



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?

Dennis-Jonathan Mann
Kai P. Purnhagen

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Dennis-Jonathan Mann is a doctoral researcher in the Department of Political and Social Sciences at the European University Institute. He is supported by a DAAD doctoral scholarship.

Kai P. Purnhagen is an *Akademischer Rat* (Senior Researcher and Lecturer) at the Ludwig Maximilians University of Munich and a fellow at the University of Amsterdam Law School.

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Address for correspondence
Dennis-Jonathan Mann
European University Institute
Department of Political & Social Sciences
Badia Fiesolana
Via dei Roccettini, 9
50014 Fiesole Firenze
Italy
Email: dennis-jonathan.mann@eui.eu

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Abstract

The legal nature of EU citizenship remains a hotly debated issue, in particular its relationship with Member State citizenship/nationality. We comparatively analyze the ECJ's *Rottmann* ruling and the US Supreme Court's infamous *Dred Scott* 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. 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 reluctant, 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 v. Sandford* we are able to demonstrate some of the challenges of shaping the boundaries of Union Citizenship. The separate opinions delivered in that decision provide an 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 using 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 bite. 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 also, 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.

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.¹ Its subsequent development has also attracted substantial attention, particularly in the post-Maastricht and post-Amsterdam period.² The increasing amount of recent scholarly work that not only continues the tradition of interlinking EU citizenship with the theoretical foundation of the EU³, but also investigates special issues of citizenship as

¹ See for notable early studies on European citizenship in light of its introduction in the Maastricht Treaty: Monographs and edited books: N. Kotalakidis, *Von der nationalen Staatsangehörigkeit zur Unionsbürgerschaft*, Nomos: Baden-Baden, 2000; E. A. Marias (ed.), *European Citizenship*, European Institute of Public Administration: Maastricht, 1994; E. Meehan, *Citizenship and the European Community*, Sage: London, 1993; Articles in journals and edited books: R. Adam, 'Prime riflessioni sulla cittadinanza dell'Unione', in *Riv. Dir. Int.*, 1992, pp. 622-656; C. Closa, 'The Concept of Citizenship in the Treaty on European Union', in *CMLR*, 1992, pp. 1137-1169; U. Everling, 'Von der Freizügigkeit der Arbeitnehmer zum Europäischen Bürgerrecht?', in *EuR Beiheft 1*, 1990, pp. 81-103; S. Magiera, 'Die neuen Entwicklungen der Freizügigkeit für Personen: Auf dem Wege zu einem europäischen Bürgerstatut', in *Europarecht*, 1992, pp. 434-450; D. O'Keefe, 'Union Citizenship', in: D. O'Keefe/P. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, Wiley Chancery Law: London 1994, pp. 87-107; S. O'Leary, 'National Law and Community Citizenship: A Tale of two uneasy Bedfellows', in *Yearbook of European Law*, No. 12, 1992, pp. 353-384.

² See for more comprehensive studies within this period: E. P. Close, *Citizenship, Europe and Change*, Palgrave Macmillan: London, 1995; M.-J. Garot, *La citoyenneté de l'Union européenne*, L'Harmattan: Paris, 1999; B. Jørgensen, *Union Citizens. Free movement and non-discrimination*, DJØF: Copenhagen, 1996; S. O'Leary, *The Evolving Concept of Community Citizenship*, Kluwer: The Hague, 1997; M. La Torre (ed.), *European Citizenship*, Kluwer: The Hague, 1998; V. Lippolis, *La Cittadinanza Europea*, Il Mulino: Bologna, 1994; P. Magnette, *La citoyenneté européenne. Droits, politiques, institutions*, Éditions de l'Université de Bruxelles: Brussels, 1999; N. Reich, *Bürgerrechte in der Europäischen Union*, Nomos: Baden-Baden, 1999; A. Rosas/A. Eska (eds.), *A Citizens' Europe. In Search of a New Order*, Sage: London, 1995; S. O'Leary/T. Tiilikainen (eds.), *Citizenship and Nationality Status in the New Europe*, Sweet and Maxwell: London, 1998.

³ In the recent five years, see *inter alia* A. Hatje/P. Huber (eds.), 'Unionsbürgerschaft und soziale Rechte', in *Europarecht Beiheft 1*, 2007; R. Bauböck, 'Why European citizenship? Normative approaches to supranational union', in *Theoretical Inquiries in Law*, No. 8, 2007, pp. 453-488; N. Foster, 'From persons to citizens and beyond: the evolution of personal free movement in the European Union', in *Annual of German and European Law*, 2005, pp. 239-282; D. Kostakopoulou, 'European Union citizenship: writing the future', in *European Law Journal*, No. 13, 2007, pp. 623-646; F. G. Jacobs, 'Citizenship of the European Union: a legal analysis', in *European Law Journal*, No. 13, pp. 591-610; S. Besson (ed.), 'Special issue on EU Citizenship', *European Law Journal*, Vol. 13, pp. 573-694; M. W. Hesselink, 'European contract law: a matter of consumer protection, citizenship, or justice?', in *European Review of Private Law*, No. 15, 2007, pp. 323-348; A. Schrauwen, 'European Union citizenship in the Treaty of Lisbon: any change at all?', in *Maastricht Journal of European and Comparative Law*, Vol. 15, 2008, pp. 55-64.

such⁴ and the similarly increasing number of European court decisions on European citizenship⁵ pay witness to the fact that questions regarding EU citizenship remain highly important. Surprisingly, the developments of EU citizenship are seldom compared to the role citizenship played in the USA during its time of unification.⁶ Using the questions the ECJ had to solve in the *Rottmann* case,⁷ this article will show

⁴ See *inter alia* T. Fischer, 'European 'citizenship': in its own rights and in comparison with the United States', in *Cambridge Yearbook of European Legal Studies*, No. 5, 2003, pp. 357-394; E. Spaventa, 'Seeing the Woods Despite the Trees? On the scope of Union citizenship and its constitutional effects', in *CMLR*, No. 45, 2008, p. 13-45.

⁵ The most influential cases were Case 293/83, *Gravier*, ECR 593, 1985, paras 21 ff.; Case C-147/03, *Commission v Austria*, CMLR 645, 2005, paras 31 ff.; Case C-357/89, *Raulin*, ECR I-1027, 1992, paras 25 ff.; Case C-47/93, *Commission v Belgium*, ECR I-1593, 1994, paras 13 ff.; Case C-65/03, *Commission v Belgium*, ECR I-6427, 2004, para. 25; Case 186/87, *Cowan*, ECR 195, 1989, para. 17; Case C-323/95, *Hayes v Kronenberger GmbH*, ECR I-1711, 1997, para. 17; Case C-274/96, *Criminal proceedings against Bickel and Franz* ECR I-7637, 1998, paras 15 ff.; Case C-43/95, *Data Delecta*, ECR I-4661, 1996, paras 13 ff.; Joined Cases C-92/92 and C-326/92, *Collins, Patricia and Kraul v EMI*, ECR I-5145, 1993, paras 20 ff.; Case C-28/04, *Tod's and Tod's France v Heyraud*, CMLR 755, 2005; Case C-85/96, *Martinez Sala*, ECR I-2691, 1998, paras 63 ff.; Case C-184/99, *Grzelczyk*, ECR I-6193, 2001, paras 30 ff.; Case C-456/02, *Trojani*, ECR 7573, 2004, paras 37 ff.; Case C-224/98, *D'Hoop*, ECR I-6191, 2002, paras 29 ff.; Case C-209/03, *R (Dany Bidar)*, ECR I-2119, 2005, paras 31 ff.; Case C-148/02, *Garcia Avello*, ECR I-11613, 2003, paras 21 ff.; Case C-158/07, *Förster*, ECR I-08507, 2008; For a comprehensive overview of case law (and publications) on European citizenship, see also the EUDO citizenship website, available at <http://eudo-citizenship.eu/>.

⁶ Fortunate exceptions are *inter alia* Larry Catá Backer, 'The Extra-National State. American Confederate Federalism and the European Union', in *Columbia Journal of European Law*, Vol. 7, 2001, p. 173-240; AG Colomer, ECJ, Case C-228/07, ECR I-6989, 2008, footnote 30; *Petersen*; T. Fischer, 'European 'citizenship': in its own rights and in comparison with the United States', in *Cambridge Yearbook of European Legal Studies*, No. 5, 2003, pp. 357-394; D. Lacorne, *European Citizenship: 'The Relevance of the American Model'*, in: K. Nicolaïdis/R. Howse (eds.): *The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union*, Oxford University Press: Oxford/New York, 2001, pp. 427 (428 ff.); M. Meehan, *European Integration and Citizens' Rights: 'A Comparative Perspective'*, in *The Journal of Federalism*, Vol. 26, 1996, pp. 99 ff.; there are also a number of studies in which the comparison with the US concept is one aspect of the analysis, see *inter alia* C. Closa, 'The Concept of Citizenship in the Treaty on European Union', in *CMLR*, 1992, pp. 1137-1169 (1140-1141); E. A. Marias, 'From Market Citizen to Union Citizen', in: E. A. Marias (ed.), *European Citizenship*, European Institute of Public Administration : Maastricht, 1994, p. 13; V. Lippolis, *La Cittadinanza Europea*, pp. 61 ff.; C. Schönberger, *Unionsbürger*, Nomos: Tübingen, 2005, pp. 54 ff.; F. Fabbrini, 'La Corte di giustizia europea e la cittadinanza dell'Unione, Il commento', in: *Giornale di diritto amministrativo*, No. 7, 2010, pp. 702-710.

⁷ Case C-135/08, *Janko Rottmann v Freistaat Bayern*, ECR I-01449, 2010; for extensive discussion of the case, see the contributors to the forum 'Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?' on the website of the European Union Democracy Observatory on Citizenship, available at <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law>.; D. Kochenow, 'Case C-135/08, Janko Rottmann v. Freistaat Bayern, judgment of 2 March 2010 (Grand Chamber)', in *Common Market Law Review*, Vol. 47, 2010; T. Konstantinides, 'La Fraternité Européenne? The Extent of National Competence to Condition the Acquisition and Loss of Nationality From the Perspective of EU Citizenship', in *European Law Review*, Vol. 35, 2010, pp. 401 ff.

that a glance 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 which 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 upon this issue. The ECJ, however, intimated that there is a certain autonomous element in European citizenship that might affect Member State's nationality (see section 2).

Interestingly, the USA also faced a heated debate about the 'nature' of federal citizenship that, roughly 150 years ago, culminated in the infamous *Dred Scott v. Sandford* decision. Eventually, the 14th Amendment to the US Constitution would establish a unified 'national citizenship' and thereby resolved most (but by no means all) of the tensions that had existed in the *antebellum* US. Although the historic and societal settings in the US prior to the Civil War were, of course, quite different compared to those of contemporary Europe, we argue that a comparative analysis of *Scott v. Sandford* can offer valuable insights on 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 USA, as this judgment is today perceived as the catalyst for the US-American Civil War (see section 3).

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 (see section 4). Although the impact of the *Scott v. Sandford* 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. We argue that the European citizenship has indeed an autonomous value. As the withdrawal of Member State citizenship has hence 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 (see section 5).

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 the legal withdrawal of a Member State nationality? The question touches upon the exciting contrast that results from the dependency of the European citizenship on Member State nationality, on the one hand, and its autonomous character stemming from the autonomy of the European legal order, which the European citizenship is part of, on the other.⁸

Towards this end, Art. 20 (1) 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 TFEU stipulates the additional character of EU citizenship.⁹ 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'.¹⁰ As European citizenship is therefore an accessory to Member 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.¹¹ The existence of a European citizenship is therefore dependent on the existence of Member State nationality.

⁸ C. Callies described this phenomenon as 'Der im Verbund geteilte Bürger', see C. Callies, 'Der Unionsbürger: Status, Dogmatik, Dynamik', in: A. Hatje/P. Huber (eds.), *Unionsbürgerschaft und soziale Rechte*, Europarecht, Beiheft 1, 2007, p. 19 ff.

⁹ 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.

¹⁰ See *inter alia* German: 'besitzt'; French: 'ayant'; Italian: 'abbia'; Spanish: 'ostente'.

¹¹ Case C-369/90, *Mario Vicente Micheletti and Others v. Delegación del Gobierno en Cantabria*, ECR I-4239, 1992, para 10; E. A. Marias, 'From Market Citizen to Union Citizen', in: E. A. Marias (ed.), *European Citizenship*, European Institute of Public Administration: Maastricht, 1994, p. 15.

However, according to established and well-known case law,¹² European law forms an autonomous legal order. As European citizenship is, according to Art. 20 TFEU, part of this legal order, it is also autonomous.¹³ 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. So, 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 on 'independence' and 'autonomy'. Although these words are often used synonymously,¹⁴ 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 of Art. 20 (1) TFEU, European citizenship depends on the existence of a Member State nationality; therefore, it can hardly be recognized as being independent. 'Autonomous' legal systems are those which have a 'self-legislating' character. Although they may still be interlinked with other legal systems, they develop their own life, their own identity and thereby their own, independent normativity.

Regarding the question what actual effect the autonomy of European citizenship has 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

¹² ECJ, Case C-285/98, *Costa v. ENEL*, I-69, 2000. See on recent developments on the autonomy question in EU law B. de Witte, 'European Union Law: How Autonomous is its Legal Order?', in *Zeitschrift für Öffentliches Recht*, Vol. 65, 2010, pp. 141-155; R. Wessel, 'The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation', in *European Constitutional Law Review*, Vol. 5, 2009, pp. 117-142.

¹³ See AG *Maduro*, ECJ, Case C-135/08, *Rottmann*, Opinion delivered on September 30, 2009, nyr, para 23, who highlighted 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'.

¹⁴ See most crucial in the English translation of AG General *Maduro's* opinion on ECJ, Case C-135/08, *Rottmann*, Opinion delivered on September 30, 2009, nyr, para. 23, in which he strongly emphasizes that both, European citizenship and Member State nationality are 'autonomes' (French original) concepts. Although this passage was accurately translated to most other language versions such as in the German version as 'autonom', in the Italian version 'autonome', and in the Spanish version 'autónomos', in the English version, which is probably read the most, it was translated as 'independent'. This inaccurate translation has already yielded fruits in the case review of *T. Konstadinides*, 'La Fraternité Européenne? The Extent of National Competence to Condition the Acquisition and Loss of Nationality From the Perspective of EU Citizenship', in *European Law Review*, Vol. 35, 2010, pp. 401, who on page 406 - also, in good tradition with the inaccurate translation - treats the concepts of autonomy and dependence as exclusionary.

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European citizenship.¹⁵ However, such a view would establish an exception to the general autonomy of the European legal order, of which European citizenship is 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.¹⁶ It would hence form a solely 'symbolic plaything' which does not have 'substantive content'.¹⁷ 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.¹⁸ In fact, the TFEU equips the European citizen with several individual rights enlisted in Art. 20 (2) - 25 TFEU, thereby already shaping its substantial content. Other scholars, on the other hand, support the autonomy of the European citizenship and also grant its own normative content. However, they highlight that the normative content of the 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

¹⁵ B. Nascimbene, 'Towards a European Law on Citizenship and Nationality?', in: S. O'Leary/T. Tiilikainen (eds.), *Citizenship and Nationality Status in the New Europe*, Sweet & Maxwell: London, 1998, p. 64 ff. The author, however, admits that this statement is relative and in fact very much depends on the stage of the integration process.; T. Konstadinides, 'La Fraternité Européenne? The Extent of National Competence to Condition the Acquisition and Loss of Nationality From the Perspective of EU Citizenship', in *European Law Review*, Vol. 35, 2010, pp. 401 (406). Konstadinides uses 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, in his view, needed to be used also to interpret the wording of Art. 20 TFEU.; Against such a transferability of the meaning of the wording of Art. 17 EC to Art. 20 TFEU, s. M. Dougan, 'Some comments on Rottmann and the 'personal circumstances' assessment in the Union citizenship case law', in: J. Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, EUDO Forum Discussion, p. 2, available at <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=1>.

¹⁶ S. O'Leary, 'The Options for the Reform of European Union Citizenship', in: S. O'Leary/T. Tiilikainen (eds.), *Citizenship and Nationality Status in the New Europe*, London, Sweet & Maxwell, 1998, pp. 88 ff.; also I. Ward, '(Pre)Conceptions in European Law', in *Journal of Law and Society*, Vol. 23, No. 2, 1996, p. 198.

¹⁷ J. d'Oliviera, 'European Citizenship: Its Meaning, its Potential', in: R. Dehousse (ed.), *Europe after Maastricht*, LBE: Munich, 1994, p. 147.

¹⁸ Reich highlights this aspect with reference to a similar formulation in the of the German Constitutional Court's *Maastricht decision*: See N. Reich, *Bürgerrechte in der Europäischen Union*, Nomos: Baden-Baden, 1999, p. 425.

has previously been perceived as a 'market citizen'.¹⁹ Some of these authors also add an evolutionary feature to the content of European citizenship, which may ultimately even lead to an independency of the European citizenship from Member State nationality.²⁰ As AG Léger pointed out, this citizenship in the making 'should lead to citizens of the Union being treated absolutely equally, irrespective of their nationality.'²¹ He also foresaw a major role for the ECJ in raising the content of EU citizenship.²²

The ECJ in fact took the opportunity to put some flesh on 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 granting and losing European citizenship would depend on individual Member State law about the procedure to acquire or lose nationality. However, as the ECJ held in *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.'²³ 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 nationality.²⁴ 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.'²⁵

¹⁹ See *inter alia* J. Shaw, 'Citizenship of the Union: Towards Post-National Membership?', in Academy of European Law, Florence, 1998, p. 315; N. Reich, 'Economic Law, Consumer Interest and EU Integration', in: Micklitz/Reich/Rott (eds.), *Understanding EU Consumer Law*, Intersentia: Antwerp, 2009, p. 48.

²⁰ AG Léger, ECJ, Case C-214/94, ECR I-2253, 1996, para. 63 – *Boukhalfa*; M. Hilf, in: 'Art. 17 [Unionsbürgerschaft]', in: E. Grabitz/M. Hilf, *Das Recht der Europäischen Union*, 38. EL, 2009, para 62.

²¹ AG Léger, ECJ, Case C-214/94, ECR I-2253, 1996, para. 63 – *Boukhalfa*.

²² AG Léger, ECJ, Case C-214/94, ECR I-2253, 1996, para. 63 – *Boukhalfa*.

²³ Case C-369/90, *Mario Vicente Micheletti and Others v. Delegación del Gobierno en Cantabria*, ECR I-4239, 1992, para 10, emphasis added; confirmed by Case C-179/98 *Mesbah*, ECR I-7955, 1999, para 29, Case C-192/99 *Kaur*, ECR I-1237, 2001, para 19; and Case C-200/02 *Zhu and Chen*, ECR I-9925, 2004, para 37.

²⁴ W. Kuth, 'Art. 17 (ex-Art. 8) [Unionsbürgerschaft]', in: C. Callies/M. Ruffert (eds.), *Das Verfassungsrecht der Europäischen Union*, 3rd ed., 2007, para 9; M. Haag, 'Art. 17', in: von der Groeben/Schwarze (eds.), *Kommentar zum EU-/EG-Vertrag*, 6th ed., 2003, para 9; C. Koenig/M. Pechstein, *Die Europäische Union*, Mohr Siebeck: Tübingen, 1995, pp. 172 ff..

²⁵ E. Spaventa, 'The Constitutional Impact of European Citizenship', in: U. Neergaard/R. Nielsen/L. Roseberry (eds.), in *The Role of Courts in Developing a European Social Model*, Copenhagen, DJØV Publishing: Copenhagen, 2010, p. 151.

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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 TEC.²⁶ In *Grzelczyk*²⁷ the court held that a student who was lawfully resident 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*²⁸ and *Trojani*²⁹, the ECJ went even further, conditioning the limiting value of secondary law on whether such limitation meets the requirements of the principle of proportionality. Another framing of Union citizenship was established by the doctrine of 'real link' in *D'Hoop*³⁰, which was further substantiated in *Collins*³¹ and then in *Förster*³². In *Förster*, it was even widened in order to achieve a general application to European citizens who had resided 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 detail regarding the interesting implications of these cases,³³ particularly as they do not reflect exhaustively the rulings of the Court on the scope of European citizenship.³⁴ 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

²⁶ C. Callies describes ex-Art. 12 TEC as 'Schleuse' of the European citizen, see C. Callies, 'Der Unionsbürger: Status, Dogmatik, Dynamik', in: A. Hatje/P. Huber (eds.), *Unionsbürgerschaft und soziale Rechte*, Europarecht, Beiheft 1, 2007, pp. 30 ff.

²⁷ Case C-184/99, *Grzelczyk* ECR I-6193, 2001.

²⁸ Case C-413/99, *Baumbast and R v Secretary of State for the Home Department* ECR I-7091, 2002.

²⁹ Case C-456/02, *Trojani*, ECR I-7573, 2004.

³⁰ Case C-224/98, *M N D'Hoop v Office national d'emploi*, ECR I-6191, 2002.

³¹ Case C-138/02, *Collins*, ECR I-2703, 2004.

³² Case C-158/07, *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep*, ECR I-08507, 2008.

³³ See instead C. Semmelmann, 'Die Grenzen der Unionsbürgerschaft im Urteil Förster', in *Europarecht*, 2009, pp. 683-693; E. Spaventa, 'The Constitutional Impact of European Citizenship', in: U. Neergaard/R. Nielsen/L. Roseberry (eds.), *The Role of Courts in Developing a European Social Model*, DJØV Publishing: Copenhagen, 2010, pp. 141-167; for assorted questions on the scope of Union citizenship that have been left out by the court, see A. Epiney, 'The scope of Article 12 EC: some remarks on the influence of European citizenship', in *European Law Journal*, No. 13, 2007, pp. 611-622.

³⁴ For a helpful – although no longer up-to-date – overview of the most influential cases, see A. Epiney, 'The scope of Article 12 EC: some remarks on the influence of European citizenship', in *European Law Journal*, No. 13, 2007, pp. 611-622; for a comprehensive overview of publications and case law on European citizenship compare also the EUDO citizenship observatory, available at <http://eudo-citizenship.eu/>; For comparable cases in the US, see footnote below.

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 1996.³⁵ Recently, in *Ruiz Zambrano*³⁶ the ECJ has once again pushed the boundaries of EU citizenship. Here, we will, as mentioned, focus on the earlier *Rottmann* decision, the importance of which has not yet been fully recognized in the literature.

2.1. The Rottmann Case

In the *Rottmann* case³⁷ 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.

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. Before moving, he was being investigated by the Landesgericht für Strafsachen Graz for suspected serious fraud. He had denied the accusations. In February 1997, the Landesgericht für Strafsachen Graz issued a national warrant for his arrest. When Mr. Rottmann applied for German nationality in 1998, he failed to mention the proceedings against him in Austria. The naturalisation document, dated 25 January 1999, was issued to him on 5 February 1999. According to Austrian law, the naturalisation in Germany caused him to lose his Austrian nationality. In September and October 1999 the city of Munich became aware of the proceedings against Mr. Rottmann in Austria. The Freistaat Bayern consequently withdrew the naturalisation with retroactive effect, on the grounds that the applicant had not disclosed the fact

³⁵ AG Léger, ECJ, Case C-214/94, ECR I-2253, 1996, para. 63 – *Boukhalfa*.

³⁶ 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* 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, *Rui Zambrano*, judgment of 8 March 2011, emphasis added.

³⁷ Case C-135/08, *Rottman*, ECR I-01449, 2010

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that he was the subject of a judicial investigation in Austria and that he had, in consequence, obtained German nationality by deception. When the case was brought before the ECJ, the withdrawal of his naturalisation obtained in Germany had not yet become definitive, by reason of the action for annulment of that decision brought by the applicant in the main proceedings. 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. Art. 16 (1) GG 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 pending before the Bundesverwaltungsgericht when the case was brought before the ECJ.

It 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. It states that, by virtue of the relevant provisions of Austrian law, that is to say, the StbG, the applicant in the main proceedings does not at present satisfy the conditions for immediate recovery of Austrian nationality. It further 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. According to the Bayerischer Verwaltungsgerichtshof, the effect of assuming that there existed an obligation from 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. Furthermore, as the *Micheletti* judgment only clarified that Member States may not impose an additional condition for the recognition of a nationality, it is not sufficiently clear whether the status of being stateless and the loss of citizenship of the Union validly acquired previously, linked to the withdrawal of naturalization, is compatible with EU law, in particular, with Article 17(1) EC (now: Art. 20 TFEU).

The Bayerischer Verwaltungsgerichtshof, however, 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 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. 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?'
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?'

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 that, in situations covered by EU law, the national rules concerned must have due regard to the latter.³⁸ This also held true for situations such as in the case at issue, where the withdrawal of a naturalization by a Member State would also lead to the loss of European citizenship.³⁹ 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*,⁴⁰ 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 a naturalization if this results in the loss of European citizenship. The ECJ first discusses 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.⁴¹ The Court comes 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'. Hence, the withdrawal of both Member State nationality and European citizenship were legitimate in principle, even if the person in question became stateless.⁴² 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 assigns Member State courts with the authority to review whether the respective individual decisions meet the requirements of European law.⁴³ In order to ensure the effectiveness of the enforcement of European law through Member State courts, it then provides paradigms for the court on how to exercise its decision review process. It states that any Member State court needs to conduct a proportionality test, which also takes into account 'where appropriate [..., omission of the authors] the consequences [... the decision, addendum of the authors] entails

³⁸ Case C-135/08, *Rottmann*, judgment of 2 March 2010, para 41.

³⁹ Case C-135/08, *Rottmann*, judgment of 2 March 2010, para 42.

⁴⁰ Case C-135/08, *Rottmann*, judgment of 2 March 2010, paras 43-45.

⁴¹ Case C-135/08, *Rottmann*, judgment of 2 March 2010, paras 43-45.

⁴² Case C-135/08, *Rottmann*, judgment of 2 March 2010, paras 51-54.

⁴³ Case C-135/08, *Rottmann*, judgment of 2 March 2010, para 55.

for the situation of the person concerned in the light of European Union law.’⁴⁴ 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, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union.’⁴⁵ 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.’⁴⁶ The ECJ then comes 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.’⁴⁷

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, the so-called *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 a Member State nationality was granted,⁴⁸ the ECJ then in *Rottmann* identified some criteria for the withdrawal of a

⁴⁴ Case C-135/08, *Rottmann*, judgment of 2 March 2010, para 55.

⁴⁵ Case C-135/08, *Rottmann*, judgment of 2 March 2010, para 56.

⁴⁶ Case C-135/08, *Rottmann*, judgment of 2 March 2010, para 56.

⁴⁷ Case C-135/08, *Rottmann*, judgment of 2 March 2010, para 59.

⁴⁸ Case C-369/90, *Mario Vicente Micheletti and Others v. Delegación del Gobierno en Cantabria*, ECR I-4239, 1992.

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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 within this proportionality test. 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/her family concerned and
3. Where relevant, need to balance it 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.
 - c. When the consequence would be the total loss of European citizenship, whether it is possible for that person to recover European citizenship.

According to step 1 of the test, the ECJ unfortunately refrains from providing neither a straightforward definition, nor a 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 a 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 fulfils the requirements of 'appropriateness' according to the *Rottmann* test.

Steps 2 and 3 form regular steps of the proportionality principle that do not need special explanations here.⁴⁹ The bottom line of the judgment is hence 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 hence 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 hence did not take the opportunity in *Rottmann* to give the 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 taking 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 citizenship, one in which an autonomous EU citizenship

⁴⁹ See on the proportionality test of the ECJ in general Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e procuratori di Milano*, ECR I-4165, 1995, para 37; see on its conceptual application P. Szegealla, 'Grundrechtliche Schutzbereiche und Schrankensystematik', in: Heselhaus/Nowak (eds.), *Handbuch der Europäischen Grundrechte*, C.H.Beck/Linde/Stämpfli: München/Wien/Bern, 2006, § 7, para 33 (with additional references).

contains its own set of rights and privileges and thereby transforms it into a fully-fledged subjective right⁵⁰?

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."⁵¹ We would, however, like to widen the view, providing a possible explanation that comes from looking across the Atlantic.⁵² In fact, the decision *Dread Scott v. Sandford* had to deal with comparable issues at a time the USA 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,⁵³ the European Union (and its predecessors) have been increasingly compared to other 'federal' or 'multilevel' systems,⁵⁴ above all the

⁵⁰ See in this respect especially N. Reich, *Bürgerrechte in der Europäischen Union*, Nomos: Baden-Baden, 1999; P. Kubicki, 'Die subjektivrechtliche Komponente der Unionsbürgerschaft', in *Europarecht*, Vol. 41, No. 4, 2006, pp. 489-511.

⁵¹ See N. Reich, 'Union Citizenship – yesterday, today and tomorrow!', *RGSL Working Papers*, No. 3, 2000.

⁵² See in this respect also AG Colomer, ECJ, Case C-228/07, ECR I-6989, 2008, footnote 34 – Petersen, who draws a direct parallel between European citizenship and the *Dred Scott v. Sandford* decision.

⁵³ 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 E. Tortarolo, 'Europa. Zur Geschichte eines umstrittenen Begriffs', in: A. von Bogdandy (Ed.), *Die Europäische Option. Eine interdisziplinäre Analyse über Herkunft, Stand und Perspektiven der europäischen Integration*, Nomos: Baden-Baden, 1993, pp. 21-33 (28 ff.); 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 A. Glencross, Andrew, 'Altiero Spinelli and the Idea of the US Constitution as a Model for Europe: The Promises and Pitfalls of an Analogy', in *Journal of Common Market Studies (JCMS)*, Vol. 47, No. 2, 2009, pp. 287-307. From the 1980s onwards

United States.⁵⁵ 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.⁵⁶ 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'⁵⁷ the wording of the US Constitution appears to make state citizenship derivative from federal citizenship.⁵⁸ Amendment XIV, Section 1, Clause 1 of the US Constitution explicitly establishes that:

however, it was through a new understanding of the EU polity as a (legal) multi-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 M. A. Pollack, 'Theorizing EU Policy-Making', in: H. Wallace/W. Wallace/ M. A. Pollack (eds.): *Policy-Making in the European Union*, 5th edition, Oxford University Press: Oxford/New York, 2005, pp. 13-48, p. 28.

⁵⁴ 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. Cf. Shivadev Shastri, 'Lessons for the European Community from the Indian Experience with Federalism', in *Hastings International and Comparative Law Review*, Vol. 17, 1994, p. 633; J. E. Fossum, 'The Transformation of the Nation-State: Why Compare the EU and Canada?', Arena Working Paper, No. 28, 2002; J. Erk, *Explaining federalism. State, society and congruence in Austria, Belgium, Canada, Germany and Switzerland*, Routledge: London/New York, 2008; H. Kristoferitsch, *Vom Staatenbund zum Bundesstaat? Die Europäische Union im Vergleich mit den USA, Deutschland und der Schweiz*, Springer: Wien, 2007; F. W. Scharpf, 'The joint-decision trap. Lessons from German federalism and European integration', in *Public Administration*, Vol. 66, No. 3, 1988, pp. 239-278.

⁵⁵ See *inter alia* the voluminous study by M. Cappelletti/M. Secombe/J. Weiler (Eds.), *Integration Through Law – Europe and the American Federal Experience, Volume 1: Methods, Tools and Institutions, Book 1: A Political, Legal and Economic Overview*, Walter de Gruyter: Berlin/New York, 1986; See 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 P. Craig/G. de Búrca, *EU Law*, 4th ed., 2008, pp. 1-3; P. Craig, 'Integration, Democracy, and Legitimacy', in: P. Craig/G. de Búrca, *The Evolution of EU Law*, 2nd ed., 2011, pp. 13 ff..

⁵⁶ 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 O'Leary, 'An iron law of nationalism and federation? A (neo-Diceyan) theory of the necessity of a federal Staatsvolk, and of consociational rescue', in *Nations and Nationalism*, Vol. 7, No. 3, 2001, pp. 273 ff. (280).

⁵⁷ Art. 9 TEU; '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.' Art. 20 (1) TFEU.

⁵⁸ For such a reading of *today's* US citizenship see D. Lacorne, 'European Citizenship: The Relevance of the America Model', in: K. Nicolaïdis/ R. Howse (eds.): *The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union*, Oxford University Press: Oxford/New York, 2001, pp. 427-437 (428).

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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.

Some authors⁵⁹ have gone as far as to suggest that – with the adoption of the 14th 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’⁶⁰ and that, therefore, ‘State citizenship [...] in the United States it has become a non-issue’⁶¹.

However, one needs 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 citizens⁶² – or that of the locus of sovereignty⁶³ – to realize that such an assessment of the US case not only greatly exaggerates the differences between the US and EU but also ignores the crucial role state citizenship continues to play (at least from a legal perspective) until this day.

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 to citizenship concepts in the *antebellum* United States. Surveying different federal cases, Delaney & 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

⁵⁹ See *inter alia* G. L. Neuman, *European Citizenship and Modern U.S. Federal Citizenship, Conference ‘U.S. Federalism and its Implications for Europe’*, CERISciences-Po, Dec 10-11, 1998, p. 2 (cited in Lacorne: ‘European Citizenship’).

⁶⁰ G. L. Neuman, *European Citizenship and Modern U.S. Federal Citizenship, Conference ‘U.S. Federalism and its Implications for Europe’*, CERISciences-Po, Dec 10-11, 1998, p. 4 (cited in Lacorne: ‘European Citizenship’).

⁶¹ Lacorne, *European Citizenship: ‘The Relevance of the American Model’*, in: Nicolaïdis/Howse (eds.), *The Federal Vision*, pp. 427 (428).

⁶² 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; cf. ‘Residence Requirements after Shapiro v. Thompson’, in *Columbia Law Review*, Vol. 70, No. 1, pp. 134-155; For the ECJ, see above, i.a. *Brown* (1988), *Cowan* (1989), *Grzelczyk* (2001), *CHEN* (2001) and *Collin* (2004).

⁶³ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 1995; D. Farber, *Lincoln’s Constitution*, The University of Chicago Press: Chicago, 2003, pp. 27 ff.; c. also D.-J. Mann, ‘Ein Gebilde sui generis? Die Debatte um das Wesen der EU im Spiegel der ‘Nature of the Union’-Kontroverse in den USA’, in: F. Decker/M. Höreth (eds.), *Die Verfassung Europas. Perspektiven des Integrationsprojekts*, PVS: Wiesbaden, 2009, pp. 319-343, p. 328.

constitutional contract were not defined, and the attitudes of early Americans towards these fundamental problems were often diametrically opposed.’⁶⁴

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’,⁶⁵ 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 US 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 citizenships 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).⁶⁶
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 USA, 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

⁶⁴ E. Delaney/L. Barani, ‘The Promotion of ‘Symmetrical’ European Citizenship: A Federal Perspective’, in *Journal of European Integration*, Vol. 25, No. 2, 2003, pp. 95-114 (98 ff.); s. further E. M. Meehan, ‘European Integration and Citizens’ Rights: A Comparative Perspective’, in *Publius*, Vol. 26, No. 4, 1996, pp. 99-121; For a comparison with other historic citizenship concepts including the Germanic Confederation, s. C. Schönberger, Unionsbürger. *Europeas föderales Bürgerrecht in vergleichender Sicht*, Mohr Siebeck: Tübingen, 2005.

⁶⁵ Lacorne, European Citizenship: ‘The Relevance of the American Model’, in: Nicolaïdis/Howse (eds.), *The Federal Vision*, pp. 427 (428).

⁶⁶ For arguments for further „federalization“ of the EU, s. *inter alia* A. Trechsel, ‘How to federalize the European Union ... and why bother’, in: *Journal of European Public Policy*, Vol. 12, 2005, pp. 401-418.

administration.⁶⁷ Hence, we also do not believe that a comparison of contemporary EU citizenship with the US 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.⁶⁸ 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.⁶⁹

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 US 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,⁷⁰ 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.

⁶⁷ A. Sbragia, 'Thinking about the European Future: The Uses of Comparison', in: A. Sbragia (ed.), *Euro-Politics. Institutions and Policymaking in the 'New' European Community*, The Brookings Institution: Washington, 1992, p. 257-292 (265).

⁶⁸ R. Dehousse, 'Comparing National and EC Law. The Problem of the Level of Analysis', in *American Journal of Comparative Law*, Vol. 42, No. 4, 1994, pp. 761-781 (764); B. Théret, *Protection sociale et fédéralisme: L'Europe dans le miroir de l'Amérique du Nord*, Peter Lang: Brussels, 2002, pp. 64 ff.

⁶⁹ For an elaborate discussion of the methodological implications of what is usually referred to as a 'diachronic comparison', see C. Schönberger, *Unionsbürger. Europeas föderales Bürgerrecht in vergleichender Sicht*, Mohr Siebeck: Tübingen, 2005, p. 60.

⁷⁰ 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* A. R. Amar, *America's Constitution. A Biography*, Random House: New York, 2006, p. 381

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 v. Sandford*⁷¹ 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 v. Sandford*⁷² (hereinafter *Dred Scott*) a landmark decision. It is, after all, widely characterized as one of the ‘most discussed legal contests in American history’⁷³. 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’⁷⁴ – has had little or no precedential effect at all.⁷⁵ 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.⁷⁶ 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

⁷¹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 1857.

⁷² The correct spelling of the appellee's name would actually be ‘Sanford’. For a possible explanation for the error, s. J. S. Vishneski III, ‘What the Court Decided in *Dred Scott v. Sandford*’, in *The American Journal of Legal History*, Vol. 32, No. 4, 1988, pp. 373-390 (373, footnote 1).

⁷³ J. S. Vishneski III, ‘What the Court Decided in *Dred Scott v. Sandford*’, in *The American Journal of Legal History*, Vol. 32, No. 4, 1988, pp. 373-390 (373).

⁷⁴ C. J. Naden/Rose Blue: *Dred Scott: Person Or Property?*, Benchmark Books: New York, 2005, p. 111; For references of further denunciations of the judgment s. also K. E. Whittington, ‘The Road Not Taken: *Dred Scott*, Judicial Authority, and Political Questions’, in *The Journal of Politics*, Vol. 63, No. 2, 2001, pp. 365-391 (366).

⁷⁵ In the words of Paul Finkelman “[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 [...]”, P. Finkelman, *Dred Scott v. Sandford: a brief history with documents*, Bedford/St. Martin's: Boston, 1997, p. 7.

⁷⁶ P. Finkelman, *Dred Scott v. Sandford: a brief history with documents*, Bedford/St. Martin's: Boston, 1997, p. 7.

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agreed that the ruling greatly contributed to the tensions that would ultimately lead to Southern secession.⁷⁷

Dred Scott can be looked at – and has been looked at – from many different angles. The heated debate about slavery (and about slavery in the US territories in particular)⁷⁸, 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 were the judges of the Supreme Court; all nine Justices gave separate opinions, totalling in 240 pages.⁷⁹ 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,⁸⁰ 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’”⁸¹. Others have gone far beyond studying the *Dred Scott* ruling – or, rather, the various different opinions the Judges delivered – and have looked not only into what the Supreme Court decided but also into *how* the Court came to do so.⁸²

Given the enormous body of literature *Dred Scott* has sparked over the centuries, including whole books like Fehrenbacher’s classic study,⁸³ it would go far beyond the scope of this paper to provide an exhaustive overview.⁸⁴ Departing from the context of

⁷⁷ See *inter alia* A. Allen, *Origins of the Dred Scott Case Jacksonian Jurisprudence and the Supreme Court. 1837-1857*, University of Georgia Press: Athens/London, 2006, p. 1 ff..

⁷⁸ See *inter alia* W. L. Miller, *Arguing about Slavery: The Great Battle in the United States Congress*, Alfred A. Knopf: New York, 1996.

⁷⁹ J. S. Vishneski III, ‘What the Court Decided in *Dred Scott v. Sandford*’, in *The American Journal of Legal History*, Vol. 32, No. 4, 1988, pp. 373-390 (373).

⁸⁰ 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.

⁸¹ K. E. Whittington, ‘The Road Not Taken: *Dred Scott*, Judicial Authority, and Political Questions’, in: *The Journal of Politics*, Vol. 63, Vol. 2, 2001, pp. 365-391 (366); This is largely what Justice Samuel Nelson did in his concurrence.

⁸² 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. See S. Vishneski III, ‘What the Court Decided in *Dred Scott v. Sandford*’, in *The American Journal of Legal History*, Vol. 32, No. 4, 1988, pp. 373-390 (383 ff).

⁸³ D. E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, Oxford University Press: New York, 1978; An abridged version has also been issued: D. E. Fehrenbacher, *Slavery, law, and politics: the Dred Scott case in historical perspective*, Oxford University Press: New York, 1981.

⁸⁴ This list should be a starting point for readers seeking further information: S. I. Kutler (ed.), *The Dred Scott Decision: Law or Politics?*, Houghton Mifflin: Boston, 1967; P. Finkelman, *Dred Scott v. Sandford: a brief history with documents*, Bedford/St. Martin’s: Boston, 1997, D. E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, Oxford University Press: New York, 1978; A. Allen, *Origins of the Dred Scott Case. Jacksonian*

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, 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 18th century).⁸⁵ Even the facts given in the judgment should be taken with a grain of salt. For instance, the defendants’ name was actually John F. A. Sanford and not Sandford.⁸⁶ 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,⁸⁷ was purchased by John Emerson, an US Army Major stationed outside of St.

Jurisprudence and the Supreme Court. 1837-1857, University of Georgia Press: Athens/London, 2006; Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil*, Cambridge University Press: New York, 2006; C. L. Eisgruber, ‘Dred Again: Originalism’s Forgotten Past’, in *Constitutional Commentary*, Vol. 10, No. 37, 1993, pp. 37-65; C. R. Sunstein, ‘Dred Scott v. Sandford and Its Legacy’, in: R. P. George, *Great Cases in Constitutional Law*, Princeton University Press: Princeton, pp. 64-89.

⁸⁵ Cf. D. E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, Oxford University Press: New York, 1978, p. 239 ff.; c. also C. R. Sunstein, ‘Dred Scott v. Sandford and Its Legacy’, in: R. P. George, *Great Cases in Constitutional Law*, Princeton University Press: Princeton, pp. 64-89 (68).

⁸⁶ See J. S. Vishneski III, ‘What the Court Decided in *Dred Scott v. Sandford*’, in *The American Journal of Legal History*, Vol. 32, No. 4, 1988, pp. 373-390 (373).

⁸⁷ 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*’. D. E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, Oxford University Press: New York, 1978, p. 240.

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Louis. Emerson took Scott along as he went from Missouri to his new assignment in the free state⁸⁸ of Illinois 1834. In 1836, Emerson took Dred Scott to a military post in the free territory then known as Upper Louisiana⁸⁹ before both eventually returned to Missouri in 1838. In the meantime (in either 1836 or 1837) Scott had been allowed to officially⁹⁰ 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 inherited⁹¹ his estate, including his slaves. Scott attempted to purchase his freedom 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 precedents⁹² 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.⁹³ 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.⁹⁴ A new trial was

⁸⁸ 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.

⁸⁹ 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. R. P. Forbes, *The Missouri Compromise and Its Aftermath. Slavery and the Meaning of America*, University of North Carolina Press: Chapel Hill, 2007.

⁹⁰ 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. cf. P. Finkelman, *Dred Scott v. Sandford: a brief history with documents*, Bedford/St. Martin's: Boston, 1997, p. 15 f..

⁹¹ There is, as Fehrenbacher argues, some 'confusion' in the literature as to what the legal status of Mrs. Emerson and her daughter were under the will of John Emerson was exact. On this, cf. Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, Oxford University Press: New York, 1978, p. 248.

⁹² See, for instance, *Winnny v. Whitesides*, Phebe, April, 1821, Case No. 190, Circuit Court Case Files, Office of the Circuit Clerk, City of St. Louis, Missouri, (text available at <http://stlcourtrecords.wustl.edu>); *William Rachel, a woman of color v. Walker, William*, Nov 1834, Case No. 82, Circuit Court Case Files, Office of the Circuit Clerk, City of St. Louis, Missouri, (text available at <http://stlcourtrecords.wustl.edu>).

⁹³ Cf. D. E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, Oxford University Press: New York, 1978, p. 252 ff..

⁹⁴ Scott simply failed to provide a witness to testify the fact that he was a slave belonging to Mrs. Emerson.

eventually granted⁹⁵ 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.⁹⁶

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.⁹⁷ The Supreme Court of Missouri held that only Missouri law was applicable in determining the status of Dred Scott and his family. 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.⁹⁸ The fact that John Sanford was a resident of a different state (New York) allowed Scott, who claimed to be a citizen of Missouri, and his advisors to again sue in federal court under 'diversity jurisdiction'⁹⁹. 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. Judge Wells told the jury that the case was to be determined by Missouri Law

⁹⁵ Emerson appealed the (trial court's) decision to grant a new trial to the Supreme Court of Missouri, which – in 1848 – upheld the order.

⁹⁶ *Scott v. Emerson*, Missouri Circuit Court 1850, second trial.

⁹⁷ K. L. Hall, 'Scott v. Sandford', in: K. L. Hall (ed): *The Oxford guide to United States Supreme Court decisions*, Oxford University Press: New York, 2001, pp. 277-278 (277).

⁹⁸ *Scott v. Emerson*, 15 Mo. 576, 586, 1852; cf. D. Benton, 'Lessons for Judges from Scott v. Emerson', in: D. T. Konig/P. Finkelman/C. A. Bracey (eds.): *The Dred Scott Case: Historical and Contemporary Perspectives on Race and Law*, Ohio University Press: Ohio, 2010, pp. 193-211.; P. Finkelman, *Dred Scott v. Sandford: a brief history with documents*, Bedford/St. Martin's: Boston, 1997, p. 22.

⁹⁹ Diversity jurisdiction – as provided for in US Constitution, Article III, Sec. 2, Para. 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; s. P. Finkelman, *Dred Scott v. Sandford: a brief history with documents*, Bedford/St. Martin's: Boston, 1997, p. 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 D. E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, Oxford University Press: New York, 1978, p. 268 ff.; K. L. Hall, 'Scott v. Sandford', in: K. L. Hall (ed): *The Oxford guide to United States Supreme Court decisions*, Oxford University Press: New York, 2001, pp. 277-278 (277).

and (given the Missouri Supreme Court's recent ruling) the jury upheld Scott's slave status.¹⁰⁰

In December of 1854, Dred Scott appealed to the US Supreme Court and it took until the February of 1856 until the court started to hear arguments.¹⁰¹ After a lengthy and rather unusual process,¹⁰² the Supreme Court ruling was eventually handed down on March 6, 1857.¹⁰³

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:¹⁰⁴

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)?

¹⁰⁰ P. Finkelman, *Dred Scott v. Sandford: a brief history with documents*, Bedford/St. Martin's: Boston, 1997, p. 26.

¹⁰¹ Cf. D. E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, Oxford University Press: New York, 1978, p. 285 ff.; P. Finkelman, *Dred Scott v. Sandford: a brief history with documents*, Bedford/St. Martin's: Boston, 1997, p. 27 f..

¹⁰² For a concise overview, see K. L. Hall (ed): *The Oxford guide to United States Supreme Court decisions*, Oxford University Press: New York, 2001, pp. 277-278 (277); For an in-depth study, see D. E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, Oxford University Press: New York, 1978, p. 285 ff..

¹⁰³ 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 P. Finkelman, *Dred Scott v. Sandford: a brief history with documents*, Bedford/St. Martin's: Boston, 1997, p. 28.; cf. B. McGinty, *Lincoln and the Court*, Harvard University Press: Cambridge, 2008; G. L. Jacobsohn, 'Abraham Lincoln 'On This Question of Judicial Authority': The Theory of Constitutional Aspiration', in *The Western Political Quarterly*, Vol. 36, No. 1, 1983, pp. 52-70.

¹⁰⁴ For a helpful illustration, see D. E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, Oxford University Press: New York, 1978, p. 303.

Although the above-listed legal problems are rather straightforward, not only have the solutions the court ultimately reached been hotly debated until 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*,¹⁰⁵ 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.¹⁰⁶ 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 authoritative, binding precedent.¹⁰⁷ 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.

While Taney's opinion can clearly be considered decision in *Dred Scott* in a political and historical sense, analytically speaking there is no single solution to the four key

¹⁰⁵ As Vishneski remarks, the nine opinions given by the judges amount for a total of 240 pages in the official reports. J. S. Vishneski III, 'What the Court Decided in *Dred Scott* v. Sandford', in *The American Journal of Legal History*, Vol. 32, No. 4, 1988, pp. 373-390 (373).

¹⁰⁶ For a detailed analysis how the 'Taney Court' produced opinions, see J. S. Vishneski III, 'What the Court Decided in *Dred Scott* v. Sandford', in *The American Journal of Legal History*, Vol. 32, No. 4, 1988, pp. 373-390 (383 ff.).

¹⁰⁷ 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 D. E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, Oxford University Press: New York, 1978, p. 322 ff.; J. S. Vishneski III, 'What the Court Decided in *Dred Scott* v. Sandford', in *The American Journal of Legal History*, Vol. 32, No. 4, 1988, pp. 373-390.

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problems but rather nine different ones.¹⁰⁸ Of these, 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.¹⁰⁹

Taney, in his 'Opinion of the Court', declared Dred Scott to still be a slave for several reasons:¹¹⁰

1. Based on an elaborate 'original intent' analysis,¹¹¹ 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.
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 *orbiter dictum*,¹¹² 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.¹¹³

¹⁰⁸ Some of the concurring judges filed texts that addressed certain aspects only though.

¹⁰⁹ 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 P. Finkelman, *Dred Scott v. Sandford: a brief history with documents*, Bedford/St. Martin's: Boston, 1997, p. 28, footnote 38, pp. 100 ff.; 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'. J. B. Dyer, 'Lincolnian Natural Right, Dred Scott, and the Jurisprudence of John McLean', in *Polity*, Vol. 41, No. 1, 2009, pp. 63-85 (65).

¹¹⁰ *Scott v. Sandford*, 60 U.S. 393, 1856.

¹¹¹ '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).

¹¹² Here, the argument is that once the Supreme Court determined that it did not have jurisdiction to hear Scott's case, it is 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 J. S. Vishneski III, 'What the Court Decided in Dred Scott v. Sandford', in *The American Journal of Legal History*, Vol. 32, No. 4, 1988, pp. 373-390 (376 ff.); D. E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, Oxford University Press: New York, 1978, p. 322 ff..

¹¹³ Taney uses the narrowest possible reading of Art 4, Sect. 3 Cl. 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 applies only to the original territories that already existed when the Constitution was adopted. *Scott v. Sandford*,

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.¹¹⁴

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.¹¹⁵ 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', Taney's views were seen as conflicting with the higher principles of the US Constitution and the 'natural rights of man.'¹¹⁶

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:¹¹⁷

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.¹¹⁸

60 U.S. 393, 1856, opinion of the Court, Taney, p. 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. K. L. Hall, *The Supreme Court and Judicial Review in American History*, American Historical Association: Washington DC, 1985.

¹¹⁴ Taney explicitly refers to *Strader v. Graham*, 51 U.S. 82, 1851 to back up this point. See *Scott v. Sandford*, 60 U.S. 393, 1856, p. 453.

¹¹⁵ *Scott v. Sandford*, 60 U.S. 393, 1856, opinion of the Court, Taney, pp. 405 ff..

¹¹⁶ *Scott v. Sandford*, 60 U.S. 393, 1856, dissent McLean, p. 533.

¹¹⁷ *Scott v. Sandford*, 60 U.S. 393, 1856, dissent Curtis, pp. 554 ff.

¹¹⁸ 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'. *Scott v. Sandford*, 60 U.S. 393, 1856, dissent Curtis, p. 569 ff.; cf. D. E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, Oxford University Press: New York, 1978, p. 405 ff..

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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.¹¹⁹ Curtis argues that laws discriminating against blacks, such as those invoked by Taney, no more disproved citizenship than would those disadvantaging married women.¹²⁰
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 Constitution or laws, is also a citizen of the United States.'¹²¹ Astonishingly, Curtis' interpretation seems to be prefiguring the later 14th Amendment.
4. Having affirmed Dred Scott's capacity to bring suit in a federal court, Curtis goes on to address the Missouri Compromise. 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.'¹²²

¹¹⁹ '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 v. Sandford*, 60 U.S. 393, 1856, dissent Curtis, p. 572 f..

¹²⁰ c. D. P. Currie, 'The Constitution in the Supreme Court: Article IV and Federal Powers, 1836-1864', in *Duke Law Journal*, Vol. 1983, No. 4, 1983, pp. 695-747 (p. 730).

¹²¹ *Scott v. Sandford*, 60 U.S. 393, 1856, dissent Curtis, p. 576; see also C. Schönberger, *Unionsbürger. Europas föderales Bürgerrecht in vergleichender Sicht*, Mohr Siebeck: Tübingen, 2005, p. 72 f.; D. E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, Oxford University Press: New York, 1978, pp. 406 f..

¹²² *Scott v. Sandford*, 60 U.S. 393, 1856, dissent Curtis, p. 620.; See also D. E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, Oxford University Press: New York, 1978, pp. 408 ff.; For a conclusive analysis of the diversity and complexity of the Northern and Southern concepts with regard to the legality/constitutionality of slavery, see E. M. Maltz, 'Fourteenth Amendment Concepts in the Antebellum Era', in *The American Journal of Legal History*, Vol. 32, No. 4, 1988, pp. 305-346.

5. Curtis therefore concludes in favor of Scott that 'the Circuit Court should be reversed, and the cause remanded for a new trial.'¹²³

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' for blacks was a very narrow set of core fundamental rights - a far cry from 'equality' in the modern sense.¹²⁴

3.2. The Taney and Curtis Opinions: Diametrically Opposed Conceptions of Union Citizenship

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* US.

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*)¹²⁵ in determining the scope of US citizenship. Taney explicitly states that whether or not blacks can be (or become) citizens of the US 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

¹²³ *Scott v. Sandford*, 60 U.S. 393, 1856, dissent Curtis, p. 633.

¹²⁴ See Paul Finkelman, *Dred Scott v. Sandford: a brief history with documents*, Bedford/St. Martin's: Boston, 1997, p. 109; c. Earl M. Maltz, 'Fourteenth Amendment Concepts in the Antebellum Era', in *The American Journal of Legal History*, Vol. 32, No. 4, 1988, pp. 305-346; cf. E. M. Maltz, *Dred Scott and the Politics of Slavery*, University of Kansas Press: Lawrence, 2007, pp. 132 ff.

¹²⁵ Ironically, Taney shares this view with McLean, 'who agreed that citizenship for constitutional purposes was to be determined by a federal standard'. E. M. Maltz, 'Slavery, Federalism, and the Structure of the Constitution', in *The American Journal of Legal History*, Vol. 36, No. 4, 1992, pp. 466-498 (p. 483).

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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'¹²⁶ conception in which a citizen of the United States is *automatically* a citizen of the US 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:¹²⁷

*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.*¹²⁸

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 US and elsewhere that rather have regarded the two as 'inseparable dimensions of the same status.'¹²⁹

Also, a serious challenge for Taney's argument is posed by the US Constitution's comity clause,¹³⁰ which declares that '[t]he Citizens of each State shall be entitled to

¹²⁶ For two classic statements of the 'dual citizenship' paradigm, see *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 1833; *The Slaughter-House Cases*, 83 U.S. 36, 1873.

¹²⁷ The explicit power of Congress to establish a uniform rule of naturalization was widely used to make this argument (*inter alia* by Taney). See E. M. Maltz, 'Fourteenth Amendment Concepts in the Antebellum Era', in *The American Journal of Legal History*, Vol. 32, No. 4, 1988, pp. 305-346 (p. 334).

¹²⁸ *Scott v. Sandford*, 60 U.S. 393, 1856, opinion of the Court, Taney, p. 405.

¹²⁹ J. H. Kettner, *The Development of American Citizenship, 1608-1870*, The University of North Carolina Press: Chapel Hill, 2005, p. 328; for a comparative perspective, see C. Schönberger, *Unionsbürger. Europeas föderales Bürgerrecht in vergleichender Sicht*, Mohr Siebeck: Tübingen, 2005, p. 51 ff. (USA: p. 72 ff.).

¹³⁰ US Constitution, Article IV, Sect. 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 has to overcome. For *comity clause*-based arguments for and against slavery in the *antebellum* US, see E. M. Maltz, 'Fourteenth Amendment Concepts in the Antebellum Era', in *The American Journal of Legal History*, Vol. 32, No. 4, 1988, pp. 305-346 (pp. 334 ff.).

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.’¹³¹ Only those who possess what Taney refers to as (state) citizenship ‘within the meaning of the [US] Constitution’¹³² 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:¹³³

[...] *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.*¹³⁴

All in all, Taney’s theory of citizenship in the *antebellum* US 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.¹³⁵ Taney’s citizenship concept could thus be seen as taking the idea that American citizens are living under two ‘separate and distinct sovereignties’¹³⁶ to the extreme,¹³⁷ whereas his

¹³¹ D. E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, Oxford University Press: New York, 1978, p. 344 ff.

¹³² *Scott v. Sandford*, 60 U.S. 393, 1856, opinion of the Court, Taney, p. 405.

¹³³ See D. E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, Oxford University Press: New York, 1978, p. 345 f.; This transformation of the issue into a matter of federal law seems to conflict with some of Taney’s ‘even if’ arguments (s. above) that stress the importance of state provisions in determining Scott’s status.

¹³⁴ *Scott v. Sandford*, 60 U.S. 393, 1856), opinion of the Court, Taney, p. 427, emphasis added.

¹³⁵ Chief Justice Marshall arguably expresses the underlying dialectic of the concept 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. 264, 1821, opinion of the Court, Justice Marshall; cf. D. Farber, *Lincoln’s Constitution*, The University of Chicago Press: Chicago, 2003.; c. also D.-J. Mann, ‘Ein Gebilde sui generis? Die Debatte um das Wesen der EU im Spiegel der ‘Nature of the Union’-Kontroverse in den USA’, in: F. Decker/M. Höreth (eds.): *Die Verfassung Europas. Perspektiven des Integrationsprojekts*, PVS: Wiesbaden, 2009, pp. 319-343.

¹³⁶ ‘[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*,

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core assumptions are 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,¹³⁸ was the so-called states' rights doctrine of the United States. Also known 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.¹³⁹ 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.' 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.'¹⁴⁰

62 U.S. 506, 1859; A, controversial, practical effect of this doctrine can be observed with regard to the double jeopardy clause which 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. Compare A. R./J. L. Marcus, 'Double Jeopardy Law after Rodney King', in *Columbia Law Review*, Vol. 95, No 1, 1995, pp. 1-59.

¹³⁷ Even so, the challenge for Taney remains to shield his argument from the implications of the *comity clause* (see footnote above).

¹³⁸ On the sentiment in the South, changing from nationalistic to particularistic, see C. Sellers, *Andrew Jackson, Nullification, and the State-Rights Tradition*, Rand McNally: Chicago, 1963, p. 19 f.; cf. W. W. Freehling, *Prelude to Civil War. The Nullification Controversy in South Carolina. 1816-1836*, Oxford University Press: New York, Reissue Edition 1992, pp. 89 ff.

¹³⁹ See D. Farber, *Lincoln's Constitution*, The University of Chicago Press: Chicago, 2003, pp. 32 ff.; 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 are 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 J. C. Calhoun, 'A Discourse on the Constitution and Government of the United States, Columbia, South Carolina, 1851', reprinted in: H. L. Cheek, Jr. (Ed.): *John C. Calhoun: Selected Writings and Speeches*, Regnery Publishing: Washington, 2003, pp. 61-222 (p. 91); cf. M. G. Forsyth, *Unions of States. The Theory and Practice of Confederation*, Holmes & Meier Publishers: New York, 1981: 125 ff.

¹⁴⁰ J. C. Calhoun, 'Speech on the [Revenue Collection] Force Bill, Senate of the USA, February 15/16, 1833', reprinted in: H. L. Cheek, Jr. (Ed.): *John C. Calhoun: Selected Writings and Speeches*, Regnery Publishing: Washington, 2003, pp. 411-456 (p. 443).

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.¹⁴¹ 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*.¹⁴² 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 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.¹⁴³ 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.¹⁴⁴

¹⁴¹ J. H. Kettner, *The Development of American Citizenship, 1608-1870*, The University of North Carolina Press: Chapel Hill, 2005, p. 328; s. also P. Finkelman, *Dred Scott v. Sandford: a brief history with documents*, Bedford/St. Martin's: Boston, 1997, p. 35.

¹⁴² On this double-edged effect of *Dred Scott* with regard to state autonomy, see E. M. Maltz, 'Slavery, Federalism, and the Structure of the Constitution', in *The American Journal of Legal History*, Vol. 36, No. 4, 1992, pp. 466-498 (p. 488).

¹⁴³ 'The Constitution has conferred on Congress the right to establish an 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.' *Scott v. Sandford*, 60 U.S. 393, 1856, opinion of the Court, Taney, p. 405 f.

¹⁴⁴ Taney's failure to conceive of this problem – or at least to raise it explicitly – leads to the fact that the understanding of the underlying concepts in *Dred Scott* vary greatly. While 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 E. M. Maltz, 'Slavery, Federalism, and the Structure of the Constitution', in *The American Journal of Legal History*, Vol. 36, No. 4, 1992, pp. 305-346, pp. 338 ff.; Finkelman – looking at previous as well as subsequent opinions of the chief justice – argues that Taney in fact constantly shifted from states' rights to 'nationalist' (divided sovereignty) arguments in order to achieve his desired

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. Beside all the historical inaccuracies and logical inconsistencies of Taney's opinion Curtis points out, the latter's main point is that, in his view, state citizenship determines federal citizenship.¹⁴⁵

This is exemplified by Curtis' already above-mentioned credo that '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 Constitution or laws, is also a citizen of the United States.' Ironically, Curtis' theory - though employed here in Dred Scott's favor - closely resembles Southern, almost Calhounian 'states rights' conceptions of citizenship. While *prima facie* 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.¹⁴⁶ 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

(anti-slavery) outcome. In *Dred Scott*, Finkelman further argues, Taney had to rely on a nationalist stance if he wanted to assure that 'blacks would not appear before his Court - or any other federal court - as plaintiffs, defendants, or attorneys.' P. Finkelman, 'The Taney Court (1836-1864): The Jurisprudence of Slavery and the Crisis of the Union', in: C. L. Tomlins (ed.), *The United States Supreme Court: The Pursuit of Justice The Jurisprudence of Slavery*, Houghton Mifflin Company: Boston/New York, 2005, pp. 75-99 (pp. 92 ff.).

¹⁴⁵ What further distinguishes him from Taney's approach is Curtis' scepticism towards judicial activism. Curtis argues for a more modest judicial role. See K. E. Whittington, 'The Road Not Taken: Dred Scott, Judicial Authority, and Political Questions', in *The Journal of Politics*, Vol. 63, No. 2, 2001, pp. 365-391 (p. 389).

¹⁴⁶ 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. P. Finkelman, *Dred Scott v. Sandford: a brief history with documents*, Bedford/St. Martin's: Boston, 1997, p. 100, p. 109.

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. 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 or deliberately chosen by the ECJ in *Rottmann* becomes *prima facie* plausible. In fact, *Dred Scott* not only shows that an interconnected, cooperative understanding of citizenship that wisely governs between the different notions of dependence and autonomy seems to be most effective. The legacy of *Dred Scott* as the US Supreme Court's 'self-inflicted wound' also shows that in contentious policy areas, Courts are well advised to choose a modest, gradualist approach and avoid activist, winner-takes-all decisions.¹⁴⁷

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 Dworkin¹⁴⁸

¹⁴⁷ K. E. Whittington, 'The Road Not Taken: Dred Scott, Judicial Authority, and Political Questions', in *The Journal of Politics*, Vol. 63, No. 2, 2001, pp. 365-391 (pp. 366 f.).

¹⁴⁸ Initially R. M. Dworkin, *Taking Rights Seriously*, Harvard University Press: Cambridge, 1977.

and Alexy¹⁴⁹ 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,¹⁵⁰ scholars seem to propose exactly such a treatment of the dependency principle. Building on the theory that the ECJ is the 'engine' of integration,¹⁵¹ a 'constitutionalizing' Court,¹⁵² which is the only European institution endowed with political initiative,¹⁵³ they also favor a strong role for the ECJ with regard to EU citizenship.¹⁵⁴ 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 feature¹⁵⁵ of the content of EU citizenship by an *approfondissement* of the judicial lever.¹⁵⁶ It would hence indeed form a sole 'symbolic plaything' without any 'substantive content.'¹⁵⁷ 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

¹⁴⁹ R. Alexy, *Theorie der Grundrechte*, Suhrkamp: Frankfurt, 1986, p. 75; R. Alexy, 'On the Structure of Legal Principles', in *Ratio Juris*, Vol. 13, 2000, pp. 249-304.

¹⁵⁰ See in the remains of this *subpara*.

¹⁵¹ C.-D. Ehlermann, 'The European Communities, its Law and Lawyers', in *Common Market Law Review*, Vol. 29, 1992, p. 218; G. Mancini, 'The Making of a Constitution for Europe', in *Common Market Law Review*, Vol. 26, 1989, pp. 595 ff.; M. Volcansek, 'The European Court of Justice, Supranational Policy-Making', in *West-European Politics*, No. 15, 1992, p. 119; J. Weiler, 'Journey to an Unknown Destination. A Retrospective and Prospective of the European Court of Justice in the Area of Political Integration', in *Journal of Common Market Studies*, No. 31, 1993, pp. 417 ff.

¹⁵² F. Jacobs, 'Is the Court of Justice of the European Communities a Constitutional Court?', in Curtin/O'Keefe (eds.), *Constitutional Adjudication in European Community and National Law*, Butterworth Ireland: Dublin, 1992, p. 32.

¹⁵³ F. Bilancia, 'The Concept of Statutory Law in EU Perspective', in *Indiana Journal of Global Legal Studies*, No. 12, 2005, p. 505.

¹⁵⁴ AG Léger, ECJ, Case C-214/94, ECR I-2253, 1996, para. 63 – *Boukhalfa*.

¹⁵⁵ See to this end *inter alia* AG Léger, ECJ, Case C-214/94, ECR I-2253, 1996, para. 63 – *Boukhalfa*; M. Hilf, 'Art. 17 [Unionsbürgerschaft]', in: Grabitz/M. Hilf, *Das Recht der Europäischen Union*, 38. EL, 2009, para 62.

¹⁵⁶ See for a contemporary analysis of this 'integration through law' theory A. Vauchez, 'Integration-through-law': contribution to a socio-history of EU political commonsense', *EUI working papers RSC*, No. 10, 2008. The 'integration through law' theory has been developed in the 70s and 80s at the EUI in Florence under the responsibility of M. Cappelletti/M. Secombe/J. Weiler (eds.), *Integration through law*, multiple volumes, Walter de Gruyter: Berlin, 1985.

¹⁵⁷ J. d'Oliviera, 'European Citizenship: Its Meaning, its Potential', in: R. Dehousse (ed.), *Europe after Maastricht*, LBE: Munich, 1994, p. 147.

evaluations of the *Rottmann* case. *M. Dougan* criticizes the *Rottmann* judgment as sitting ‘rather uneasily with the previous ruling in Case C-210/06 *Cartesio*’¹⁵⁸, 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. *D. 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’¹⁵⁹. 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 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.’ *O. Golyunker* hence also finds ‘(t)he consequences of the *Rottmann* judgment for matters of nationality’ to be ‘relatively limited’¹⁶⁰.

Such an understanding of a heavy weight of 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’”.¹⁶¹ 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 might be a fear that Member States tend to use their wide discretion

¹⁵⁸ M. Dougan, ‘Some comments on *Rottmann* and the “personal circumstances” assessment in the Union citizenship caselaw’, in: J. Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, EUDO Forum Discussion, p. 2; Available at <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=1>

¹⁵⁹ D. Kochenov, ‘Two Sovereign States vs. a Human Being: ECJ as a Guardian of Arbitrariness in Citizenship Matters’, in: J. Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, EUDO Forum Discussion, p. 4; Available at <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=3>

¹⁶⁰ O. Golyunker, ‘The correlation between the status of Union citizenship, the rights attached to it and nationality in *Rottmann*’, in: J. Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, EUDO Forum Discussion, p. 5; Available at <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=4>

¹⁶¹ O. Golyunker, ‘The correlation between the status of Union citizenship, the rights attached to it and nationality in *Rottmann*’, in: J. Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, EUDO Forum Discussion, p. 5.

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 on 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 US American experience after the Civil War when individuals used – taking recourse to the 14th 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.¹⁶² These Spanish policies have been criticized for intentionally misusing the right of free movement enshrined in European citizenship as a political argument. In 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.'¹⁶³ 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.¹⁶⁴ Nonetheless, Taney's opinion

¹⁶² c. <http://news.bbc.co.uk/2/hi/europe/4242411.stm>; s. also G. Davies, 'The entirely conventional supremacy of Union citizenship and rights', in: J. Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, EUDO Forum Discussion, p. 3.

Available at <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=2>

¹⁶³ G. Davies, 'The entirely conventional supremacy of Union citizenship and rights', in: J. Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, EUDO Forum Discussion, p. 3.

¹⁶⁴ See in this respect G. Davies, 'The entirely conventional supremacy of Union citizenship and rights', in: J. Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, EUDO Forum Discussion, p. 3; 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

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’¹⁶⁵. As the ECJ emphasized, ‘(s)ome of them conclude that a decision 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.’¹⁶⁶ In addition, *T. Kostadinides*, like many others, stresses the wording of the old Art. 17 EC, according to which EU citizenship shall ‘complement’ Member State nationality.¹⁶⁷ In his view, the new wording of Art. 20 TFEU “additional” shall also

violated the spirit of European Citizenship. In the US case, on the other hand, the federal Constitution establishes a uniform rule of naturalization (see above).

¹⁶⁵ Case C-135/08, *Rottmann*, judgment of 2 March 2010, para 37.

¹⁶⁶ Case C-135/08, *Rottmann*, judgment of 2 March 2010, para 37.

¹⁶⁷ T. Konstadinides, ‘La Fraternité Européenne? The Extent of National Competence to Condition the Acquisition and Loss of Nationality From the Perspective of EU Citizenship’, in *European Law Review*, Vol. 35, 2010, p. 403.

be interpreted in the light of the wording of Art. 17 EC.¹⁶⁸ It hence implies 'that an individual's nationality is to be settled by reference to national law and further confirm(es) the practical impossibility of referring to EU citizenship as 'dual citizenship.'¹⁶⁹ From this perspective, *Rottmann*, as G. de Groot and A. Seling point out, might be viewed not so much as a restrained, pragmatic judgment but rather as 'judicial activism.'¹⁷⁰ It could be interpreted as intervening deeply in national law as it 'is willing to challenge Member States' autonomy in nationality matters.'¹⁷¹

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 downsides 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

¹⁶⁸ T. Konstadinides, 'La Fraternité Européenne? The Extent of National Competence to Condition the Acquisition and Loss of Nationality From the Perspective of EU Citizenship', in *European Law Review*, Vol. 35, 2010, p. 403 f.

¹⁶⁹ T. Konstadinides, 'La Fraternité Européenne? The Extent of National Competence to Condition the Acquisition and Loss of Nationality From the Perspective of EU Citizenship', in *European Law Review*, Vol. 35, 2010, p. 404.

¹⁷⁰ G. R. de Groot/A. Seling, 'The consequences of the Rottmann judgment on Member State autonomy. The Court's avant-gardism in nationality matters', in: J. Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, EUDO Forum Discussion, p. 5; Available at <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=6>

¹⁷¹ G. R. de Groot/A. Seling, 'The consequences of the Rottmann judgment on Member State autonomy - The Court's avant-gardism in nationality matters', in: J. Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, EUDO Forum Discussion, p. 5.

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 US 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.¹⁷² 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.¹⁷³ 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* US, Member States are very protective of their right to determine who their 'people' are. In essence, it is therefore wise to leave this most fundamental question in the political arena.

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

¹⁷² To say nothing of the legal challenges this doctrine creates with regard to the comity clause (see footnote above), 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.

¹⁷³ See for an extensive analysis in this respect R. Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law*, OUP: Oxford, 2009; For a comparison with the cooperative German federalism, see F. W. Scharpf, 'The joint-decision trap: lessons from German federalism and European integration', in *Public Administration*, Vol. 66, No. 3, 1988, pp. 239-278.

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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 these hence need to form the autonomous element of EU citizenship, which requires to be safeguarded 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.¹⁷⁴ 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, 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

¹⁷⁴ See inter alia A. Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue', in *European Journal of Legal Studies*, Vol. 1, 2007; M. Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism', in *European Journal of Legal Studies*, Vol. 1, 2007; Both available at www.ejls.eu.

substantial analysis (as Germany did in *Rottmann*)¹⁷⁵. 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 14th amendment’ is neither on the cards nor would it, in our judgment, be desirable. Although supporters of a strong role of autonomy may favor such a ‘European 14th 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 depriving European citizens of their rights. On the other hand, the Curtis opinion revealed that

¹⁷⁵ Germany did not even feel the need to wait for the outcome of the legal procedures in Austria where Rottmann tries to re-gain his Austrian citizenship, see BVerwG 5 C 12.10, Judgment of November 11, 2010.

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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 applicableness of EU law – was found to have strong *prima facie* plausibility. It was, however, the actual implementation of this concept in *Dred Scott* 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; 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.