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The self-perpetuation of EU constitutionalism in the area of free movement of persons: Virtuous or vicious cycle?

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Abstract: This paper analyses the mutual influence and self-perpetuating cycle of legitimacy of EU legal scholars and the Court of Justice of the European Union (CJEU) in expanding and broadening the free movement rights of Union citizens and their family members. It is argued that legal scholars have played a dual role in promoting the constitutional paradigm of an ever-expanding scope of directly enforceable residence and movement rights in the EU. First, by presenting the expansion of free movement rights as an inevitable outcome of the EU constitutional order based on directly enforceable individual rights, scholars have played a significant role in legitimizing the jurisprudence of the Court in the face of initial resistance from the member states. Second, legal scholars have been an important source for the Court of Justice in developing its case law in this area. The Advocates General in their opinions have drawn on an expanding field of scholarship presenting the expansion of free movement rights as an inherent feature of the EU as a constitutional legal order. Spurred by the objective of turning the EU into more than an internal market, the opinions of the Advocates General have mostly been followed by the Court. Legal scholars have thus served not only as a legitimizing force, but also as a source of inspiration for the perceived constitutionalization of free movement rights in the EU.

Keywords: Advocates General; EU constitutionalism; European citizenship; free movement of persons

Introduction

For decades European legal and political scholars have intensely debated the role of the European Court of Justice in the process of European integration.[1]

[1] See amongst many others E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law* 1; M Kumm, 'Who is the Final Arbiter of Constitutionality in Europe?' (1999) 36 *Common Market Law Review* 351; K Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205; J Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor', and Other Essays on European Integration* (Cambridge University Press, Cambridge, 1999); C Timmermans, 'The Constitutionalization of the European Union' (2002) 21 *Yearbook of European Law* 1.

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The 'constitutionalization' of the EU legal order, triggered by the establishment of the doctrines of direct effect and supremacy is 'one of the grand, discursive narratives of the study of European integration'.[2] The granting of personal rights to individuals under EU law coupled with effective enforcement mechanisms, most crucially the preliminary ruling procedure, are seen to have given the EU Treaties a quasi-constitutional status. In particular, at times where the EU legislature is paralysed, the Court has been identified as a crucial policy-making organ. Even though there is more than one constitutionalization process[3] and various different meanings of 'constitutionalism' and 'constitutionalization',[4] the crucial element identified by most scholars is the strengthening and codification of individual rights by the Court. Haltern has defined constitutionalization as a process whereby the EU 'has evolved from a set of legal arrangements binding upon sovereign states into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within the sphere of application of [EU] law'.[5]

The important role played by the Court in developing the status of the individual under EU law is thus widely acknowledged. However, European constitutionalism, which used to be an almost universally accepted truth amongst legal scholars and political scientists, is no longer taken for granted. Hunt and Shaw[6] have demonstrated that by using the language of 'constitutionalization' to describe the creation of an EU legal order, scholars have made two implicit claims about EU law: first, that the system under creation reflects and respects constitutional practices, in particular the protection of individual human rights and second, that the Court acts as a motor of integration, pursuing an 'integration-through-law' agenda. The consequence of these twofold assumptions has been an

[2] A Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance' (2010) 5 *Living Reviews in European Governance* 2, 5.

[3] Next to the strengthening and codification of individual rights constitutionalization also refers to the development of representative parliamentary institutions, see B Rittberger and F Schimmelfennig, 'Explaining the constitutionalization of the European Union' (2006) 13 *Journal of European Public Policy* 8, 1149.

[4] P Craig, 'Constitutions, Constitutionalism, and the European Union' (2001) 7 *European Law Journal* 7, 130–34.

[5] U Haltern, 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination' (2003) *European Law Journal* 1, 14–44.

[6] J Hunt and J Shaw, 'Fairy Tale of Luxembourg? Reflections on Law and Legal Scholarship in European Integration' in D Phinnemore and A Warleigh-Lack (eds), *Reflections on European Integration. 50 Years of the Treaty of Rome* (Palgrave Macmillan, Basingstoke, 2009) 111.

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emphasis on the integrative potential of law and a presentation of the 'constitutionalization' of the Court's case law as inevitable. This narrative of the Court's case law moving inevitably towards further integration in a process of 'constitutionalization' has increasingly been challenged in the academic literature.[7]

Moreover, rather than seeing the development of the Court's case law towards further integration as an inevitable and self-explanatory process, scholars have increasingly scrutinized the influence of different actors on the direction of the Court's case law. Some authors have stressed the importance of the positions of individual judges[8] or the interests of private actors, such as producers and traders[9] in determining the outcome of cases, whilst others have argued that the Court tends to follow the preferences of the most powerful member sates.[10] The role played by the Advocates General[11] and the European Commission[12] has also come under scrutiny. Moreover, there has been some (albeit limited) scholarship on the role of academics and in particular legal scholars as advocates of European integration. Vauchez has pointed out that many of the most prominent actors in the Court, the Commission, and the institutions' Legal Services are often at the same time academics, justifying and extending the significance of the Court's case law that they have

[7] D Wincott, 'Political Theory, Law and European Union' in J Shaw and G More (eds), *New Legal Dynamics of European Union* (Clarendon Press, Oxford, 1995) 298; M Avbelj, 'Questioning EU Constitutionalism' (2008) 9 *German Law Journal* 1, 1–26; MP Maduro, 'How Constitutional Can the European Union Be? Reconciling Intergovernmentalism with Constitutionalism in European Constitutionalism' in JM Beneyto (ed), *La Europa de los veinticinco: desafíos políticos y económicos* (Dykinson, Madrid, 2005) 24; I Ward, 'Beyond Constitutionalism: The Search for a European Political Imagination' (2001) 7 *European Law Journal* 1, 24–40.

[8] R Gely and PT Spiller, 'Strategic Judicial Decision-making' in KE Whittington, DR Kelemen and GA Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, Oxford, 2008) 24–46.

[9] A-M Burley and W Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 *International Organization* 41.

[10] G Garrett, RD Kelemen and H Schulz, 'The European Court of Justice, National Governance and Legal Integration in the European Union' (1998) 52 *International Organization* 1, 149–76; C Carubba, M Gabel and C Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102 *American Political Science Review* 435. See also more generally for a discussion of different factors explaining the 'anomaly'of the Court's relatively great autonomy A Moravcsik, 'Liberal Intergovernmentalism and Integration: A Rejoinder' (1995) 33 *Journal of Common Market Studies* 4, 611–28.

[11] N Burrows and R Greaves, *The Advocate General and EC Law* (Oxford University Press, Oxford, 2007).

[12] E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law* 1, 1–27.

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influenced.[13] He argues that by emphasizing and legitimizing the role played by the Court in the process of European integration, the ensemble of EU lawyers and legal scholars has also constituted itself as a specific EU elite with the task of protecting the Treaties and advancing the Europeanization process.

This paper deals with the ongoing process of constitutionalization of free movement rights and the right to non-discrimination on grounds of nationality under EU law. It focuses on the role played by academics in the development of the case law of the Court in the area of free movement of persons, as a power of legitimization on the one hand and as a source of inspiration for the Court on the other. I will first consider the 'constitutionalization' of free movement rights in terms of the transformation of free movement rights from an economically-inspired right to a full right of citizenship. Secondly, I will consider the way in which academics have inspired and justified the Court's approach in developing the concept of European citizenship as a limit to national competences in the sphere of nationality law.

'Constitutionalization' in the area of free movement of persons

The important role played by the CJEU in pushing the project of European integration further and extending the rights of individuals, at times against the express will of the member states, has been well documented. This development has been particularly evident in the area of free movement of persons. The process of 'constitutionalization' largely relies on the enforcement of EU rights by individuals through the preliminary ruling procedures. There is hardly any area of law where this is more visible than in the area of free movement of persons.[14] The establishment of the doctrines of supremacy and direct effect and the EU system of judicial review has enabled EU citizens to directly invoke their rights before the national courts. Individuals have increasingly made use of this possibility, invoking their free movement rights before the national courts and challenging domestic legislation

[13] A Vauchez, '"Integration-through-Law": Contribution to a Socio-history of EU Political Commonsense' (2008) EUI RSCAS Working Papers 2008/10.

[14] Even though scholars have identified a convergence in the interpretation of the fundamental freedoms, the free movement of persons, in particular the free movement of workers continues to be distinct from the free movement of goods in many ways, see C Barnard, 'Fitting the Remaining Pieces into the Goods and Persons Jigsaw?' (2001) 26 *European Law Review* 1, 35–9; A Tryfonidou, 'Further Steps on the Road to Convergence amongst the Market Freedoms' (2010) 35 *European Law Review* 1, 1–20.

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and the national interpretation of Treaties and secondary legislation.[15] In response, the Court has rather consistently interpreted the enabling provisions of the Treaty as well as secondary legislative acts expansively.[16] In particular the primary Treaty provisions on Union citizenship (Articles 20 and 21 TFEU) have served as vehicles for extending the rights of EU citizens in a way that is at least questionable from the perspective of the initial intentions of the legislature. When it was introduced by the Treaty of Maastricht in 1992, the concept of European Union citizenship was largely perceived as a mere symbolic institution.[17] It appears from the legislative history[18] and the submissions of member states before the Court[19] that the provisions on Union citizenship were not intended to create any new directly effective rights. As we will see below, the case law of the Court has taken a rather different course up to the point of relying on Articles 20 and 21 TFEU to create rights for third-country national family members of Union citizens that are not covered by secondary legislation.

So far, in spite of initial outcries against certain judgments, the member states have not challenged or limited the powers of the Court. Many judgments in the area of free movement of persons have initially been subject to a lot of criticism by the member states and in the media.[20] However, after a period of reflection, and a stout defence of the rulings in the academic literature, the member states have in most cases gone along with the ruling of the Court and consolidated the newly created rights in primary or secondary legislation. This is partly due to the fact that the mechanisms available to the member state or the EU institutions to shape, let alone reverse, the outcome of the Court's case law are relatively limited. None of the relevant Treaty provisions (Articles 258, 263 and 267 TFEU)

[15] This applies not only to EU citizens, but also to third-country nationals, see S Carrera and A Wiesbrock, 'Whose Citizenship to Empower in the Area of Freedom, Security and Justice. The Act of Mobility and Litigation in the Enactment of European Citizenship' (2010) 12 *European Journal of Migration and Law*, 337–59.

[16] Cases representing an exception to the extensive approach taken by the Court were mostly overturned in later judgments. See the *Akrich* ruling, overturned by *Metock*.

[17] HU Jessurun d'Oliveira, 'European citizenship: Its Meaning, Its Potential', in R Dehousse (ed), *Europe after Maastricht: An Ever Closer Union?* (Law Books in Europe, Munich, 1994) 147.

[18] See S O'Leary, *European Union Citizenship. Options for Reform* (Institute for Public Policy Research, London, 1996) 36–41. It appears that the introduction of Union citizenship was primarily regarded as a way to reduce the democratic deficit and to improve the Union's democratic legitimacy.

[19] See the submissions of Germany and the UK in Case C-413/99 *Baumbast* [2002] ECR I-7091.

[20] See for example the reactions to *Metock*.

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grant the member states or the EU institutions the right to prevent litigation or to reverse judgments. Nevertheless, it is notable that, whilst contesting individual decisions, the member states have not called into question the authority of the Court as such. On the contrary, over time they have come to terms with the Court's rulings and in many cases even consolidated them in future rounds of legislation. This was the case with the adoption of the so-called 'Citizen's Directive' 2004/38/EC.[21] The directive fulfilled an important symbolic function as the formal recognition by the European legislature of the 'fundamental status' case law of the Court.[22] It links the system of citizenship-related rights directly to the status of Union citizenship, rather than requiring economic participation in the internal market.[23] The consolidation of the Court's role is also apparent in the Lisbon Treaty, which does not see a weakening of the powers of the Court, but rather an extension of its jurisdiction in the third pillar as well as a formal recognition of the supremacy of EU law.[24]

The role of the CJEU in 'constitutionalizing' free movement rights has been widely acknowledged by legal and political science scholarship.[25] As we will see, European legal scholars have generally sought to legitimize if not expand the Court's judgment on EU free movement rights. In the political science literature, neo-functionalists and supranationalists have emphasized the integrative potential of law and the ability of the Court to effectively operate beyond national control in advancing the integration process.[26] The general tendency in the literature has been to legitimize the expanding case law of the Court and even to suggest a more liberal

[21] Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states, OJ L 158/77, 30.4.2004.

[22] See recital 3 of the Directive's preamble.

[23] S Giubboni, 'Free Movement of Persons and European Solidarity' (2007) 13 *European Law Journal* 3, 360–79.

[24] Declaration 17 annexed to the Lisbon Treaty.

[25] See amongst many others M Condinanzi, A Lang and B Nascimbene, *Citizenship of the Union and Freedom of Movement of Persons* (Martinus Nijhoff Publishers, Leiden, 2008); S O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship' (2008) 27 *Yearbook of European Law* 1, 167–93; A Hatland and E Nilssen, 'Policy making and application of law: free movement of persons and the European Court of Justice' in R Ervik, N Kildal and E Nilssen, *The Role of International Organizations in Social Policy. Ideas, Actors and Impact* (Edward Elgar Publishing, Cheltenham, 2009) 94–71.

[26] E Haas, *The Uniting of Europe* (Stevens, London, 1958); A Niemann, *Explaining Decisions in the European Union* (Cambridge University Press, Cambridge, 2006); J Caporaso and W Sandholtz, 'From Free Trade to Supranational Polity: The European Court and Integration' in W Sandholtz and A Stone Sweet (eds), *European Integration and Supranational Governance* (Oxford University Press, Oxford, 1998) 92–133.

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interpretation of the free movement and citizenship provisions. Criticism of the Court's expansive case law and the ever-enlarging scope of EU free movement rights, restricting national discretion and sovereignty, has been limited. The majority of scholars agree with the Court's interpretation of EU citizens' rights, suggesting an even more expansive approach, rather than a more restrictive one. In particular, the notion of European Union citizenship has inspired legal scholarship not only for 'constitutionalizing' the pre-existing rights of movement and residence,[27] but also for constituting a form of post-national citizenship[28] and consolidating a rights-based approach.[29] The Court's role has been particularly important in making redundant the requirement of being engaged in a cross-border activity for enjoying EU movement and non-discrimination rights by giving flesh to the 'skeleton' of EU citizenship.[30] It has also played an important role in imposing limits upon national sovereignty in the area of nationality law.[31] As we will see, EU legal scholars have played a role in legitimizing and inspiring the case law of the Court in both areas.

Free movement as a fundamental right: from market citizen to Union citizen

The most crucial 'constitutional' development in the free movement case law of the Court has been the creation of free movement as a fundamental right, rather than an economic necessity. Initially, the free movement provisions were focused on the economic functionality of the exercise of rights in the internal market. Moving individuals were perceived as economic agents,[32] fulfilling a function in the process of European integration. The emphasis was thus placed on the 'market

[27] D Kostakopoulou, 'European Union citizenship: writing the future' (2007) 13 *European Law Journal* 5, 623.

[28] See amongst others T Faist, 'Social Citizenship in the European Union: Nested Membership' (2001) 39 *Journal of Common Market Studies* 1, 37–58; M Wind, 'Post-National Citizenship in Europe: The EU as a Welfare Rights Generator' (2008) 15 *Columbian Journal of European Law* 239; B Enjolras, 'Two hypotheses about the emergence of a post-national European model of citizenship' (2008) 12 *Citizenship Studies* 5, 495–505.

[29] Y Borgmann-Prebil, 'European Citizenship and the Rights Revolution' (2008) 30 *Journal of European Integration* 311–19.

[30] Case C-184/99 *Grzelczyk* [2001] ECR I-6193.

[31] Case C-135/08 *Rottmann* [2010] ECR I-1449.

[32] M Everson, 'The Legacy of the Market Citizen' in J Shaw and G More (eds), *New Legal Dynamics of European Union* (Clarendon Press, Oxford, 1995) 73; D Oliver, 'What is Happening to the Relationship between the Individual and the State?' in J Jowell and D Oliver (eds), *The Changing Constitution* (Oxford University Press, Oxford, 1994) 461.

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citizen', i.e., a person acting as a participant or beneficiary of the internal market. This perception changed with the introduction of Union citizenship. Seeing individuals no longer as merely units of economic production, the free movement rules developed into individual rights under EU law, limiting national discretion even in areas considered to be at the heart of national sovereignty. The Court granted substantive rights to Union citizens as a result of a broad interpretation of the Treaties' primary provisions and secondary legislation.

The concept of Union citizenship was introduced by the Treaty of Maastricht in 1992, supposedly as an embodiment of the growing political dimension of the hitherto primarily economic nature of European integration.[33] Since then it has undergone significant changes in the way in which it has been conceptualized and interpreted by the European legislature and courts. Over the years, the personal and material scope of the concept of European citizenship has gradually widened. The Court has played a particularly important role in this development. Starting with the case of *Grzelczyk*[34] in 2001, it has elevated the status of Union citizen to be the '… fundamental status of nationals of the Member States'.[35] In doing so, the Court has developed a concept of 'social citizenship', abandoning the distinction between economically active and non-economically active citizens.[36]

The landmark cases in this area dealt with the question of whether the citizenship provisions have a material content independent of secondary legislation and to what extent they can form the basis for a right of residence and access to social benefits for non-economically active EU citizens. Even though there is little doubt that by introducing the concept of Union citizenship into the Treaties the member states hardly intended to create any new rights, the Court was quick to give an independent meaning

[33] European Commission, *EU Citizenship Report 2010. Dismantling the obstacles to EU citizens' rights*, COM(2010) 603 final, 27.10.2010.

[34] Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 31.

[35] See also (amongst others) the following cases: Case C-413/99 *Baumbast* [2002] ECR I-7091; Case C-148/02 *Garcia Avello* [2003] ECR I-11613; Case C-138/02 *Collins* [2004] ECR I-2703; Case C-456/02 *Trojani* [2004] ECR I-7573; Case C-209/03 *Bidar* [2005] ECR I-2119; Case C-403/03 *Schempp* [2005] ECR I-6421; Case C-406/04 *De Cuyper* [2006] ECR I-6947; Case C-192/05 *Tas-Hagen* [2006] ECR I-10451; Joined Cases C-11 and 12/06 *Morgan and Bucher* [2007] ECR I-9161; Case C-127/08 *Metock and Others* [2008] ECR I-6241; Case C-310/08 *Ibrahim* [2010] ECR I-1065; Case C-480/08 *Teixeira* [2010] ECR I-1107; Case C-162/09 *Lassal* [2010] nyr; Case C-145/09 *Tsakouridis* [2010] nyr.

[36] K Hailbronner, 'Free Movement of EU Nationals and Union Citizenship' in R Cholewinski, R Perruchoud and E MacDonald (eds), *International Migration Law. Developing Paradigms and Key Challenges* (TMC Asser Press, The Hague, 2007) 317–20.

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to the citizenship provisions. In *Martinez Sala*[37] the Court stressed that the status of Union citizenship contains the rights and obligations contained in the Treaties, including the right to non-discrimination on grounds of nationality, provided that the situation falls within the scope of EU law.[38] The case did not, however, solve the question of whether economically inactive Union citizens in need of social assistance could rely on the citizenship provisions in order to claim a right of residence in another member state. This was decided in the landmark case *Grzelczyk*[39] where the Court established a right of residence also for economically inactive Union citizens, who have to be treated in the same way as nationals regarding social assistance, unless they become an 'unreasonable burden' to the host member state. The Court identified Union citizenship as the 'fundamental status' of nationals of a member state. In all situations falling within the material scope of EU law, reliance on the principle of non-discrimination on grounds of nationality enshrined in Article 18 TFEU is possible. The material scope is defined, *inter alia*, on the basis of the right of all Union citizens to move and to reside in another member state (Article 21). A lawfully resident non-economic actor may thus be entitled to social assistance benefits on the basis of Article 18 TFEU.[40] In *Baumbast*,[41] the Court identified a right of residence and movement for Union citizens and their family members springing directly from Article 21 TFEU (ex Article 18 EC) rather than secondary legislation. It established that Article 21 creates a directly effective right, in spite of the references in the Articles to the limitations and conditions laid down in secondary law.

Whereas the reference to Article 21 was initially closely tied to the prohibition of nationality discrimination enshrined in Article 18 TFEU, the Court has also embraced the concept of non-discriminatory restrictions. The requirement of falling within the 'material scope of EU law' is thus

[37] Case C-85/96 *Martinez Sala* [1998] ECR I-2691. The case has been discussed widely; see for instance C Tomuschat, 'Case Note *Martínez Sala*' (2000) 37 *Common Market Law Review* 450.

[38] Para 61 of the judgment.

[39] Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 31.

[40] See Case C-456/02 *Trojani* [2004] ECR I-7573. The Court has, however, set certain restrictions on the right of access to social benefits. For instance, in *Bidar* (Case C-209/03), it argued against the Advocate General, holding that a certain degree of integration, possibly appropriate residence requirement, can be required. Moreover, the Union citizen may not become an unreasonable burden on the welfare system of the host member state. The Court has also stressed in *Vatsouras* (Joined Cases C-22/08 and C-23/08) that Article 24(2) of Directive 2004/38 remains valid and that member states retain competence to evaluate whether a jobseeker is entitled to receive social assistance whilst actively seeking work and having a genuine chance of finding employment. Benefits intended to facilitate access to the labour market, such as jobseeker's allowances, however, are not to be regarded as social assistance and must be made available.

[41] Case C-413/99 *Baumbast* [2002] ECR I-7091.

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easily fulfilled: it is sufficient that a measure may have detrimental effects for the moving EU citizen. In *D'Hoop* the Court argued that a measure treating a citizen in her own member state less favourably than the treatment she would have enjoyed had she not made use of free movement rights renders the exercise of free movement rights less attractive.[42] In the same vein, the Court has held that operating a residence requirement for receiving benefits for civilian war victims,[43] a disability pension compensating for suffering following deportation to Siberia[44] or the benefits granted to the surviving spouses of German national war victims[45] are liable to discourage the exercise of rights under Article 21(1) TFEU. Moreover, in recent cases the Court has made clear that not only cross-border movement, but also the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European citizenship status can bring a situation within the scope of EU law.[46]

One can speak of a further stage in the 'constitutionalization' of free movement rights by considering the increasing reliance on fundamental rights in free movement cases. The Court relies to an increasing extent on a broad EU fundamental rights framework, including the Charter, the ECHR and other international treaties and documents. The reliance on fundamental rights has been particularly important in cases related to the rights of third-country national family members. In *Carpenter*[47] the Court referred to the fundamental right to respect for family life as a general principle of EU law. Reference to this fundamental right was repeated in succeeding cases such as *Akrich,*[48] *Metock,*[49] *Zambrano*[50] and *Dereci*.[51]

[42] Case C-224/98 *D'Hoop* [2002] ECR I-6191; see also Case C-224/02 *Pusa* [2004] ECR I-5763.

[43] Case C-192/05 *Tas-Hagen* [2006] ECR I-10451.

[44] Case C-499/06 *Nerkowska* [2008] ECR I-3993.

[45] Case C-221/07 *Zablocka-Weyhermüller* [2008] ECR I-9029.

[46] Case C-34/09 *Zambrano* [2011] nyr; Case C-434/09 *McCarthy* [2011] nyr; Case C-256/11 *Dereci* [2011] nyr.

[47] Case C-60/00 *Carpenter* [2002] ECR I-6279. According to the Court, the content of the right to family life must be defined in line with Article 8 ECHR and the case law of the ECtHR. See also Case C-459/99 *MRAX* [2002] ECR I-6591; Case C-540/03 *Parliament v Council* [2006] ECR I-5769. Hence, in the official discourse of the Court, the right to respect for private and family life enshrined in Article 7 of the Charter of Fundamental Rights offers the same level of protection as Article 8 ECHR.[47] Yet, the jurisprudence of the Court in *Carpenter, Akrich, Metock* and *Zambrano* suggests a much more inclusive approach than that pursued by the ECtHR. Union citizens' right to family life is protected also in cases where the family relationship was established at a point of time where the residence status of the applicant was precarious.

[48] Case C-109/01 *Akrich* [2003] ECR I-9607.

[49] Case C-127/08 *Metock and Others* [2008] ECR I-6241.

[50] Case C-34/09 *Zambrano* [2011] nyr.

[51] Case C-256/11 *Dereci* [2011] nyr.

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The Advocates General have for the most part enthusiastically embraced the concept of Union citizenship, paving the way for the extensive interpretation of Articles 20 and 21 by the Court. Although the wording of 'fundamental status' was mentioned for the first time in *Grzelczyk*, the Advocates General set the ground for attaching crucial significance to the concept of Union citizenship in earlier cases. The opinions of the Advocates General paved the way for the Court to sever the link between economic activity or self-sufficiency and the right to free movement. In *Wijsenbeek*[52] AG Cosma argued that Article 21 TFEU (ex Article 8a EC) has an independent content. According to him, Article 20 puts the individual at the centre of attention, granting him a right of movement and residence within the territory of the member states. Hence, as opposed to other fundamental freedoms, such as Article 45 TFEU, which are of a functional nature, Article 20 creates a right that serves the right holder himself, rather than the Union.[53] In *Martinez Sala*[54] AG La Pergola emphasized the fact that the right to move and to reside in other member states is a right derived from Union citizenship and primary law and that this right cannot be separated from the status of Union citizenship. Countering the view of the German government that Article 8a EC (now Article 21 TFEU) is explicitly subjected to the limits of the Treaty and secondary legislation, AG Pergola emphasized that all Union citizens residing in other member states have the right to non-discrimination on grounds of nationality, even if no secondary legislation is applicable. He emphasized that 'the limitations provided for in Article 8a itself concern the actual exercise but not the existence of the right.'[55] The right to free movement and residence enshrined in Article 21 TFEU is a right inseparable from Union citizenship that is common to all citizens of the member states. It is conferred directly upon all Union citizens, recognizing them as subjects of the law. AG Pergola already uses the language of fundamental status in *Martinez Sala*, stating that Union citizenship is the 'fundamental legal status guaranteed to the citizens of every member state by the legal order of the Community and now of the Union'. According to him, this results 'unequivocally' from the terms of Article 21.[56] In *Grzelczyk* Advocate General Alber made the claim that Article 21 contains a material content independent from other primary or secondary legislative provisions even more explicit. According to him, Article 21 (ex Article 8a EC) brought about a 'qualitative

[52] Opinion of AG Cosma in Case C-378/97 *Wijsenbeek* [1999] ECR I-6207.
[53] Para 83 of the AG opinion.
[54] Opinion of AG La Pergola in Case C-85/96 *Martinez Sala* [1998] ECR I-2691.
[55] Para 18 of the AG opinion.
[56] Ibid.

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change' with the status of Union citizenship taking on greater significance, seeing individuals as more than purely economic factors in the internal market. He states that 'the conditions under which freedom of movement may depend are no longer economic in nature, as they still were in the 1990 directives.'[57]

In addition to preparing the ground for severing the link between economic activity and free movement rights, the Advocates General have played an important role in embracing the concept of non-discriminatory restrictions in the area of free movement of persons. Advocate General Jacobs stated in *Pusa* that Article 21 (ex Article 18 EC) is not limited to a prohibition of direct or indirect discrimination, but also applies to non-discriminatory restrictions. Moreover, the provision applies not only to national restrictions on a person's right to enter or reside in a member state, but covers 'all measures of any kind which impose an unjustified burden on those exercising it'.[58] AG Geelhoed in *De Cuyper*[59] and AG Kokott in *Tas-Hagen*[60] have also underlined that Article 21 equally applies to non-discriminatory measures that impose a restriction on the exercise of the right to move and reside freely in other member states or which otherwise constitute an obstacle which might deter Union citizens from exercising this right.

The Advocates General have not only shaped the 'fundamental status' case law of the Court, they have also presented the expansive interpretation of the provisions on Union citizenship as inevitable. According to Advocate General Leger in *Boukalfa*, the status of Union citizenship is of considerable symbolic value. He argues that 'taken to its ultimate conclusion, the concept should lead to citizens of the Union being treated absolutely equally, irrespective of their nationality. Such equal treatment should be manifested in the same way as amongst nationals of one and the same State.'[61]

The Advocates General have also frequently resorted to concepts of not only individual rights, but also fundamental rights operating as legally enforceable constraints on the exercise of powers by the EU institutions and the member states within the context of the free movement provisions. According to AG Jacobs in *Konstantinidis*[62] EU citizens are entitled to

[57] Opinion of AG Alber in Case C-184/99 *Grzelczyk* [2001] ECR I-6913, para 52.

[58] Opinion of AG Jacobs in Case C-224/02 *Pusa* [2004] ECR I-5763, paras 20 and 21.

[59] Opinion of AG Geelhoed in Case C-406-04 *De Cuyper* [2006] ECR I-6947, paras 107 and 108.

[60] Opinion of AG Kokott in Case C-192/05 *Tas-Hagen* [2006] ECR I-451, para 50.

[61] Opinion of AG Leger in Case C-214/94 *Boukalfa v Federal Republic of Germany* [1996] ECR I-2253, para 63.

[62] Opinion of AG Jacobs in Case C-168/91 *Konstantinidis* [1993] ECR I-1191.

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assume that they will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. Similarly, AG Colomer in his opinion in *Petersen* emphasizes the importance played by fundamental rights in guaranteeing the rights of individuals in the Union. He stresses that the fundamental rights form an 'integral part of the status of citizenship' and that the protection of fundamental rights grants the claims of Union citizens greater legitimacy.[63]

In many cases the Advocates General have referred explicitly or implicitly to specific scholars or EU legal scholarship in general when developing their arguments. AG Cosma in *Wijsenbeek* refers to the 'body of European constitutional literature' in order to emphasize the nature of the right to free movement and residence as a directly enforceable individual right.[64] Other Advocates General who have pointed to the legal literature when discussing the direct effect of Article 21 are Mengozzi in *Eind*[65] and Geelhoed in *Baumbast*.[66] AG Sharpston in *Zambrano* relies on legal scholarship[67] when discussing the scope and meaning of European citizenship, in particular when arguing that the evolution of Article 21 having direct effect and conferring on non-economically active individuals a free-standing right of free movement was 'inevitable', following 'logically' from the creation of Union citizenship.[68] Advocate General Colomer in *Petersen* refers extensively to the academic literature[69] when putting forward his argument that with the introduction of Union citizenship and the change from a free movement of persons to a 'movement of free

[63] Para 27 of the AG opinion in *Petersen*.

[64] Para 89 of the AG opinion.

[65] Para 123 of the AG opinion in *Eind*.

[66] Para 96 of the AG opinion in *Baumbast*.

[67] S O'Leary, *The Evolving Concept of Community Citizenship* (Kluwer Law International, The Hague, 1996); C Closa, 'The Concept of Citizenship in the Treaty on European Union' (1992) 29 *Common Market Law Review* 1137–69.

[68] Para 125 of the AG opinion in *Zambrano*.

[69] See (n 67) 23–30; Editorial (2008) 45 *Common Market Law Review* 2–3; LFM Besselink, 'Dynamics of European and national citizenship: inclusive or exclusive?' (2007) 3 *European Constitutional Law Review*, 1–2; A Castro Oliveira, 'Workers and other persons: step-by-step from movement to citizenship – Case Law 1995–2001'(2002) 39 *Common Market Law Review*; M Dougan and E Spaventa, 'Educating Rudy and the (non-) English patient: A double-bill on residency rights under Article 18 EC' (2003) 28 *European Law Review* 700–4; D Martin, 'A Big Step Forward for Union Citizens, but a Step Backwards for Legal Coherence' (2002) 4 *European Journal of Migration and Law* 136–44; S O'Leary, 'Putting flesh on the bones of European Union citizenship' (1999) 24 *European Law Review* 75–9; J Shaw and S Fries, 'Citizenship of the Union: First Steps in the European Court of Justice' (1998) 4 *European Public Law* 533.

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citizens', the focus of attention has shifted to the individual.[70] Legal scholarship undoubtedly served as an inspiration for his opinion, which emphasizes that the concept of citizenship 'entails a legal status for individuals' and that member states 'must pay particular attention to individual legal situation'. Just as is the case with his colleagues, Colomer presents the development of the case law as inevitable, stating that the emphasis on the rights of the individual rather than the interests of the states is 'in keeping with the nature of citizenship of the Union'. He refers to the writings of Spaventa[71] when emphasizing the 'constitutional' nature of the free movement of persons in the EU.[72] Colomer also refers to the academic literature[73] in developing his argument that fundamental rights as an 'integral part of the status of citizenship' enhance the legitimacy of the Court's free movement case law. Similarly, in *Morgan and Bucher*, AG Colomer cites academic literature which highlights the role of the Court in overcoming the constraints of the Treaties by interpreting the free movement provisions expansively.[74] He also refers to writings emphasizing the importance of the concept of Union citizenship for developing a common European 'identity'[75] and identifies scholars who have pointed out the inherent feature of direct effect in Article 21 before this was recognized by the Court.[76]

The extent to which Advocates General have relied on the academic literature when discussing and defending the direct effect of Article 21 and the importance of the status of European citizenship within the 'constitutional' framework of the Union is notable. Moreover, reference to legal scholarship has been particularly crucial in areas that are still controversial (amongst scholars as well as presumably amongst members of the Court). This applies in particular to the concept of 'reverse discrimination' and the question of whether the protection of EU citizenship rights should extend to so-called internal situations. In *Government of the*

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[70] Para 28 of the AG opinion in *Petersen*.

[71] E Spaventa, 'Seeing the Wood despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45 *Common Market Law Review* 40.

[72] Para 19 of the AG opinion.

[73] E Spaventa (n 71) 37, 38.

[74] V Abellán Honrubia and B Vilá Costa, *Lecciones de Derecho comunitario europeo* (Ariel, Barcelona, 1993) 191.

[75] J Borja, G Dourthe and V Peugeot, *La Ciudadanía Europea* (Península, Barcelona, 2001) 37.

[76] A Dorrego de Carlos, 'La libertad de circulación de personas: del Tratado de Roma al Tratado de la Unión Europea' in JM Gil-Robles, *Los derechos del europeo* (Incipit editores, Madrid, 1993) 30; A Mattera, 'La liberté de circulation et de séjour des citoyens européens et l'applicabilité directe de l'article 8 A du traité CE' in GC Rodríguez Iglesias et al., *Mélanges en hommage à Fernand Schockweiler* (Baden-Baden, 1999) 413.

French Community, Advocate General Sharpston paid extensive tribute to the academic literature on reverse discrimination[77] when suggesting that the provisions on citizenship challenge the sustainability of the doctrine on purely internal situations. In *Zambrano*, AG Sharpston also refers to legal writing[78] when discussing the concept of reverse discrimination, putting forward the argument that reverse discrimination is not acceptable from the perspective of EU law, in particular within the context of Union citizenship.[79] Interestingly, in *Zambrano* Sharpston cites the very literature[80] which analyses the judgment *Government of the French Community,* a case to which she herself contributed an opinion. AG Kokott in her opinion in *McCarthy*, even though making the opposite argument to Sharpston, also acknowledges the legal scholarship[81] which infers a prohibition of reverse discrimination from the concept of Union citizenship.[82] At present the Court has not taken up the argument advanced in EU legal scholarship and by AG Sharpston that Article 21 should be capable of being relied upon in internal situations. It has, however, in the recent cases of *Zambrano, McCarthy and Dereci* redefined the internal situation rule and broadened the material scope of EU law to include situations that do not have a cross-border element, provided that

[77] S O'Leary (n 67). Discussing citizenship and free movement, the author argues *inter alia* that the provisions on citizenship are difficult to reconcile with reverse discrimination. See also N Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?' (2002) 39 *Common Market Law Review* 748; HUJ d'Oliveira, 'Is reverse discrimination still possible under the Single European Act?' in *Forty Years On: The Evolution of Postwar Private International Law in Europe: Symposium in Celebration of the 40th anniversary of the Centre of Foreign Law and Private International Law, University of Amsterdam, on 27 October 1989* (Kluwer, Deventer, 1990) 84; E Spaventa, 'From *Gebhard* to *Carpenter*: Towards a (non-economic) European Constitution' (2004) 41 *Common Market Law Review* 771.

[78] A Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer Law International, The Hague, 2009); E Spaventa, *Free Movement of Persons in the EU: Barriers to Movement in their Constitutional Context* (Kluwer Law International, The Hague, 2007); C Barnard, *EC Employment Law* (Oxford University Press, 2006) 213–14; N Nic Shuibhne (n 77) ibid.; and C Ritter, 'Purely internal situations, reverse discrimination, Guimont, Dzodzi and Article 234' (2006), 31 *European Law Review* 690.

[79] Para 133 of the AG opinion in *Zambrano*.

[80] P van Elsuwege and S Adam, 'The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination' (2009) *5 European Constitutional Law Review* 327.

[81] K-D Borchardt, 'Der sozialrechtliche Gehalt der Unionsbürgerschaft' (2000), *Neue Juristische Wochenschrift* 2059; D Edward, 'Unionsbürgerschaft – Mythos, Hoffnung oder Realität?' in 'Grundrechte in Europa' – *Münsterische Juristische Vorträge* (Münster, 2002) 41; D Edward, 'European Citizenship – Myth, Hope or Reality?', in 'Problèmes d'interprétation' – *À la mémoire de Constantinos N Kakouris* (Athens/Brussels, 2004) 131–33; E Spaventa (n 71) 30–9.

[82] Para 41 of the AG opinion in *McCarthy*.

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substantial citizenship rights are affected.[83] It is not unlikely that the academic writings cited by the Advocates General and representing an (albeit selective) public opinion have played a role in this development.

Legal scholars have not only been relied upon by the Advocates General in order to develop their arguments of an 'inevitable' extension of rights under the concept of Union citizenship. They have also acted as a force for legitimizing the Court's 'fundamental status' case law. The transformation 'from worker to citizen'[84] has received a large degree of attention in the academic literature.[85] Not all legal writing has been positive. The material scope of Articles 20 and 21 TFEU has met with criticism for, *inter alia,* failing to impose reciprocal obligations upon Union citizens, for not matching lists of national citizenship rights and being particularly thin in terms of political rights,[86] for the fact that the provision is limited by secondary law and for the exclusion of third-country nationals.[87] Neither has the impact of the case law on national welfare systems been free from criticism. The member states have complained about the gradual erosion of national welfare schemes and the reduction of discretion in decisions on the award of social welfare assistance.[88] Part of this criticism has been taken up in the academic literature. It has been warned that if member states are prevented from restricting eligibility for benefits, their only alternative is to cut down on social benefits in general.[89] In more general terms, the case law is seen to have undermined the exclusivity of national welfare systems.[90]

[83] See A Wiesbrock, 'Disentangling the 'Union Citizenship Puzzle'? The McCarthy Case' (2011) 36 *European Law Review* 860–72.

[84] P Conlan, 'Citizenship of the Union: the Fundamental Status of Those Enjoying Free Movement?' (2008) 7 *ERA Forum* 3, 345–55.

[85] See for instance F Wollenschläger, 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration' (2011) 17 *European Law Journal* 1, 1–34; D Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68 *The Modern Law Review* 2, 233–67; FG Jacobs, 'Citizenship of the European Union – A Legal Analysis' (2007) 13 *European Law Journal* 5, 591–610; R Bauböck, 'Why European Citizenship? Normative Approaches to Supranational Union' (2007) 8 *Why Citizenship?* 2, 453–88.

[86] S Besson and A Utzinger, 'Introduction: Future Challenges of European Citizenship – Facing a Wide-Open Pandora's Box' (2007) 13 *European Law Journal* 5, 576.

[87] J Weiler, 'European Citizenship and Human Rights' in JA Winter et al. (eds), *Reforming the Treaty on European Union – The Legal Debate* (Kluwer, The Hague, 1996) 57–76.

[88] K Hailbronner, 'Union Citizenship and Access to Benefits' (2005) 42 *Common Market Law Review* 1245.

[89] FW Sharpf, 'Legitimacy in the Multilevel European Polity' (2009) 1 *European Political Science Review* 2, 173–204.

[90] A Somek, 'Solidarity Decomposed: Being and Time in European Citizenship' 6 *European Law Review* 787.

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There are, however, hardly any instances where the Advocates General in their reasoning have relied on the critical writing of legal scholars which take up member states' concerns in respect of an overtly expansive interpretation of individual rights. One of the few examples of a case where the Advocate General has adopted an author's cautious interpretation of the reach of EU law in limiting national sovereignty is the *Kamberaj* case, which concerned the interpretation of the Directive on long-term residents (Directive 2003/109/EC). Advocate General Bot argued against an autonomous European Union law interpretation of the concepts of social security, social assistance and social protection.[91] The more common approach when citing critical scholarship has been to argue for an expansive interpretation of individual rights in spite of such academic writing. For instance, in *Iida* AG Trstenjak refers to critical legal writing on the applicability of the Charter of Fundamental Rights in the context of restrictions on the fundamental rights, but concludes in favour of applying the fundamental rights enshrined in the Charter to restrictions on freedom of movement under Article 21 TFEU.[92]

In any case, the overall tendency of legal scholarship has been to justify the Court's approach. According to Kostakopoulou, the blanket exclusion of economically inactive persons from access to social benefits was 'no longer consonant with the constitutionalization of Union citizenship',[93] warranting a case-by-case approach and personalized assessments. Moreover, few scholars have questioned the symbolical value and future potential of Union citizenship. By creating a body of legal rights and duties for individuals under EU law, the Court is seen to have 'constitutionalized' the conception of citizenship within the EU legal order.[94] The terminology of constitutionalization has been used consistently in EU academic literature discussing free movement rights and Union citizenship.[95] It has been argued that the right of free movement of persons has been altered

[91] Opinion of AG Bot in Case C-571/10 *Kamberaj* [2012] nyr, para 75, referring to K Hailbronner, *EU Immigration and Asylum Law – Commentary* 646.

[92] Opinion of AG Trstenjak in Case C-40/11 *Iida* [2012] nyr, para 74.

[93] D Kostakopoulou, 'European Union Citizenship: Enduring Patterns and Evolving Norms' (2011) EUSA, Boston, 3–5 March 2011.

[94] J Shaw, 'Citizenship of the Union: Towards Post-National Membership?' (1997) NYU *Jean Monnet Papers*, available at <http://centers.law.nyu.edu/jeanmonnet/archive/papers/97/97-06-.html>.

[95] See M Dougan, 'The constitutional dimension to the case law on Union Citizenship' (2006) 31 *European Law Review* 613; E Spaventa (n 71) 13; A Evans, 'Union Citizenship and the Constitutionalization of Equality in EU Law' in M La Torre (ed) *European Citizenship. An Institutional Challenge* (Kluwer Law International, The Hague, 1998) 267–91; E Spaventa (n 77) 743; N Reich, 'The Constitutional Relevance of Citizenship and Free Movement in an Enlarged Union' (2005) 11 *European Law Journal* 675–98.

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fundamentally as a result of legislative and judicial developments. The character of free movement rights has been centred upon the citizen, followed by the constitutionalization of a general right of free movement.[96] By using the concept of constitutionalism when referring to EU free movement rights, scholars have not only made the implicit claim that the extensive material scope of rights emerging from the Court's case law is an inherent feature of the EU legal system. They have also emphasized the perception of EU citizenship as an independent legal status with an ever-widening scope of rights. The presentation of the Court's case law as inevitable and the proclamation of Union citizenship as a status of constitutional significance have beyond doubt had an influence on the reasoning of the AGs and the judgments of the Court. EU legal scholars have thus not only served as an inspiration for the AG opinions and indirectly for the judgments of the Court, they have also increased their significance by emphasizing the 'constitutionalization' of free movement rights in the EU.

European Union citizenship and member state nationality

Another area related to the free movement of persons where scholars have played a dual role of legitimizing and inspiring the case law of the Court is the relationship between Union citizenship and member state nationality. The determination of national citizenship is still left up to the member states, which differ considerably in their approaches towards the acquisition of member state nationality and consequently access to the rights granted by Union citizenship. Nevertheless, the Court in its case law has imposed notable limitations on national autonomy in matters of nationality law. It is established case law that member states' competences in the area of nationality law must be exercised with due regard to Union law.[97] In *Rottmann*[98] the Court made a number of additional statements regarding the impact of EU law on member states' competence to regulate rules on the acquisition and loss of nationality. The case concerned a former Austrian national, who had lost Austrian nationality at the moment of acquiring German citizenship by naturalization. In his application for German nationality, Mr Rottmann failed to mention that he was subject to criminal proceedings in Austria. After having discovered this fact, the German authorities decided to revoke his German nationality on grounds

[96] M Condinanzi, A Lang and B Nascimbene, *Citizenship of the Union and Free Movement of Persons* (Martinus Nijhoff Publishers, The Hague, 2008) 67.

[97] Case C-369/90 *Micheletti* [1992] ECR I-4239, para 10.

[98] Case C-135/08 *Rottmann* [2010] ECR I-1449.

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of fraud. The question arose whether the withdrawal of German nationality was contrary to Article 20 TFEU, since the consequent statelessness also entailed the loss of Union citizenship and the rights attached thereto.

Advocate General Maduro in his opinion relied extensively on the writings of EU legal scholars. He emphasized the autonomous nature of the concept of Union citizenship by stressing that it is 'a legal and political concept independent of that of nationality … based on the mutual commitment [of the member states] to open their respective bodies politic to other European citizens and to construct a new form of civic and political allegiance on a European scale'.[99] Thus, for example, a national provision providing for the loss of nationality in the event of a transfer of residence to another member state would 'undoubtedly' constitute an infringement of the right of movement and residence conferred on citizens of the Union by virtue of Article 21 TFEU.[100] When making this argument, Maduro relied on the academic literature, in particular on the writings of G-R De Groot[101] and A Zimmermann.[102] He also referred to scholarly writing to emphasize that the provisions of primary EU law, as well as general principles of EU law, are capable of restricting the legislative power of the member states in the sphere of nationality law. If member states were to carry out, without consulting the Commission or its partners, actions of direct relevance to the other member states, such as an unjustified naturalization of third-country nationals, the principle of sincere co-operation (Article 4 TEU) could be affected.[103] Maduro cites Weiler[104] when emphasizing the 'radically innovative character' of the concept of Union citizenship, as a Union being composed of citizens holding different nationalities and relies on the academic literature when making his final argument that the obligation to have due regard to EU law in the exercise of the member states' competence in the sphere of nationality is bound to place some restriction on the state act of depriving a person of nationality when such an act entails the loss of Union citizenship, otherwise the competence of the Union to determine the rights and duties of its citizens would be affected. In the instant case, however, the Advocate General came to the

[99] Para 23 of the AG opinion.

[100] Para 32 of the AG opinion.

[101] GR De Groot, 'The relationship between nationality legislation of the Member States of the European Union and European citizenship' in M La Torre (ed), *European Citizenship: An Institutional Challenge* (Kluwer Law International, The Hague, 1998) 115.

[102] A Zimmermann, 'Europäisches Gemeinschaftsrecht und Staatsangehörigkeitsrecht der Mitgliedstaaten unter besonderer Berücksichtigung der Probleme mehrfacher Staatsangehörigkeit' (1995) *Europarecht* 62–3.

[103] Para 30 of the AG opinion.

[104] J Weiler (n 1) 344.

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conclusion that the loss of nationality on grounds of fraud was not sufficiently related to the exercise of free movement rights for it to fall within the scope of EU law.

Rottmann is one of a few cases where the Court not only takes inspiration from the AG opinion, but interprets the free movement provisions even more expansively. Even though the Court did not depart from the starting point that the competence to determine the conditions for the acquisition and loss of nationality rests with the member states,[105] it underlined the obligation to exercise this competence by having due regard to EU law in situations that fall under the ambit of the latter.[106] Member states are thus not freed from their obligation to comply with EU law in areas where there is no Union competence to legislate. As long as a link to Union law can be established, the fundamental principles of the EU legal order have to be complied with. In the case at hand, the Court considered it to be 'clear' that the situation of a Union citizen who is faced with a decision withdrawing naturalization resulting in a loss of Union citizenship fell 'by reason of its nature and its consequences' within the ambit of EU law.[107] It follows from the Court's reasoning that the requirement to observe EU principles of law does not only apply to decisions regarding the loss but also the acquisition of citizenship.[108] Hence, when exercising their competences in the sphere of nationality law, which is intrinsically linked to the acquisition and loss of the fundamental status of Union citizen, member states are obliged to have due regard to EU principles of law. By stating that rules governing the loss (and acquisition) of nationality fall *by reason of their nature and consequences* within the scope of EU law, the Court essentially did away with the requirement of a cross-border element in order for national rules regarding the acquisition and loss of

[105] Para 39 of the judgment, see also Case C-369/90 *Micheletti and Others* [1992] ECR I-4239, para 10; Case C-179/98 *Mesbah* [1999] ECR I-7955, para 29; and Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, para 37.

[106] In this context the Court referred to a number of cases covering different areas of law, such as national rules governing a person's name or direct taxation, where in situations covered by Union law the competences of the member states must be exercised with due regard to EU law. See Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, para 17; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, para 25; Case C-403/03 *Schempp* [2005] ECR I-6421, para 19; Case C-145/04 *Spain* v *United Kingdom* [2006] ECR I-7917.

[107] Para 42 of the judgment.

[108] According to the Court, 'the principles stemming from this judgment with regard to the powers of the Member States in the sphere of nationality, and also their duty to exercise those powers having due regard to European Union law, apply both to the Member State of naturalization and to the Member State of the original nationality', para 62 of the judgment.

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nationality to fall within the scope of Union law.[109] The mere fact that such rules are directly connected to the acquisition or loss of Union citizenship suffices for the Court to subject states to the duty of compliance with principles of EU law. This conclusion does not deprive member states of their power to lay down the conditions for the acquisition and loss of nationality, but it subjects their decisions in the area of nationality law that affect the rights of Union citizens to judicial review by the CJEU.[110]

Thus, the Court in its judgments goes even further in the interpretation of free movement rights than the Advocate General and it essentially employs the reasoning put forward in the academic literature. Even though the influence of the literature on the judgment cannot be traced directly, it appears that the scholarly writing cited by the AG, arguing for considerable limitations to national autonomy in nationality matters, paved the way for the Court's reasoning in *Rottmann*. The academic literature has embraced the potential of EU citizenship as a form of post-national citizenship decoupled from member state nationality for many years. The potential of EU citizenship as a 'unique historical moment' and its role as a status of citizenship beyond the nation state, undermining the exclusivity of national citizenship has consistently been stressed.[111] It has been argued that through the conferral of rights which are enforceable before national courts, the boundaries of national citizenship have been 'ruptured from the outside' and that domicile constitutes a more suitable criterion for membership in the 'European demos' than the possession or acquisition of member state nationality.[112] There have also been countering perspectives, emphasizing the fact that EU citizenship should not be confused with a state-like pan-European form of citizenship nor be understood as giving rise to a European nationality.[113] Nevertheless, the predominant threat in the academic literature cited by the AG and followed by the Court has been that European citizenship poses strict limits upon the member states in determining rules for the acquisition and loss of nationality.

[109] D Kochenov, 'Case C-135/08, Janko Rottmann v. Freistaat Bayern, Judgment of the Court (Grand Chamber) of 2 March 2010' (2010) 47 *Common Market Law Review* 1831–46; H Van Eijken, 'European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals' (2010) 27 *Merkourious* 65–9.

[110] Para 48 of the judgment.

[111] I Alexoviocová, 'The Rights of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States' in H Schneider (ed), *Migration, Integration and Citizenship. A Challenge for Europe's Future*, vol. I (Forum Maastricht, 2005) 73.

[112] D Kostakopoulou, 'European Union Citizenship: Writing the Future?' (2007) 13 *European Law Journal* 5, 643.

[113] S Besson and A Utzinger (n 86).

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In the aftermath of the judgment, EU legal and political scholarship has for the most part thought to justify the Court's encroachment upon national discretion in nationality matters as a necessary implication of the concept of Union citizenship. The *Rottmann* judgment imposes constraints upon member state autonomy in the area of nationality law, extending the scope of EU law to an area that lies at the heart of national sovereignty. Considering the ever-expanding scope of rights that Union citizenship entails, the member states have generally robustly defended their right to determine how member state nationality, and simultaneously access to Union citizenship rights, can be acquired and lost. It is therefore surprising that the *Rottmann* judgment has elicited little reaction from the member states. The academic literature has largely praised the judgment and emphasized how limitations to national sovereignty in the area of nationality law inevitably emerge from the very nature of Union citizenship rights. It has been suggested that the case 'marks a turning point in the evolution of European citizenship'[114] and that it implies a 'new way of thinking about the reach and effects of Union citizenship vis-à-vis national law, especially national rules on the acquisition and loss of citizenship'.[115] *Rottmann* is considered to have reinforced the autonomous nature of the status of Union citizenship, 'potentially liberating its essence from the vestiges of derivative thinking, … inviting ideas on the full decoupling of the two statuses in the future'.[116] Even though stopping short of identifying European citizenship as a post-national status, independent of member states' nationality, it has been called a 'post-nationalist' concept, which subjects administrative decisions on nationality to a strict proportionality test.[117] If anything, the judgment has been criticized for not going far enough in the interpretation of free movement rights. It has been argued that the Court did not pay tribute to the autonomous nature of European citizenship, which confers specific additional rights and constitutes a distinct dimension of citizenship.[118] Moreover, there has been criticism

[114] M Savino, 'EU Citizenship: Post-national or post-nationalist? Revisiting the Rottmann case through administrative lenses' (2011) 23 *European Review of Public Law /Revue Européenne de Droit Public* 1.

[115] J Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' in P Craig and G de Búrca, *The Evolution of EU Law* (Oxford University Press, Oxford, 2011) 594.

[116] D Kocheno, 'Case C-135/08, Janko Rottmann v. Freistaat Bayern, Judgment of the Court (Grand Chamber) of 2 March 2010' (2010) 47 *Common Market Law Review* 1837.

[117] See (n 114).

[118] D Kostakopoulou, 'European Union citizenship and Member State nationality: updating or upgrading the link?' (2011) available at <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=5>.

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that the Court did not follow a rights-based approach and upheld national sovereignty, failing to take account of the perspective of the individual 'caught between two omnipotent sovereign states'.[119] Overall, EU scholars have thus not only embraced the Court's approach of limiting national sovereignty in nationality matters on account of the Treaties' free movement provisions, they have also presented this development as only the first step in the 'constitutionalization' of EU citizenship as an autonomous legal status.

Conclusion

There are few areas where the impact of the Court's case law on individual rights and the celebration of this development by legal scholars are as pronounced as in the area of free movement of persons. On account of the case law of the Court and the legitimation lent to it by EU legal scholarship, the status of the individual under EU law has been transformed from that of an economic citizen or market citizen to a holder of EU fundamental rights. A 'constitutionalized' conception of citizenship within the EU legal order has thus emerged and has fundamentally altered the relationship between EU citizenship and the nationality of the member states. As we have seen legal scholars have played a twofold role in this development.

First, by presenting the expansion of free movement rights as an inevitable outcome of the EU constitutional order based on directly enforceable individual rights, scholars have played a significant role in legitimizing the jurisprudence of the Court in the face of initial resistance from the member states. The interpretation and analysis of the Court's judgments by legal scholars has to a large extent served to justify the expansive case law of the Court. EU legal scholars have generally defended the 'quasi-legislative' role of the Court. Kostakopoulou has argued that the Court's legislative role is problematic only if the meaning of democracy is confined to majoritarian processes, but not if the conception of democracy also encompasses reflective values and rights, which place constraints on governments' powers. In the latter case the judicial protection and advancement of these values and rights are normatively and empirically justified.[120] In advancing the 'constitutionalization of Union citizenship',

[119] D Kochenov, 'Two Sovereign States vs. a Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters' (2010) available at <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=2>.

[120] See (n 93).

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the judges of the Court are seen to have responded to citizens' needs.[121] The legal and constitutional implications of the Court's judgments have thus been highlighted, if not exaggerated. EU legal scholars, who have an active interest in the extension and increasing importance of EU law, have thought to present the progression towards more extensive free movement rights as an inevitable step towards further integration. By emphasizing the 'constitutional' nature of Union citizenship, identifying it as a new legal status conferring substantial and directly effective rights upon the European demos, rather than being of a mere symbolic or confirmative nature, EU scholars have paved the way for an expanding scope of individual movement rights. The perception of free movement as a fundamental constitutional right of every Union citizen, rather than a by-product of market integration, has been a major trigger for the Court to widen the scope of citizenship-related rights and to interpret potential restrictions emerging from national law restrictively. In the opinion of most legal scholars such an approach follows inevitably from the constitutional nature of free movement rights.

Legal scholars have also been an important source for the Court of Justice in developing its case law in this area. Since little is known about the internal mechanisms of the Court (the votes are not published and the Court does not have a system of dissenting opinions), it is impossible to analyse the opinion of individual judges, let alone the extent to which they have been influenced by arguments made in the academic literature. What can be assessed, however, is the extent to which the Court follows the opinion of the Advocate General. Moreover, we can analyse to what extent individual Advocates General have been inspired by academic scholarship, since some Advocates General, as opposed to the Court, refer to legal scholarship in their opinions. Moreover, it is interesting to note that many AGs have before, after and also during their role as Advocates Generals been active members of the academic community. Maduro, Sharpston and Kokott have all contributed to the very body of legal scholarship that they are relying upon in their opinions. It has been shown that the Advocates General have drawn on scholarly writings in emphasizing the importance of the concept of Union citizenship, in presenting the expansion of free movement rights as an inherent feature of the EU constitutional legal order and in entering upon more delicate territory, such as the reversal or redefinition of the internal situation rule. Spurred by the objective of turning the EU into more than an internal market, the opinions of the Advocates General have mostly been followed

[121] Ibid.

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by the Court. The way in which the Advocates General make use of academic scholarship indicates the indirect influence of academics on the case law of the Court. Legal scholars have thus served as a source of inspiration for the perceived constitutionalization of free movement rights in the EU.

The extent to which the Advocates General rely on scholarly writing inevitably varies from case to case and from Advocate General to Advocate General. Some AGs are more inclined than others to refer to academic literature due to their own jurisdictional background (as in the case of Kokott) or personal style (as in the case of Sharpston). Overall, reliance on academic writing to develop legal arguments is much less pronounced in the CJEU than in many continental European jurisdictions. The Court in its judgments refers exclusively to precedence and the Advocates General use academic literature only sporadically to develop their arguments. This makes it all the more noticeable that scholarly writing has been used as a source of inspiration in several important cases in the area of free movement of persons. Even though references to academic debates and articles can be found only in selected cases, it is crucial to note that many of those cases have been landmark decisions. Most cases discussed in this article have been crucial in that, by dealing with particularly sensitive questions, they have instigated an important shift or a new 'stage' in the development of the citizenship case law. As we have seen, in some cases it was in fact an AG opinion which first inspired the scholars. The subsequent reference by the AGs to scholars' writings could be seen as a form of indirect self-reference, with the difference of being able to support a particular idea with a vast body of literature. The idea or suggestion of an AG has thus turned into an accepted truth that is bound to influence the direction of the Court's case law.

The impact of academics can certainly not be seen in isolation. There is no doubt that other factors, such as the submissions of the most powerful member states as well as the preferences of the judges play a crucial role in the development of the case law. However, the role of academics and the way in which they have sought to defend and consolidate the case law of the Court is not to be underestimated. EU legal scholars have been a major force in legitimizing and justifying the Court's expansive approach and the ensuing limits to national sovereignty. The development of the status of the individual under EU law is presented as an ongoing process in the constitutionalization of free movement rights and the right to non-discrimination on the grounds of nationality.[122] EU legal scholars have presented as inevitable the development of the Court's case law under

[122] J Shaw, 'The Many Pasts and Futures of Citizenship in the European Union' (1997) 22 *European Law Review* 554–56.

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Article 21, the advance of Union citizenship status and the concept of free movement independent of economic activity as a directly enforceable right. The extension of free movement rights is seen as an inherent feature of the constitutional status of Union citizenship. Moreover, the underlying assumption of the progressive constitutionalization of free movement rights is that we have only seen the tip of the iceberg. Most of the academic legal scholarship cited by Advocates General focuses on the 'dynamic' nature of citizenship, suggesting an even more expansive interpretation of rights in the future.[123]

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[123] An area where developments can be expected in the future are the rights of third-country nationals. In fact, the codification of individual rights relating to third-country nationals has already been phrased in terms of a 'constitutionalization of rights'. See S Lavenex, 'Towards the constitutionalization of aliens' rights in the European Union' (2006) 13 *Journal of European Public Policy* 8, 1284–1301.

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