial in 1847. However, his suit was dismissed on formal grounds.<sup>121</sup> A new trial was eventually granted<sup>122</sup> but – due to external factors in Missouri – the retrial did not start until 1850. In the meantime, Scott and his family were placed in custody in St. Louis County and Scott’s rent was held in escrow. Scott eventually won this second trial as the jury declared him (and his family) free.<sup>123</sup>

When Mrs. Emerson re-married and moved to New England, she transferred advocacy of the case to her brother, businessman John F. A. Sanford. Sanford – in an attempt to avoid the loss of her slaves (Scott and his family) as well as their substantial escrow account – appealed the case to the State Supreme Court.<sup>124</sup> The Supreme Court of Missouri held that only Missouri law was applicable in determining the status of Dred Scott and his family.<sup>125</sup> In bold proslavery language (and effectively reversing twenty-eight years of “once free, always free” precedents) the Supreme Court of Missouri on this basis reversed the lower court and declared Scott to be a slave.<sup>126</sup> The fact that John Sanford was a resident of a different state (New York) allowed Scott, who claimed to be a citizen

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<sup>119</sup> See, e.g., David Thomas Konig, *The Long Road to Dred Scott: Personhood and the Rule of Law in the Trial Court Records of St. Louis Slave Freedom Suits*, 75 UMKC L. Rev. 53, 73 et seq. (2006).

<sup>120</sup> Cf. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* *supra* note 110, at 252.

<sup>121</sup> Scott simply failed to provide a witness to testify the fact that he was a slave belonging to Mrs. Emerson.

<sup>122</sup> Emerson appealed the (trial court’s) decision to grant a new trial to the Supreme Court of Missouri, which – in 1848 – upheld the order.

<sup>123</sup> *Missouri’s Dred Scott Case, 1846-1857*, MISSOURI STATE ARCHIVES, <http://www.sos.mo.gov/archives/resources/africanamerican/scott/scott.asp> (last visited May 15, 2012).

<sup>124</sup> KERMIT L. HALL, ed., *THE OXFORD GUIDE TO UNITED STATES SUPREME COURT DECISIONS* 277 (2001).

<sup>125</sup> Duane Benton, *Lessons for Judges from Scott v. Emerson*, in *THE DRED SCOTT CASE: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON RACE AND LAW* 193, 193–194 (David Thomas Konig, Paul Finkelman & Christopher Alan Bracey, eds., 2010).

<sup>126</sup> *Scott v. Emerson*, 15 Mo. 577, 586 (1852); FINKELMAN, *supra* note 102, at 22.

of Missouri, and his advisors to again sue in federal court under “diversity jurisdiction.”<sup>127</sup> United States Circuit Court Judge Wells rejected Stanford’s plea in abatement – arguing that while Scott was certainly a “resident” of Missouri, no black slave could be a “citizen” of Missouri so that the court lacked jurisdiction to hear the case – and in 1854 the case went to trial.<sup>128</sup> Judge Wells told the jury that the case was to be determined by Missouri Law and (given the Missouri Supreme Court’s recent ruling) the jury upheld Scott’s slave status.<sup>129</sup>

Dread Scott appealed to the US Supreme Court and it was not until February of 1856 that the Court began to hear arguments.<sup>130</sup> After a lengthy and rather unusual process,<sup>131</sup> the Supreme Court ruling was eventually handed down on March 6, 1857.<sup>132</sup>

### 3.1.2. PROBLEMS AND SOLUTIONS OF THE COURT

As mentioned above, *Dred Scott* is conventionally discussed in relation to the ontological status of the concept of slavery. From this perspective, there were four key questions for the court to decide:<sup>133</sup>

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<sup>127</sup> Diversity jurisdiction – as provided or in US Constitution, Article III, Section 2, Paragraph 1 – allows for federal district courts to hear civil cases where the persons that are parties are ‘diverse in citizenship’, which includes citizens of different US states. See FINKELMAN, *supra* note 102, at 24. Scott could also have directly appealed from the Missouri Supreme Court to the US Supreme Court but, as a number of scholars suggest, the reason why Scott and his lawyer chose a different path can be seen in a precedent by the US Supreme Court – *Strader v. Graham*, 51 U.S. 82, 1851 – that was very much in line with the Missouri Supreme Court’s approach in determining the status according to local law. See FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS, *supra* note 110, at 268; Hall, *supra* note 124, at 278.

<sup>128</sup> FINKELMAN, *supra* note 102, at 25.

<sup>129</sup> FINKELMAN, *supra* note 102, at 26.

<sup>130</sup> FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS, *supra* note 110, at 286 et seq.; FINKELMAN, *supra* note 102, at 27 et seq.

<sup>131</sup> For a concise overview, see Hall, *supra* note 124, at 277. For an in-depth study, see FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS, *supra* note 110, at 285 et seq.

<sup>132</sup> This was just two days after the inauguration of President Buchanan. In his ‘House Divided’ speech, Abraham Lincoln would later suggest that the timing (or: delay) of the Supreme Court was part of a bigger plot to overturn the Missouri Compromise. See FINKELMAN, *supra* note 102, at 28; BRIAN MCGINTY, LINCOLN AND THE COURT 59 (2008); Gary J. Jacobsohn, *Abraham Lincoln “On this Question of Judicial Authority”*: *The Theory of Constitutional Aspiration*, 36 W. POL. Q. 52, 55 (1983).

<sup>133</sup> For a helpful illustration, see FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS, *supra* note 110, at 303.

1. Was the case rightly before the federal courts or, put differently, did Dred Scott have standing and did the Supreme Court have jurisdiction?
2. Could a descendant of a black slave (a member of the “negro race” in the Court’s terminology) ever be considered a “citizen” under the US Constitution?
3. Did Scott become free in Illinois?
4. Did Scott become free in the territory of Upper Louisiana (by virtue of the Missouri Compromise)?

Although the above-listed legal problems are rather straightforward, not only have the solutions the court ultimately reached been hotly debated to this day, but there is also a great deal of confusion as to exactly *what* the US Supreme Court decided in *Dred Scott*.

On the face of it, *Dred Scott* is a fairly clear ruling with a solid seven-to-two majority supporting Chief Justice Roger B. Taney’s “Opinion of the Court.” On closer inspection, however, the picture is less clear-cut. First of all, every single judge pronounced his opinion *seriatim*,<sup>134</sup> with Samuel Nelson concurring with the ruling but not its reasoning, and Benjamin Curtis and John McLean providing individual dissents. To make matters worse, the Justices of the Supreme Court in *Dred Scott* considered and voted upon the questions before the court separately. However, to actually constitute an authoritative judgment, each issue had to have a majority of the judges supporting Taney’s “Opinion of the Court” – even though this majority could be made of different judges for different questions.<sup>135</sup> Alleged differences between the opinions delivered orally by Taney and the later final text, along with rumors of Taney “revising” his text to counter some of the dissenters’ arguments, immediately sparked a debate among dissenting judges, commentators, and scholars. In particular, it was questioned whether all of the considerations Taney had presented as the “Opinion of the Court” actually reflected the opinion of a majority of the Supreme Court judges and could thereby be considered part of the *ratio decidendi*; hence, constituting an authorita-

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<sup>134</sup> Vishneski, *supra* note 9, at 373 (as Vishneski remarks, the nine opinions given by the judges amount for a total of 240 pages in the official reports).

<sup>135</sup> For a detailed analysis on how the ‘Taney Court’ produced opinions, see *id.* at 383 et seq.

tive, binding precedent.<sup>136</sup> While these questions remain academically disputed to this day, the adoption of the Fourteenth Amendment effectively overruled *Dred Scott*, thereby rendering the practical implications of this question mostly obsolete.

It is usually only Taney's opinion that is referred to as "the *Dred Scott* decision" in a political and historical sense. Analytically speaking, there is no comprehensive majority opinion as such. Rather, all nine judges offer their own solutions to the four key problems before the Court, which is why Taney's opinion may be the "Opinion of the Court" as far as the verdict is concerned but not when it comes to the grounds for the decision.<sup>137</sup> Here, it is Taney's opinion as well as Benjamin Curtis' dissent – almost a direct antithesis to Taney's remarks – that will be more closely looked at here.<sup>138</sup>

Taney, in his "Opinion of the Court", declared *Dred Scott* to still be a slave for several reasons:<sup>139</sup>

1. Based on an elaborate "original intent" analysis,<sup>140</sup> Taney concludes that black slaves – even if they are citizens of a given US State – cannot be (or become) citizens of the United States under the US Constitution.

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<sup>136</sup> For two in-depth studies on 'what the court actually decided in *Dred Scott*' that come to different conclusions regarding the question if Taney's 'opinion of the court' was fully backed by a majority of the judges, see FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS*, *supra* note 110, at 322 et seq.; Vishneski, *supra* note 9, at 373–90

<sup>137</sup> Some of the concurring judges filled texts only addressing certain aspects though.

<sup>138</sup> Justice John McLean's dissent has usually been considered to be the weaker of the two. Predominantly, what is perceived as a lack of bite has been attributed to McLean's ambitions to run for president. While this might seem as a strange move by modern standards, one has to keep in mind that it was not uncommon for justices to be actively involved in partisan politics until the end of the twentieth century. See FINKELMAN, *supra* note 102, at 28 n.38; Nevertheless, John McLean's dissent has recently regained the interest of scholars, some of which have argued that there is an 'affinity between McLean's opinion and certain aspects of Lincoln's constitutional thought.' Justin Buckley Dyer, *Lincolnian Natural Right, Dred Scott, and the Jurisprudence of John McLean*, 41 *POLITY* 63, 65 (2009).

<sup>139</sup> *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

<sup>140</sup> 'Original intent' is a principle of interpretation, which holds that (constitutional) interpretation should be consistent with what was meant by those who drafted and ratified it. In *Dred Scott*, Taney goes to great lengths to demonstrate that there were no black citizens at the time of the drafting and ratification of the US Constitutions. Taney's critics have questioned this alleged 'fact' (s. Curtis opinion, discussed below).

2. This implies that Scott does not have a right to sue in a federal court. Still, in a move seen by many as an *obiter dictum*,<sup>141</sup> Taney goes on to decide on the merits of the case and on slavery in general.

3. Taney reasons that Scott had never been free in the first place, as Congress – in outlawing slavery in certain territories with *inter alia* the Missouri Compromise – had exceeded its powers.<sup>142</sup>

4. Irrespective of whatever status a former slave might or might not have in a free state, if this slave (voluntarily) returned to a slave state, his status is governed by the rules of that state. Since Missouri's courts had declared Scott to be a slave "by the laws of Missouri," this was the fact the US Supreme Court would recognize.<sup>143</sup>

From our modern perspective, it is certainly Taney's theory of the "negro race" being "so inferior [a] class of beings" that, whether emancipated or not, they cannot become citizens "within the meaning of the Constitution of the United States" that is the most shocking aspect about the judgment.<sup>144</sup> But also for contemporaries such as Justice McLean, who argued that the question of whether "a colored citizen would not be an agreeable member of society . . . is more a matter of taste than of law."<sup>145</sup> Taney's views were seen as conflicting with the

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<sup>141</sup> Here, the argument is that once the Supreme Court determined that it did not have jurisdiction to hear Scott's case, it was obliged to dismiss the action instead of deciding on the merits of the case. Whether or not Taney had a majority for his reasoning that the plea in abatement was properly before the Court is still disputed. For differing views on this, see Vishneski, *supra* note 9, at 376 et seq.; FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS, *supra* note 110, at 322 et seq.

<sup>142</sup> Taney uses the narrowest possible reading of Art 4 Sect 3 Clause 2 of the US Constitution (the so-called territory clause', which grants Congress power 'to dispose of and make all needful Rules and Regulations' in the territories) arguing that this provision only applies to those original territories that existed when the Constitution was adopted. *Scott*, 60 U.S. at 436. Ironically, *Dred Scott* was only the second time the Supreme Court found an act of Congress to be unconstitutional. Judicial review had been 'invented' in the landmark *Marbury v. Madison* decision in 1803 but review over federal legislation lay dormant for a half century. Cf. KERMIT L. HALL, THE SUPREME COURT AND JUDICIAL REVIEW IN AMERICAN HISTORY 11 (1985).

<sup>143</sup> Taney explicitly refers to *Strader v. Graham*, 51 U.S. 82, 1851 to back up this point. See *Scott*, 60 U.S. at 453.

<sup>144</sup> *Scott*, 60 U.S. at 405.

<sup>145</sup> *Id.* at 533 (McLean J., dissenting).



higher principles of the US Constitution and the “natural rights of man.”<sup>146</sup>

Faced with the same four questions before the court (see above), Benjamin Curtis came to solutions quite different from Taney’s – as a matter of fact, Curtis’ dissent can be seen as a direct attack on the Chief Justice.<sup>147</sup>

1. Agreeing with the chief justice, Curtis maintained that the Court could (and should) review the plea in abatement. However, unlike Taney, he set very strict limits on the Court’s authority, effectively limiting the Court to addressing those legal issues explicitly appearing in the plea.<sup>148</sup>

2. Curtis disputed Taney’s premise as well as his conclusion about blacks not being entitled to citizenship by pointing to various examples where blacks *were* indeed recognized as citizens (or at least had standing in court) by a number of US states.<sup>149</sup> Curtis argues that laws discriminating against blacks, such as those invoked by Taney, no more disproved citizenship than would those disadvantaging married women.<sup>150</sup>

3. Curtis maintains further that, in his opinion, “under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its Constitu-

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<sup>146</sup> *Id.* at 557 (McLean, J., dissenting).

<sup>147</sup> *Id.* at 564 et. seq. (Curtis, J., dissenting).

<sup>148</sup> Put differently, facts *against* Dred Scott being a citizen should be considered by the Court only insofar as they were contained in the plea and as they were directly (‘of themselves’) related to the key question of the court; whether being of African descent, and having parents that were once slaves, is ‘necessarily inconsistent with [Scotts] own citizenship in the State of Missouri within the meaning of the Constitution and laws of the United States.’ *Id.* at 569 (Curtis, J., dissenting); *cf.* FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS*, *supra* note 110, at 405.

<sup>149</sup> ‘At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.’ *Scott*, 60 U.S. at 572 (Curtis, J., dissenting).

<sup>150</sup> David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836-1864*, 1983 DUKE L.J. 695, 730 (1983).

tion or laws, is also a citizen of the United States.”<sup>151</sup> Astonishingly, Curtis’ interpretation seems to be prefiguring the later Fourteenth Amendment.

4. Having affirmed Dred Scott’s capacity to bring suit in a federal court, Curtis goes on to address the Missouri Compromise.<sup>152</sup> Here, Curtis (and, for that matter, McLean) dispute Taney’s narrow reading of the “territory clause” (s. above) by interpreting this provision to grant Congress plenary powers (full powers) over the territories. With regard to the question of whether or not this includes the regulation of slavery, Curtis concluded that “though Congress can make a regulation prohibiting slavery in a Territory, they cannot make a regulation allowing it.”<sup>153</sup>

5. Curtis therefore concludes in favor of Scott that “the Circuit Court should be reversed, and the cause remanded for a new trial.”<sup>154</sup>

Curtis’ dissent quickly became popular in the North, serving as a basis for legal and political opposition to Taney’s “Opinion of the Court” – especially during the elections of 1858 and 1860. Yet, while the outcome and the rationale of Curtis opinion seems to appeal much more to our contemporary moral standards, many scholars have legitimately warned against mistaking Curtis’ position, and that of the (diverse) abolitionist movement in general, as an expression of racial equality. For the most part, what Northerners had in mind when they demanded “rights”

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<sup>151</sup> *Scott*, 60 U.S. at 576 (Curtis, J., dissenting). see also Schönberger, *supra* note 2, at 72 et seq.; FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS*, *supra* note 110, at 406 et seq.

<sup>152</sup> See ROBERT PIERCE FORBES, *THE MISSOURI COMPROMISE AND ITS AFTERMATH: SLAVERY & THE MEANING OF AMERICA* 5, 8 (2007) (demonstrating that the so-called ‘Missouri Compromise’ was an agreement between the pro-slavery and abolitionist forces in the US Congress, passed in 1820. It primarily dealt with the issue of slavery in the ‘new territories’).

<sup>153</sup> *Scott*, 60 U.S. at 620 (Curtis, J., dissenting). See also FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS*, *supra* note 110, at 408 et seq. For a conclusive analysis of the diversity and complexity of the Northern and Southern concepts with regard to the legality/constitutionality of slavery, see Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305 (1988).

<sup>154</sup> *Scott*, 60 U.S. at 633 (Curtis, J., dissenting).

for blacks was a very narrow set of core fundamental rights – a far cry from “equality” in the modern sense.<sup>155</sup>

### 3.2. IMPACT

What, for the purposes of this text, is most relevant to *Dred Scott* is not the institution of slavery but rather the underlying concepts of *federalism* the judges base their reasoning upon. In an almost Weberian *ideal type* manner, the opinions of Taney and Curtis contrast the two extremes in a continuum of different concepts of the relationship between state and federal citizenship in the *antebellum* United States.

Notably, it is Justice Taney who relies on what could be referred to as a purely *federal standard* (or, depending on one’s terminology, a *national standard*)<sup>156</sup> in determining the scope of US citizenship. Taney explicitly states that whether or not blacks can be (or become) citizens of the United States can be determined by the federal standard alone. As noted above, Taney – through his analysis of the “original” meaning of citizenship when the US Constitution was adopted – concludes that blacks are unfit for citizenship and therefore have no rights under the US Constitution. But Taney does not stop here: not only does he want federal citizenship to be determined by federal laws, but his theory of federal and state citizenship is indeed one in which the two are totally independent from each other.

Going beyond a traditional “dual citizenship”<sup>157</sup> conception in which a citizen of the United States is *automatically* a citizen of the United States and the state in which he resides, there is not necessarily, according to Taney, a connection of the two. Furthermore, Taney explicitly reasons that, should states decide to regard blacks as *citizens* of their state this would *not* make them citizens of the United States under the US Constitution.<sup>158</sup>

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<sup>155</sup> FINKELMAN, *supra* note 102, at 109; Maltz, *supra* note 153; EARL M. MALTZ, DRED SCOTT AND THE POLITICS OF SLAVERY 132 et seq. (2007).

<sup>156</sup> Ironically, Taney shares this view with McLean, who “agreed that citizenship for constitutional purposes was to be determined by a federal standard.” Earl M. Maltz, *Slavery, Federalism, and the Structure of the Constitution*, 36 AM. J. LEGAL HIST., 466, 483 (1992).

<sup>157</sup> For two classic statements of the ‘dual citizenship’ paradigm, see *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 249–50 (1833); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 51–55 (1873).

<sup>158</sup> The explicit power of Congress to establish a uniform rule of naturalization was widely used to make this argument (*inter alia* by Taney). See Maltz, *supra* note 153, at 344.

*In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State and yet not be entitled to the rights and privileges of a citizen in any other State.*<sup>159</sup>

Taney's theory of state and federal citizenship as two distinct, completely independent institutions that are acquired – or lost – according to their own separate rules, is a radical move from traditional federal theory in the United States and elsewhere that rather have regarded the two as “inseparable dimensions of the same status.”<sup>160</sup>

Also, a serious challenge for Taney's argument is posed by the US Constitution's comity clause,<sup>161</sup> which declares that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” Taney goes to some lengths to come up with what Fehrenbacher refers to as a “theory of two different kinds of state citizenship.”<sup>162</sup> Only those who possess what Taney refers to as (state) citizenship “within the meaning of the [US] Constitution”<sup>163</sup> are protected by the (rights and privileges) guaranteed by the US Constitution. Thereby, as Fehrenbacher further observes, this theory helped Taney effectively transform the question of whether Dred Scott was a citizen of the state of Missouri into the question of whether he was a citizen of the United States of America.<sup>164</sup>

<sup>159</sup> *Scott v. Sandford*, 60 U.S. 393, 1856, opinion of the Court, Taney, p. 405.

<sup>160</sup> JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, at 328 (1978); see Schönberger, *supra* note 2 at 51 et seq.

<sup>161</sup> U.S. CONST. art. IV, § 2, cl. 1. There are various theories regarding the purpose of this clause. Still, even the narrowest interpretation of the clause – that it only forbids any US state to discriminate against citizens of other States in favor of its own – presents a potential challenge Taney's has to overcome. See Maltz, *supra* note 153, at 334 et seq. (illustrating comity clause based arguments for and against slavery in the *antebellum* US).

<sup>162</sup> FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS*, *supra* note 110, at 345 et seq.

<sup>163</sup> *Scott*, 60 U.S. at 405.

<sup>164</sup> See FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS*, *supra* note 110, at 345 et seq. (noting the conflict between the transformation of the issue into a matter of federal law with some of Taney's ‘even if’ arguments that stress the importance of state provisions in determining Scott's status).

*Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts, and consequently that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous.*<sup>165</sup>

All in all, Taney's theory of citizenship in the *antebellum* United States is a bold statement insofar as it establishes a US citizenship in its own right, fully *autonomous* from state citizenship. Yet, Taney's considerations in *Dred Scott* become even more curious when the wider picture of the citizenship debate is taken into account. Generally the Northerners' (anti-slavery) view was that the US Constitution of 1789 had established an American nation and a system of "dual sovereignty", in which sovereignty was divided between the state and the federal level.<sup>166</sup> Taney's citizenship concept thus appears to take the idea that American citizens are living under two "separate and distinct sovereignties"<sup>167</sup> to its very extreme.<sup>168</sup> Seen this way, his core assumptions would be at odds with the traditional views of pro-slavery Southerners regarding the "nature" of the United States.

The established Southern view at the time of *Dred Scott*, championed by the likes of John C. Calhoun from the mid-1820s onwards,<sup>169</sup> was the so-called states' rights doctrine of the United States. Also known

<sup>165</sup> *Scott*, 60 U.S. at 427 (emphasis added).

<sup>166</sup> Chief Justice Marshall expresses the dialectic of the concept maybe in its purest form: "That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 413–14 (1821). Cf. FARBER, *supra* note 91; see also Mann, *supra* note 91.

<sup>167</sup> "[T]he powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres." *Ableman v. Booth*, 62 U.S. (21 How.) 506, 516 (1859). A controversial, practical effect of this doctrine can be observed in the manner in which the double jeopardy clause protects a person from being convicted twice for the same crime based on the same conduct. Here, the 'separate sovereigns' doctrine allows the States and federal level to prosecute for the same criminal act as they are recognized as possessing a separate sovereignty. See Akil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law after Rodney King*, 95 COLUM. L. REV. 1, 1–2 (1995).

<sup>168</sup> Even so, the challenge for Taney remains to shield his argument from the implications of the *comity clause* (s. footnote above).

<sup>169</sup> See CHARLES SELLERS, ANDREW JACKSON, NULLIFICATION, AND THE STATE-RIGHTS TRADITION 19–21 (1963) (showing a changing Southern sentiment, from nationalistic to particularistic). Cf. WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA 1816–1836, at 132–133 (Harper & Row 1st ed.) (1968).

as the “compact theory,” the US states were believed to have retained their sovereignty even after the adoption of the US Constitution. Therefore, the federal level was not regarded as being directly linked to a single American nation but rather conceived of as an agent of the states, created by “second-level” contract of the sovereign peoples of the US states.<sup>170</sup> Consequentially, Calhoun reinterpreted federal citizenship as merely being “entitled to all privileges and immunities of citizens in the several States; and it is in this, and in no other sense, that [one can conceive of] citizens of the United States.”<sup>171</sup> With regards to the power of Congress to establish a uniform rule of naturalization (in Article I, section 8, clause 4 of the US Constitution), to Calhoun it “extends simply to the establishment of a uniform rule by which foreigners may be naturalized in the several States or territories, without infringing, in any other respect, in reference to naturalization, the rights of the States as they existed before the adoption of the constitution.”<sup>172</sup>

To be sure, not all Southerners shared Calhoun’s radical position of a strictly accessory or secondary federal citizenship, but it was generally understood that federal citizenship was closely tied to if not dependent on the possession of state citizenship.<sup>173</sup> From this perspective, Taney’s theory of an independent federal citizenship could be seen as a threat to the concept of states’ rights and, indeed, many abolitionists were quick to point out to their Southern opponents the broad centralizing tendencies they saw in *Dred Scott*.<sup>174</sup> In reality, however, Taney’s opinion in *Dred Scott* significantly limits the power of Congress as much as it limits that of the states when it comes to citizenship and slavery – it

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<sup>170</sup> See FARBER, *supra* note 91, at 32. While *compact theory* posits the individual states to have a higher, more direct legitimacy than the federal level (on the basis of which they then, as an *ultima ratio*, can nullify federal laws), it does not claim that the United States is merely based on what in the European context is referred to as an ‘intergovernmental treaty’. Rather, Calhoun carefully distinguishes the ‘federal government’ of the US from a conventional, intergovernmental confederacy, but also from that of a consolidated, national government. See JOHN C. CALHOUN, A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES, reprinted in JOHN C. CALHOUN: SELECTED WRITINGS AND SPEECHES 90–91 (H. Lee Cheek, Jr., ed., Regnery Publishing, Washington, 2003); cf. MURRAY FORSYTH, UNIONS OF STATES: THE THEORY AND PRACTICE OF CONFEDERATION 124–25 (1981).

<sup>171</sup> Senator John C. Calhoun, Speech on the Revenue Collection [Force] Bill, Address before the United States Senate (February 15–16, 1833), in JOHN C. CALHOUN, UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 443–44, (Ross M. Lence, ed., 1992).

<sup>172</sup> *Id.* at 444.

<sup>173</sup> KETTNER, *supra* note 160, at 328; FINKELMAN, *supra* note 102, at 35.

<sup>174</sup> Maltz, *supra* note 156, at 488 (regarding the double-edged effect of *Dred Scott* with regard to state autonomy).

is therefore rather an empowerment of the US Constitution (and with this one of the Court itself).

While, as we have seen above, Taney explicitly reasons that there can be state citizens who are not citizens of the United States, he does not address the key question of whether there can be a federal citizen who is not a citizen of a state. Significantly, it is Congress' power to regulate naturalization that Taney uses as a hook to negate any impact on federal citizenship should states choose to "naturalize" blacks by granting them the rights of citizens.<sup>175</sup> From this, one might conclude that Taney assumes that – should a state decide to denaturalize a citizen – this citizen would still be entitled to US citizenship, including rights and privileges secured to a citizen under the US Constitution.<sup>176</sup>

While Taney's pro-slavery opinion is therefore rather atypical in that it is based on an *autonomous* conception of federal citizenship, Curtis' anti-slavery dissent is in turn based on rather state-centric considerations. On an empirical level, Curtis points out all the historical inaccuracies and logical inconsistencies in Taney's opinion; more importantly, however, Curtis is holding that it is state citizenship that determines federal citizenship.<sup>177</sup>

This is exemplified by Curtis' already above-mentioned belief that "under the Constitution of the United States, every free person born

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<sup>175</sup> Scott v. Sandford, 60 U.S. (19 How.) 393, 405–06 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV ("[t]he Constitution has conferred on Congress the right to establish a uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character.").

<sup>176</sup> Taney's failure to conceive of this problem – or at least to raise it explicitly – leads to the fact that the understandings of the underlying concepts in *Dred Scott* vary greatly. Many see Taney's reasoning as an example of a strict divided sovereignty doctrine (and therefore, absolute federal power over federal citizenship) while others regard Taney's position as a prime example of states' rights philosophy. For the latter (minority) position, see Maltz, *supra* note 153, at 338 et seq. As Finkelman argues – looking at previous as well as subsequent opinions of the chief justice – Taney in fact constantly shifted from states' rights to 'nationalist' (divided sovereignty) arguments in order to achieve the desired (anti-slavery) outcome. Finkelman further argues that Taney had to rely on a nationalist stance in *Dred Scott* if he wanted to assure that 'blacks would not appear before his Court – or any other federal court – as plaintiffs, defendants, or attorneys.' Paul Finkelman, *The Taney Court (1836-1864): The Jurisprudence of Slavery and the Crisis of the Union*, in *THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE* 75, 92–93 (Christopher L. Tomlins, ed., 2005).

<sup>177</sup> What further distinguishes him from Taney's approach is Curtis' skepticism towards judicial activism. Curtis argues for a more modest judicial role. See Whittington, *supra* note 101, at 389.

on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States.”<sup>178</sup> Ironically, Curtis’ theory – though employed here in *Dred Scott*’s favor – closely resembles Southern, almost Calhounian “States’ rights” conceptions of citizenship. While *prima facie* being much more coherent than Taney’s, Curtis’ theory has some severe consequences. Most importantly, under his doctrine, the rights and immunities guaranteed by the US Constitution stand or fall with the acquisition or loss of state citizenship. Therefore, for Curtis it is perfectly sound for blacks to be citizens in one US State and be denied all their rights in others.<sup>179</sup> To put it differently, it is – in Curtis’ view – solely the individual states that determine US citizenship, even if their standards are fundamentally different.

#### 4. EUROPEAN CITIZENSHIP AFTER *ROTTMANN* IN THE LIGHT OF *DRED SCOTT* – IN SEARCH OF A MIDDLE GROUND

Having evaluated the different solutions proposed in *Dred Scott*, we now evaluate whether there is anything to learn for the ECJ’s *Rottmann* case issued about 150 years later. We will argue that the Taney and Curtis opinions in *Dred Scott* each vividly illustrate the possible impact of extreme positions for either side in the autonomy/dependence struggle in the discussion about EU citizenship. Taney’s opinion, on the one hand, shows that excessive emphasis on the autonomy of EU citizenship can actually be used to deprive citizens of their rights. This idea is in stark contrast to contemporary EU literature, which often assumes that more autonomy of European citizenship enables more individual protection.<sup>180</sup> Curtis’ position, on the other hand, strongly emphasizes the dependency element and is thereby largely congruent to the Member State’s position in the ECJ’s citizenship-cases, particularly in *Rottmann*. As we have already seen in *Dred Scott*, where such a view led to different treatment of the status of slaves – and thereby to different standards for US citizenship – in the States, it might likewise result in gaps in the protection of the individual in the EU context. Given these effects illustrated by the two opinions in the *Dred Scott* decision, the modest approach intuitively

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<sup>178</sup> *Scott*, 60 U.S. at 576 (Curtis, J., dissenting).

<sup>179</sup> This might be surprising, given the popularity Curtis’ opinion would gain in the North. Yet, unlike McLean, Curtis was never a radical opponent of slavery nor did he endorse racial equality. Cf. FINKELMAN, *supra* note 102, at 109.

<sup>180</sup> See, e.g., Kotalakidis, *supra* note 1.



or deliberately chosen by the ECJ in *Rottmann* becomes *prima facie* plausible. In fact, *Dred Scott* shows that an interconnected, cooperative understanding of citizenship that wisely governs between the different notions of dependence and autonomy seems to be most effective. What is more, the legacy of *Dred Scott* as the US Supreme Court's "self-inflicted wound" also demonstrates that in contentious policy areas, Courts are well advised to choose a modest, gradualist approach and avoid activist, winner-takes-all decisions.<sup>181</sup>

#### 4.1. THE PERILS OF OVEREMPHASIZING AUTONOMY: LESSONS TO BE LEARNED FROM TANEY

A transfer of Taney's idea of independent citizen concepts *pars pro toto* on the EU is *de lege lata* not possible. Art. 20 TFEU clearly stipulates that EU citizenship depends on the national citizenship of an EU Member State. However, Taney's opinion might be used to illustrate the possible effect on downplaying the feature of dependency in EU citizenship. If we assume that both concepts, autonomy and dependency, are principles that work as optimization commands and thereby in the way Dworkin<sup>182</sup> and Alexy<sup>183</sup> understand them, it would indeed mean that the ECJ's power to determine their weight might ultimately lead to a factual collapse of the dependency principle in a way that would make its function comparable to Taney's proposal.

If one evaluates the main literature on citizenship in the EU, especially that evaluating the *Rottmann* case, scholars seem to propose exactly such a treatment of the dependency principle. Building on the theory that the ECJ is the "engine of integration,"<sup>184</sup> a "constitutionalizing" Court,<sup>185</sup> which is the only European institution endowed with polit-

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<sup>181</sup> Whittington, *supra* note 101, at 366.

<sup>182</sup> RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

<sup>183</sup> ROBERT ALEXY, THEORIE DER GRUNDRECHTE 75 (1986); Robert Alexy, *On the Structure of Legal Principles*, 13 *RATIO JURIS*. 294 (2000).

<sup>184</sup> G. Federico Mancini, *The Making of a Constitution for Europe*, 26 *COMMON MKT. L. REV.* 595, 612 (1989) (Neth.); Mary L. Volcansek, *The European Court of Justice: Supranational Policy-Making*, 15 *W. EUR. POL.* 109, 119 (1992); J. H. H. Weiler, *Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration*, 31 *J. COMMON MKT. STUD.* 417, 426-427 (1993).

<sup>185</sup> Francis Jacobs, *Is the Court of Justice of the European Communities a Constitutional Court?*, in *CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW* 25, 32 (Deidre Curtin & David O'Keefe, eds., 1992).

ical initiative,<sup>186</sup> they also favor a strong role for the ECJ with regard to EU citizenship.<sup>187</sup> Without such a strong role, the ECJ, they argue, will not be able to counterbalance the diminution of the political initiative of Member States to support the evolutionary feature<sup>188</sup> of the content of EU citizenship by an *approfondissement* of the judicial lever.<sup>189</sup> It would hence indeed form a sole “symbolic plaything” without any “substantive content.”<sup>190</sup> Put in less theoretical words: If the ECJ does not highlight its strong role in determining the autonomous character of EU citizenship, the whole concept will lose its substantial content and thereby will not only lose its value for the EU integration process but will also deprive the individual of the rights granted by the EU. These views have been expressed in the majority of evaluations of the *Rottmann* case. Michael Dougan criticizes the *Rottmann* judgment as sitting “rather uneasily with the previous ruling in Case C-210/06 *Cartesio*”,<sup>191</sup> where the ECJ confirmed that Member States rules may deprive legal persons of their right to exercise the freedom of establishment. Therein, the ECJ explicitly acknowledged that the question of when a company is granted legal personality is solely subject to national law. Dimitry Kochenov even goes a step further. By refraining from providing clear EU legal requirements that allow Member States to determine when to withdraw EU citizenship, the ECJ was “a Guardian of Arbitrariness in Citizenship Matters.”<sup>192</sup> It introduced only a “minimal logic and predictability into the current context of interaction between EU law and national law on issues of nationality.” “In this respect it” was “clearly a step backwards compared with the seminal decision in Case C-369/90 *Micheletti* (1992), as it failed to

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<sup>186</sup> Francesco Bilancia, *The Concept of Statutory Law in EU Perspective*, 12 IND. J. GLOBAL LEGAL STUD. 505 (2005).

<sup>187</sup> See Case C-214/94, *Boukhalfa v. Bundesrepublik Deutschland*, Opinion of AG Léger, 1996 E.C.R. I-2253, ¶ 63.

<sup>188</sup> See *id.*

<sup>189</sup> For a contemporary analysis of this ‘integration through law’ theory, see Antoine Vauchez, *‘Integration-through-Law’: Contribution to a Socio-history of EU Political Commonsense* (Robert Schuman Centre for Advanced Studies, Working Paper No. 10, 2008). The ‘integration through law’ theory has been developed in the 70ies and 80ies at the EUI in Florence under the responsibility of Mauro Cappelletti, Monica Seccombe & Joseph Weiler. See INTEGRATION THROUGH LAW – EUROPE AND THE AMERICAN FEDERAL EXPERIENCE, *supra* note 84.

<sup>190</sup> Jessurun d’Oliveira, *supra* note 22, at 147 n.60.

<sup>191</sup> Dougan, *supra* note 20.

<sup>192</sup> Dimitry Kochenov, *Two Sovereign States vs. a Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters*, EUR. UNION DEMOCRACY OBSERVATORY ON CITIZENSHIP, <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=2>, page 3 (last visited Apr. 19, 2012).

clear the minefield of contradictions that plague the lives of numerous EU citizens in the context of the rising importance of the ‘ever closer Union’ in Europe.” Oxana Golynger hence also finds “[t]he consequences of the *Rottmann* judgment for matters of nationality” to be “relatively limited.”<sup>193</sup>

Such an emphasis on the principle of autonomy within Art. 20 TFEU results in understanding “the relationship between Union citizenship and nationality in Art. 17 EC (Art. 20 TFEU)” as a “‘reverse’ hierarchy or an ‘inverted pyramid.’”<sup>194</sup> It hence comes close to the independent concept that Taney proposed in *Dred Scott*.

What might be underlying many of these calls for more autonomy of EU citizenship in the literature could be a fear that Member States tend to use their wide discretion to deprive European citizens of their rights or at least to discriminate against them. The underlying assumption is that only a substantiated, autonomous EU citizenship – backed by bold ECJ jurisdiction – can effectively check the Member States and secure European fundamental rights. *Prima facie*, this argument seems to hold true not only for the ECJ’s jurisdiction but also for the American experience after the Civil War when individuals used – taking recourse through the Fourteenth Amendment – the federal judiciary to enforce their rights against the US States. The Taney opinion in *Dred Scott* thus reminds us that the “more autonomy is more” approach favored by many European lawyers comes at a high price in that autonomy can easily be used to effectively deprive citizens of their rights.

Granted, it is quite hard to imagine a situation where European citizenship could be pitched against Member State citizenship but this certainly does not guarantee that it will never happen. For instance, Spain’s 2005 immigrant amnesty for as many as 800,000 people was met with harsh criticism from other EU Member States.<sup>195</sup> These Spanish policies have been criticized for intentionally misusing the right of free movement enshrined in European citizenship as a political argument. In

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<sup>193</sup> Oxana Golynger, *The Correlation Between the Status of Union Citizenship, the Rights Attached to It and Nationality in Rottmann*, EUR. UNION DEMOCRACY OBSERVATORY ON CITIZENSHIP, <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=4> (last visited Apr. 19, 2012).

<sup>194</sup> *Id.*

<sup>195</sup> *Spain Launches Immigrant Amnesty*, BBC NEWS, <http://news.bbc.co.uk/2/hi/europe/4242411.stm> (last visited Jan. 11, 2012). See also Gareth Davies, *The Entirely Conventional Supremacy of Union Citizenship and Rights*, EUR. UNION DEMOCRACY OBSERVATORY ON CITIZENSHIP, <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=1>, page 2 (last visited Apr. 19, 2012).

Spain, this massive naturalization procedure for many South Americans of Spanish descent has only been politically possible as Spain, it is argued, was aware “that many of the new Spaniards who came to Europe would not stay in Spain but go to other Member States. Spain created Union citizens, in the knowledge that many would become residents of other States of the Union.”<sup>196</sup> This negative reaction is certainly a far cry from the formation of a legal doctrine that – building on the autonomy of EU citizenship – would argue that these people could maybe acquire Spanish citizenship but would not be entitled to European citizenship.<sup>197</sup> Nonetheless, Taney’s opinion clearly highlights the potential dangers of overstating the autonomy EU citizenship towards a concept fully detached from Member State citizenship.

#### 4.2. EMPHASIZING THE DEPENDENCE MOMENTUM: LESSONS TO BE LEARNED FROM CURTIS

To apply the dependence momentum of Art. 20 TFEU *pars pro toto* to European citizenship in a way Curtis proposed it for the concept of US citizenship would – in contrast to Taney’s citizenship concept – not directly infringe the wording of Art. 20 TFEU. However, the fact that Art. 20 (2) TFEU defines the substantive component of EU citizenship by stipulating specific European rights of social, political, and economic participation that go beyond the ones granted by national citizenship result from the fact that EU citizenship is, as a logical consequence from the autonomy from the whole EU legal order, autonomous *per se*. As this autonomy concept is, like the concept of dependency, a principle, it is also subject to a balancing argument. As such, EU Member States and national scholars arguing for a strong role of Member States within the EU typically also emphasize the dependency momentum of EU citizenship. In the *Rottmann* case, for example, “[a]ll the governments that submitted observations to the Court, the Freistaat Bayern and the Commission of the European Communities argue that the rules on the acquisition and loss of nationality fall within the competence of the Member States.”<sup>198</sup> As the ECJ emphasized, “[s]ome of them conclude that a deci-

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<sup>196</sup> Davies, *supra* note 196.

<sup>197</sup> *Id.* However, in the absence of an explicit ‘naturalization provision’ in the European Treaties, this sort of argument is much harder to make. One would have to argue that the unilateral Spanish amnesty somehow violated the spirit of European Citizenship. In the US case, on the other hand, the federal Constitution establishes a uniform rule of naturalization.

<sup>198</sup> Case C-135/08, *Rottmann v. Bayern*, 2010 E.C.R. I-1449, ¶ 37.

sion to withdraw naturalization such as that at issue in the main proceedings cannot fall within the ambit of European Union law. In that connection, they make reference to Declaration No 2 on nationality of a Member State, annexed by the Member States to the final act of the Treaty on European Union.<sup>199</sup> In addition, Theodore Konstadinides, like many others, stresses the wording of the old Art. 17 EC, according to which EU citizenship shall “complement” Member State nationality.<sup>200</sup> In his view, the new wording of Art. 20 TFEU “additional” shall also be interpreted in the light of the wording of Art. 17 EC.<sup>201</sup> It hence implies that an individual’s nationality is to be settled by reference to national law and further confirms the practical impossibility of referring to EU citizenship as “dual citizenship.”<sup>202</sup> From this perspective, *Rottmann*, as Gerard De de Groot and Anja Seling point out, might be viewed not so much as a restrained, pragmatic judgment but rather as “judicial activism.”<sup>203</sup> It could be interpreted as intervening deeply in national law as it “is willing to challenge Member States’ autonomy in nationality matters.”<sup>204</sup>

What each of these approaches have in common is that they emphasize the dependency argument to a great extent. Thereby, they come surprisingly close to what Curtis proposed as a solution for the dependency/autonomy struggle in the *Dred Scott* decision. In turn then, Curtis’ opinion can help us identify the implications of a federal citizenship lacking any autonomous content whatsoever. On the upside, Curtis’ model sits very well with what in the US case might (controversially) be called *States’ rights* and with the principle of *subsidiarity* with regard to the EU. That is to say, Curtis’ citizenship model is one in which there is minimal infringement on the (Member) States’ capacity to govern the membership for their respective territory. Federal citizenship is thus citizenship in name only. As Calhoun explicitly argues (see above), it stands for a regime of non-discrimination and mutual recognition of the various state citizenships. It is the application of Curtis’ principle to the institution of slavery in *Dred Scott* that illustrates the weaknesses and down-

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<sup>199</sup> *Id.*

<sup>200</sup> Konstadinides, *supra* note 8, at 403.

<sup>201</sup> *Id.* at 403.

<sup>202</sup> *Id.* at 404.

<sup>203</sup> Gerard René De Groot & Anja Seling, *The Consequences of the Rottmann Judgment on Member State Autonomy – The Court’s Avant-gardism in Nationality Matters*, EUR. UNION DEMOCRACY OBSERVATORY ON CITIZENSHIP, <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=6>, page 7 (last visited Apr. 19, 2012).

<sup>204</sup> *Id.*

sides of this doctrine – in a much more fundamental and, without question, much more brutal way than would occur in the European context.

The first downside – which Curtis’ opinion clearly illustrates – is the fact that residents’ federal (or European) fundamental rights can be effectively denied if the state they are residing in chooses to treat them as non-citizens. In itself, but especially in cases with an inter-state dimension, this can lead to obscure outcomes. Applied to the “traveler” Dred Scott, under Curtis’ doctrine he would not have been a citizen of the US (nor have had any rights under the US Constitution) while living in Missouri, he would then have become a citizen of the United States by moving to a free state (eventually also have acquired a right to vote, depending on the local laws) and would again have lost his (US and state) citizenship upon his return to the slave state of Missouri.<sup>205</sup> Here, the analogy to the Member States’ argumentation in *Rottman* is striking, since the decision of two Member States to withdraw Rottman’s state citizenship effectively also de-naturalizes him as a European citizen.

#### 4.3. PLEA FOR A COOPERATIVE APPROACH AND ITS REFLECTION IN ROTTMANN

The analysis of the Taney and Curtis opinions has revealed the danger that lies in excessive emphasis of either the autonomy or the dependence criteria of European citizenship. Seen in this light, the modest “middle of the road” theory intuitively or deliberately chosen by ECJ in *Rottmann* becomes *prima facie* plausible. *Dred Scott* shows that an interconnected, cooperative understanding of citizenship is indeed more effective. Moreover, such an approach is also better suited to the EU’s cooperative multi-level architecture than to a dual sovereignty/federalism model.<sup>206</sup> All in all, judicial restraint with respect to EU citizenship is hence a good choice. While citizenship is not as contested in the EU as was slavery in the *antebellum* United States, Member States are very protective of their right to determine who their “people” are. It is therefore wise to leave this most fundamental question in the political arena.

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<sup>205</sup> This says nothing of the legal challenges this doctrine creates with regard to the comity clause, in a polity where the same subject (Dred Scott) might be considered a citizen with fundamental rights (by the free states) while others regard it as a property (the slave states), the owner’s rights of which would need to be recognized by other states.

<sup>206</sup> For an extensive analysis in this respect, see ROBERT SCHÜTZE, FROM DUAL TO COOPERATIVE FEDERALISM. THE CHANGING STRUCTURE OF EUROPEAN LAW (2009). For a comparison with the cooperative German federalism, see Scharpf, *supra* note 83.

Such an approach, however, immediately poses the question on where to draw the line for the Member State's power to determine citizenship. The Curtis opinion as well as the naturalization example from Spain shows that disregarding the autonomous feature of EU citizenship might lead not only to the misuse of its dependency at the expense of other Member States but also risks depriving EU citizens of their rights enshrined in Art. 20 TFEU. Such judicial restraint hence needs to be limited if it comes at the expense of the substantive content of EU citizenship or of the Member State's solidarity. Both of these need to form the autonomous element of EU citizenship, which requires safeguarding by European law. The ECJ's approach in *Rottmann*, to limit the applicability of European law to its "appropriateness," ultimately fails to substantiate the autonomous content of European citizenship. This is especially the case since, according to *Rottmann*, "appropriateness" is to be determined solely by the Member States and little guidance is given in terms of the standards that ought to be applied, such as: Member State nationality may be granted or withdrawn on grounds of arguments based on national law, while European citizenship may only be granted or withdrawn by the decision of a Member State, which bases its decision on arguments from European law. This is a direct and unconditional consequence from the dialectic of both spheres of citizenship – while interwoven, being conceptually discrete.

Underlying the ECJ's reasoning then is a confidence that the highest Member State Courts will embrace their role as "hybrid" Courts, thoughtfully balancing their role as arbiters of national citizenship (governed by national laws) and – if "appropriate" – as arbiters of European citizenship (to be determined by European law). After all, it is exactly this kind of "legal dialogue" that many advocates of European legal dialogue or legal pluralism call for.<sup>207</sup> As shown, the ECJ is generally well-advised to choose this cautious, decentralized model. However, we argue that in designing its model of EU citizenship protection, the ECJ has been too deferential to Member States and their Courts.

The empirical evidence already shows that Member State Courts fail to engage in or come up with any substantial test with regard to the European dimension when dealing with matters of citizenship. At best,

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<sup>207</sup> See, e.g., Alan Rosas, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, EUR. J. LEGAL STUD. (Dec. 2007), <http://www.ejls.eu/2/24UK.pdf>; Miguel Poiars Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, EUR. J. LEGAL STUD. (Dec. 2007), <http://www.ejls.eu/2/25UK.pdf>.

matters concerning withdrawal of European citizenship – a right already obtained and hence only justified by reasons from European law – are a mere “taking into account” and decided without any substantial analysis (as Germany did in *Rottmann*).<sup>208</sup> In other words, the Member State Court in this case failed to take up the invitation by the ECJ to engage in a balanced multi-level legal reasoning, thereby marginalizing European citizenship and affirming all the dangers of a Curtis-like approach.

Concluding our comparative analysis, we propose a refined approach that – while retaining the gradualist virtues of the *Rottmann* concept and its modesty with regard to Member State autonomy – should be able to improve European citizenship protection and help to overcome the above-identified gaps with regard to EU Citizenship protection.

### 5. CONCLUSION – STRENGTHENING EUROPEAN CITIZENSHIP WITHOUT DETACHING IT FROM MEMBER STATE NATIONALITY

The Curtis and Taney opinions in *Dred Scott* have shown that extreme emphasis on either the autonomy or dependency criterion of citizenship in federal systems leads to undesirable outcomes. Seen in this light, the ECJ is in fact well advised to adopt a reluctant approach when shaping the fine line between dependency and autonomy in European citizenship. Member State nationality and EU citizenship shall be perceived as having a cooperative relation, where both concepts exist side by side but are, however, interwoven. Moreover, without intervention from the legislator, they neither lead nor are on the way to any concept prevailing over the other. Given the state of EU integration and the diversity of nationality concepts throughout the EU, a “European Fourteenth amendment” is neither in the cards nor would it, in our judgment, be desirable. Although supporters of a strong role of autonomy may favor such a “European Fourteenth amendment” (or having the ECJ establish a comparable reading of the European Treaties), as it would be better equipped to enforce the substantial content of EU citizenship, the analysis of *Dred Scott* has revealed that quite the opposite might be true. Ironically, a strong emphasis on the autonomy of European citizenship might not only be rejected as “judicial activism” but also bears the risk of de-

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<sup>208</sup> Germany did not even feel the need to wait for the outcome of the legal procedures in Austria where Rottmann tried to regain his Austrian citizenship. See BVerwG [Federal Administrative Court], Nov. 11, 2010, docket number 5 C 12.10 (Ger.), available at JURIS.



priving European citizens of their rights. On the other hand, the Curtis opinion revealed that an extremely (Member) State-centric position on citizenship in multi-level systems also results in undesirable outcomes.

In light of the comparison with the extreme concepts to be found in *Dred Scott*, the ECJ's more balanced, middle-of-the-road approach – to give Member States great latitude of judgment in determining who their “people” are but at the same time to affirm the general applicability of EU law – was found to have strong *prima facie* plausibility. It was, however, the actual implementation of this concept in *Rottman* that we found less convincing. In limiting the review of the withdrawal of EU citizenship to where it is “appropriate” and in leaving it to the Member States and their courts determine the scope of “appropriateness,” the ECJ has failed to establish a viable framework for the protection of EU citizenship. By assigning the task to balance national and EU regulations with regard to citizenship to the Member States, we argue that the ECJ should at least have established a coherent, uniform test for appropriateness for the Member States to apply and have developed certain minimum criteria that are subject to review by EU law. These minimum requirements would then have to be taken into account whenever a Member State makes the decision to grant or withdraw nationality in a case where EU citizenship might be affected. In other words, Member States would *have* to refrain from only taking into account national arguments when issuing or withdrawing citizenship. They have to explicitly conduct an additional test to establish why this respective person shall or shall not be a European citizen. Far from imposing a uniform judicial review procedure for EU citizenship matters at the supranational level, our proposal would still leave it to the Member State level to determine citizenship, while at the same time substantially increasing the level of protection through a mandatory regime Member States have to apply.

Building on our comparative analysis of the *Dred Scott* and *Rottmann* decisions, we argue that the “EU citizenship test” shall comprise two criteria: First, whether EU citizen's rights, which are stipulated by Art. 20 (2) TFEU, are substantially affected and, if so, why this is justified; and second, whether the solidarity between Member States that safeguards the existence of European citizenship would be endangered. It would only be in cases where Member States failed to (sufficiently) conduct this test, that their decision could be subjected to review by the ECJ. Under these circumstances, the “appropriate” doctrine introduced by the ECJ in *Rottmann* indeed makes sense. Given these requirements, Member States may have the duty resulting from European law to grant or

withdraw national citizenship as well as to refrain from granting or withdrawing. In the *Rottmann* case, the ECJ already intimidated that Austria might have such a duty to grant national citizenship to Mr. Rottmann. It remains to be seen if and how the Austrian authorities and courts will take into account the “appropriateness” of their decision with regard to EU citizenship and EU law. We argue that by spelling out clear criteria for “appropriateness” at the supranational level, for instance by implementing the above-developed mandatory test, a viable European citizenship regime can be established.