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## Family life as a civil right for some EU citizens, but not all

by Jeremy B. Bierbach\*

### Introduction

One of the best-known paradoxes of EU citizenship is that of so-called “reverse discrimination”, in particular in the area of EU citizens’ rights to family reunification with so-called third-country nationals, i.e. non-EU citizens.<sup>1</sup> The immediate family members<sup>2</sup> of a so-called “mobile” EU citizen, i.e. one who is making full use of her rights of freedom of movement and residence<sup>3</sup> in a member state of which she is not a national, derive an almost automatic right of residence in that member state from EU legislation,<sup>4</sup> regardless of their nationality. These family members, just like the EU citizens they are related to, are thereby

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\* PhD in European constitutional law, University of Amsterdam. Immigration attorney at Franssen Advocaten, Amsterdam and associate fellow of the Amsterdam Center for European Law and Governance (University of Amsterdam).

<sup>1</sup> The term “third-country national” has existed since the early days of the European Economic Community as a contrast to the term “member state national”, the term used prior to the attribution by the Treaty of Maastricht (1993) of the status of “EU citizen” to the nationals of all the member states of the European Union. *See*, for an attempt at developing a coherent concept of the “EU foreigner” by contrast to the EU citizen, Iglesias Sánchez, S., ‘The Constitutional Status of Foreigners and EU Citizens: Loopholes and Interactions in the Scope of Application of Fundamental Rights’ in D. Thym, ed., *Questioning EU Citizenship. Judges and the Limits of Free Movement and Solidarity in the EU* (Hart, 2017 (forthcoming)),

<sup>2</sup> In any case: the opposite-sex spouse, descendants under 21 and other dependent descendants, and dependent ancestors. And depending on the degree of legal recognition of the following legal family relationships in a given member state: the same-sex spouse, the opposite-sex or same-sex partner in a civil union, and the *de facto* partner.

<sup>3</sup> Article 21(1), Treaty on the Functioning of the European Union

<sup>4</sup> The currently applicable legislation is Directive 2004/38. This legislation also applies to nationals of and in the territories of the states of the European Economic Area that are not member states of the EU: Norway, Liechtenstein, and Iceland (*see* Bierbach, J.B., ‘The reality test of residence goes through the looking glass. Case note on EFTA Court decision in Case E-28/15: *Jabbi*’, *EuConst*, (2017)2, forthcoming), and there are also agreements between the EEA and Switzerland largely echoing the substance of this legislation. However, I will focus on EU citizens and the EU in this paper.

not subject to the immigration law of the host member state, i.e. the laws restricting and regulating the entry and residence of aliens. They can, however, approach the immigration authorities of the host member state to apply for a so-called “residence card” as the family member of an EU citizen for documentary evidence of their rights, a document which is considered to be purely declaratory of those pre-existing rights, not constitutive of them.<sup>5</sup>

For so-called “static” or “sedentary” EU citizens, on the other hand, i.e. those who have remained resident in their home member states, the right of their third-country national family members to join them is anything but pre-existing and self-executing. These family members are subject to the requirement of applying to the immigration authorities of that member state for permission for family reunification, which if granted will result in the issuance of a residence permit, a legal document that is in fact constitutive of their right to reside and possibly to work in the member state. The sovereign power of a member state to deny family reunification is not entirely unlimited, however: in all of the member states of the EU, which also happen to be signatories to the European Convention on Human Rights (ECHR), the “right to family life” as guaranteed by art. 8 of the Convention does entail something of a “positive obligation”<sup>6</sup> for the state to make family reunification possible.<sup>7</sup> However, this positive obligation of the ECHR is fairly weak when it comes to third-country national family members who have not already been enjoying family life in the host state as fully admitted aliens (to whom the stronger “negative obligation” of non-interference with family life applies);<sup>8</sup> the second paragraph of art. 8 ECHR allows derogations from the right to family life

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<sup>5</sup> See article 25(1), Directive 2004/38.

<sup>6</sup> As first confirmed by the European Court of Human Rights in 'ECHR *Abdulaziz et al. v. United Kingdom* ', *Application Nos. 9214/80, 9473/81 & 9474/81*, (28 May 1985)

<sup>7</sup> In all of the member states of the EU except for those with an opt-out (the UK, Ireland and Denmark) there is also an additional, intermediate layer of legal norms applying directly to immigration rights of third-country nationals, such as the Family Reunification Directive (2003/86), which can sometimes indirectly influence national laws governing family reunification of third-country nationals with sedentary EU citizens. I will not address that area of EU law in this paper, however. See Groenendijk, C.A., 'Reverse discrimination, family reunification and Union citizens of immigrant origin' in E. Guild, C. Cortázar Rotaecche and T. Kostakopoulou, eds., *The reconceptualization of European Union citizenship* (Leiden, The Netherlands : Brill Nijhoff, 2014), p. 169, p. 177-178; and Bierbach, J.B., *Frontiers of Equality in the Development of EU and US citizenship*, (T M C Asser Press, 2017), p. 451-453.

<sup>8</sup> See *ibid.*, p. 336 and 365.

as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The restrictive requirements for family reunification in member state law (aside from those aimed at excluding family members with criminal records) typically entail a stable income requirement for the sponsoring sedentary EU citizen, and possibly a test of knowledge of language and culture that has to be passed by the third-country national family member, among other things.<sup>9</sup>

It is among the EU member states of Northwest Europe (and the EEA state Norway) that we find the states where the conditions for family reunification are the strictest;<sup>10</sup> many Southern and Eastern European member states, on the other hand, strive for (near) convergence with the rules that apply to mobile EU citizens, meaning reverse discrimination against sedentary EU citizens is less exposed as a problem there. As a telling example of a member state with strict conditions for family reunification, I will use the Netherlands, the member state in which I also practice as an immigration lawyer.

Now that I have introduced the legal problem, I will indicate the approach that I will use to discuss it comparatively. The work I have already cited by Anne Staver provides an excellent analysis of the problem from the point of view of descriptive political science. And the legal scholar Stephen Legomsky has touched on the problem in his comparative study of family reunification as a point of contention between states and their respective supra-national associations, comparing the EU and its member states, on the one hand, to the United States, a state whose sovereignty to regulate the immigration of aliens is practically unrestricted.<sup>11</sup>

I am taking a slightly different approach to both of these authors: as a scholar of constitutional law, informed by certain political ideas on citizenship and immigration, I will compare the EU to the US. But unlike Legomsky, I am not comparing the member states of the EU, as sovereign states, to the US as a sovereign state. Rather, I am comparing the EU, as

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<sup>9</sup> Staver, A., 'Reverse Discrimination in European Family Reunification Policies' in W. Maas, ed., *Democratic citizenship and the free movement of people* (2013), p. Ch. 3, p. 59-61.

<sup>10</sup> *ibid.*, p. 76-78.

<sup>11</sup> Legomsky, S.H., 'Rationing Family Values in Europe and America: An Immigration Tug of War Between States and Their Supra-National Associations', *Geo. Immigr. L.J.*, 25 (2011)807

a federal legal order, to the US as a federal legal order. The fact that the component states of the EU happen to be sovereign states on the international scene while the component states of the US are not does not inhibit my comparison. Both EU citizenship and US citizenship exist as what I call “duplex” federal citizenships, characterized by an interdependent layering of two legal statuses: citizenship of the federal order and citizenship of one of the component states.<sup>12</sup> US citizenship does also happen to be the nationality of a sovereign state, while EU citizenship is not a nationality in the sense of international law: an EU citizen’s nationality is still at the level of the member state. But in my research, I identify an entitlement to equality, not allegiance to a sovereign state, as the core normative aspect of citizenship, in order to be able to compare EU citizenship as a legal norm to US citizenship as a legal norm.

I should additionally clarify that scholars in my field consciously analyze the EU as a *constitutional* order, not as merely an order of international law. This is notwithstanding the fact that there is no single legal document that can be called the “Constitution” of the EU, certainly not since the rejection by referendum by the voters of the Netherlands and France of the Constitutional Treaty that would have created such a document. Nevertheless, the legal order of the European Union, and the European Economic Community that preceded it, can already be described as “constitutional” at least since 1963, when the European Court of Justice issued a decision, *Van Gend en Loos*,<sup>13</sup> in which it proclaimed that the Community “constitutes a new order of international law” that is not solely under the control of and does not solely serve the interests of the states signing the Treaty that founded it, and in which the citizens of member states can also make legal claims before the Court of Justice.<sup>14</sup> The introduction of EU citizenship in 1993, in my view, consolidated and labeled what had already existed for decades as an “incipient form of citizenship”,<sup>15</sup> in particular for nationals of

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<sup>12</sup> Bierbach, p. 4-6. The basis of this layering in the EU is article 9 of the Treaty on European Union: “Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.” In the US, it is the Citizenship Clause of Section 1 of the Fourteenth Amendment to the Constitution: “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.”

<sup>13</sup> 'ECJ *Van Gend en Loos v. Nederlandse Administratie der Belastingen*', Case 26/62 (5 February 1963)

<sup>14</sup> See, for a good retelling of this historical moment, Van Middelaar, L., *The passage to Europe : how a continent became a union*, (New Haven : Yale University Press, 2013), p. 48-50.

<sup>15</sup> See Plender, R., 'An Incipient Form of European Citizenship' in F.G. Jacobs, ed., *European Law and the Individual* (North-Holland Publishing Co, 1976), p. 39, and in general Bierbach, Ch. 7.

member states who were making use of the freedom of movement of workers, the first individual freedom of movement in the Community that—arguably since 1964—exempted mobile member state nationals from subjection to the immigration law of host member states.<sup>16</sup>

If EU citizenship is therefore a legal citizenship status defined by an entitlement to equal treatment before the law for a defined set of citizens, then whenever EU law entitles EU citizens to be accompanied by their immediate family members as an almost self-executing right, I would describe that right as a civil right. This, then, gives me the basis for comparison to the US and its states that I am choosing. I am using US citizenship, likewise, as a source of civil rights, specifically that can be exercised by a US citizen against a US state.

The right to movement between states in the US, and the concomitant entitlements to equality for migrating citizens, are no longer typically thought of as civil rights. Yet until 1941, when the Supreme Court confirmed<sup>17</sup> a right of travel at least indirectly attaching to US citizenship, it was still considered to be within the residual sovereign power of a US state<sup>18</sup> to restrict the settlement of or even deport citizens of other US states. Nowadays, however, the civil rights attaching to US citizenship that most people think of relate to the struggle for civil rights fought by African Americans in the 20<sup>th</sup> century, and indeed to this day. It is my aim to compare these some of these civil rights attaching to US citizenship, which African Americans invoked against discriminatory treatment by US states, to family reunification as a civil right that sedentary EU citizens try to invoke against their own member states. In both cases, I see federal civil rights making a transition from being enjoyed only by mobile federal citizens, i.e. those who cross interstate boundaries, to being enjoyed by sedentary federal citizens as well. I also identify, in the legislative roots of restrictions on family reunification in the Netherlands, motives of racial bias similar to those underpinning the statutory restrictions imposed on African Americans by US states.

### Why reverse “discrimination”?

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<sup>16</sup> *ibid.*p. 226.

<sup>17</sup> '*Edwards v. California*', 314 U.S. 160, (1941). See Bierbach, p. 177-180.

<sup>18</sup> See, for instance, '*Mayor of New York v. Miln*', 36 U.S. 102, (1837)

That the more favorable treatment received by mobile EU citizens relative to sedentary EU citizens is called “discrimination” implicitly reveals an underlying notion that all EU citizens ought to be treated equally. This notion long preceded the introduction of EU citizenship; indeed, article 7 of the original EEC Treaty (1957) already provided:

Within the field of application of this Treaty and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality shall hereby be prohibited , a provision that survives unchanged to this day as art. 18 of the Treaty on the Functioning of the European Union (TFEU; from now on I will only cite TFEU article numbers for unchanged provisions). And the establishment of the freedom of movement of workers, it was provided (art. 45(2) TFEU),

shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

The right of a member state national going to another member state to work to bring his immediate family members with him, regardless of their nationality, was considered to be a necessary accessory to the freedom of movement of workers, and was already provided for in the first EEC legislation implementing the freedom of movement of workers, Regulation 16/61/EEC. Arguably, this served the goal of abolishing discrimination based on nationality against workers from other member states, but not in a purely formal sense (the type of equal applicability of a given state’s laws that most properly can be called “non-discrimination”<sup>19</sup>). In other words, it was not necessarily the case that the member state’s own laws with regard to family reunification would equally be applied to mobile workers (although the Regulation did provide, in article 45(b), that it did not *restrict* workers from other member states and their family members from obtaining potentially more favorable treatment from the laws of the host member state). Rather, the provisions of the Regulation were themselves the legal norm providing for a right of residence for the family members. This norm aimed to create a *substantive*, not merely formal equality with nationals of the host member state: since for nationals of the host member state, at least if their family members were likewise nationals of the same member state, it was as a matter of course that their family members had the right to be with them as they participated in the labor market.

It does seem to have been the case in the 1960s, as well, that if a sedentary nationals of a member state did happen to have family members (in particular a spouse and children) who

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<sup>19</sup> Bierbach, p. 13.

were aliens, it was not terribly difficult for those family members to obtain a right of legal residence. (In the Netherlands, the applicable laws in the 1960s were, however, strongly gender-biased: Bonjour notes that if a Dutch man married an alien woman, she either automatically obtained the nationality of the Netherlands or was able to opt for the nationality of the Netherlands, thereby obviating the need for an immigration procedure, or otherwise was able to obtain a “blue card” confirming her right of residence. The children born of that marriage automatically had Dutch nationality. For Dutch women with foreign husbands, on the other hand, it was somewhat more difficult: since women were considered to be at risk of being lured into an ill-considered marriage by a foreign man, a foreign husband was not entitled to accelerated acquisition of Dutch nationality nor an immigration status; however, most foreign husbands were fairly easily able to acquire an immigration status for work-related purposes.<sup>20</sup>)

By 1982, however, a gap in level of protection had apparently opened between Community law and the family reunification laws of the Netherlands, because the Surinamese parents of two Dutch nationals made a claim to the Supreme Court of the Netherlands that they should get a right to stay based on Community law as the dependent ancestors of working member state nationals. (This meant, obviously, that they had been, or would have been unsuccessful in filing an application based on Netherlands law.) They supported their claim with a 1979 academic article problematizing the issue of “reverse discrimination”, by reference to the prohibition of discrimination based on nationality (article 18 TFEU): the author considered it to be a “growth disorder” of Community law, and ultimately untenable for Community law or member states to allow it to continue in the area of rights of residence for family members.<sup>21</sup>

When the Supreme Court of the Netherlands referred preliminary questions on the matter to the European Court of Justice, however, the latter Court dashed any such hopes with the consideration that “the Treaty provisions on freedom of movement for workers and the rules adopted to implement them cannot be applied to cases which have no factor linking

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<sup>20</sup> Bonjour, S.A., *Grens en gezin: Beleidsvorming inzake gezinsmigratie in Nederland, 1955-2005*, (Aksant ; Amsterdam, 2009), p. 46-47.

<sup>21</sup> Mortelmans, K.M., 'Omgekeerde Discriminatie in het Gemeenschapsrecht [*Reverse Discrimination in Community Law*]', *Sociaal-economische wetgeving: tijdschrift voor Europees en economisch recht*, (1979)10/11, 654, p. 662.

them with any of the situations governed by Community law.”<sup>22</sup> Since the adult children of Morson and Jhanjan were not making use of the freedom of movement of workers in a member state other than the one of which they had the nationality, the Court reasoned, they were in a situation “purely internal” to the Netherlands where the provisions of Community law, including the prohibition of discrimination based on nationality, did not apply.

The question arises: what had happened in the laws of the Netherlands in the course of the 1970s that led Morson and Jhanjan to make their ultimately unsuccessful appeal to Community law? In the specific case of Morson and Jhanjan, until 1975 it would certainly not have been necessary for them to make use of any laws concerning family reunification. The South American country of Suriname was, until its independence in 1975, a constituent country of the Kingdom of the Netherlands. Since 1951, in a spirit of decolonization after the Netherlands finally recognized the independence of the former Dutch East Indies as the Republic of Indonesia, the Surinamese had also been granted full Dutch nationality entailing freedom of movement to the European Netherlands.<sup>23</sup>

Dutch nationals from Suriname did not start moving to the European Netherlands in any perceivable numbers, however, until the late 1960s. The “perceptibility” of Surinamese movement, of course, is the elephant in the room: the overwhelming majority of Surinamese are persons of color, descended from peoples indigenous to South America, Africans enslaved to work on Dutch colonial plantations, and 19<sup>th</sup> century immigrants from India and Java. Starting in 1970, the record shows members of government of the European Netherlands trying to find ways to limit the movement of Surinamese to Europe, without success: it would have been practically impossible to do so within the bounds of the Charter of the Kingdom of the Netherlands. This led the government of the European Netherlands to increasingly support independence for Suriname, which would enable it to apply the normal rules of immigration law to Surinamese.

The ultimate arrangement arrived at was that Dutch nationals who stayed in Suriname at the time of its independence would become Surinamese nationals and lose their Dutch nationality, and Dutch nationals of Surinamese origin living in the European Netherlands

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<sup>22</sup> 'ECJ *Morson and Jhanjan v. The State of the Netherlands*', C-35+36/82 (27 October 1982), par. 16. See also Bierbach, p. 290-292.

<sup>23</sup> *ibid.*, p. 234 at n. 109.

would remain Dutch nationals.<sup>24</sup> When this became clear in the years leading up to independence, it led to a massive shift of population from Suriname to the European Netherlands, accompanied by the first recorded stirrings of anti-immigrant sentiment among white Dutch voters influencing the debate on immigration in Parliament. Discriminatory housing policies were introduced to keep Surinamese out of white neighborhoods.<sup>25</sup> At least one—admittedly marginal—party was founded on a platform to “Keep the Netherlands White”.<sup>26</sup>

For five years following independence, the European Netherlands maintained a relatively lax family reunification policy for Surinamese nationals, allowing them to come as extended family members. But by November 1980 this door was decisively shut and Surinamese nationals were henceforth treated the same as all other aliens, with the application of equally restrictive rules of family reunification.<sup>27</sup>

“All other aliens” except, of course, nationals of member states of the European Economic Community and their family members. Thus in the case of Morson and Jhanjan, the phenomenon of reverse discrimination was one that might have appeared to have a distinctly racial component, and not just coincidentally. While it was at least “facially neutral”, to borrow a term from American constitutional law, to equally apply the strict rules of Dutch family reunification law by using third-country nationality as a criterion, the dividing line between Dutch nationals and third-country nationals was one that now bisected the families of many Dutch nationals of color.<sup>28</sup> Not only Dutch nationals with roots in former Dutch colonies were affected, but naturalized Dutch nationals who had originally come as “guest workers” from Morocco and Turkey and their descendants were affected by this bisection as well. The government of the Netherlands increasingly mobilized a restrictive family reunification policy as a means to encourage settled third-country national immigrants and Dutch nationals of color to “return” to the respective countries of their roots to be with their

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<sup>24</sup> Bonjour, p. 129.

<sup>25</sup> Overleggroep Pensions Amsterdam, *Apartheid: zwartboek "gesloten wijken"*, (Amsterdam, 1978)

<sup>26</sup> Bonjour, , p. 112

<sup>27</sup> *ibid.*, p. 133.

<sup>28</sup> Cf. Hondius, D., *Blackness in Western Europe: racial patterns of paternalism and exclusion*, (New Brunswick, New Jersey : Transaction Publishers, 2014), p. 280.

family members.<sup>29</sup> It must be noted, as well, that certain criteria for family reunification, such as a requirement of having a stable income from employment, that are facially neutral disproportionately affect Dutch citizens of color who are already dealing with discrimination on the employment market.<sup>30</sup> I can therefore identify strict member state rules for family reunification, at least in the legislative history of the Netherlands,<sup>31</sup> as a form of racial discrimination against sedentary citizens of color.

## Crossing borders to escape reverse discrimination

### EU

Freedom of movement of workers in the Community, by contrast to family reunification with third-country nationals, may well have been perceived as an overwhelmingly “white” form of migration in Europe. In fact, it had even been more or less expressly conceived as such: one provision of the 1964 Regulation on freedom of movement of workers, Article 53(3), aimed specifically to exclude from entitlement to the freedom of movement of workers nationals of member states hailing from non-European territories, e.g. Suriname, the Dutch Antilles, and French Algeria. The provision proved to be completely unenforceable using any facially neutral criteria (if all nationals of a member state had identical passports) and became a dead letter (albeit one that survives to this day in EU law, lamentably, as Article 36(3) of Regulation 492/2011).<sup>32</sup> Community law thus ultimately provided sufficiently equal protection, unaffected by political fluctuations in member state attitudes toward immigration, that member state nationals who had been disadvantaged by their own member states’ restrictive immigration policies discovered that they could use mobility to escape the “purely internal” situation.

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<sup>29</sup> Bierbach, p. 288-289; Van Walsum, S., *The family and the nation : Dutch family migration policies in the context of changing family norms*, (Newcastle upon Tyne : Cambridge Scholars Publishing, 2008), Ch. 3.

<sup>30</sup> Bierbach, p. 367.

<sup>31</sup> In my book, I also identify similar developments in the legislative history of citizenship and immigration law in the United Kingdom that show these clearly to be rooted in racial discrimination. *ibid.*, p. 263-285.

<sup>32</sup> *ibid.* p. 230-241.

Arguably the first one of these on record was Mrs. D.M. Levin, a British national married to a South African whose application for asylum had been rejected in the United Kingdom<sup>33</sup> (and who, one presumes, was ineligible for family reunification in the UK). Levin moved with her husband to the Netherlands in the late 1970s to engage in part-time work in hotels as a chambermaid. Strikingly, in the very same year that the Court of Justice rejected the claim of Morson and Jhanjan, it issued a judgment<sup>34</sup> effectively granting Levin's claim that her right of residence as a worker in the Netherlands, and accordingly that of her third-country national husband, had to be recognized by the Netherlands. According to the Court, these rights existed despite the fact that Levin was not working full time and not earning very much: it was her activities that counted, not her income. But even more crucially, the Court rejected the argument of the government of the Netherlands that Levin had only come to the Netherlands with the intention of obtaining an immigration status for her husband, and therefore could not be seen as truly making use of the freedom of movement of workers. Again, the Court emphasized, it was her activities that counted, not her intentions.

The cases of Levin on the one hand and Morson and Jhanjan on the other are all the more striking in that both of them, with their widely divergent results from a single court, take place in the territory of the same member state. The selection of the relevant legal system is not territorial, but almost personal: just as in the ancient world, where (for instance) a Roman citizen carried with him the applicability of Roman law to himself wherever in the world he went, in this case the European citizen carries the applicability of European law with her, if not wherever she goes, then to all of the member states of the Community where she is not a national. The equal protection mandated by Community law is thus what I call a "cross-border" equality,<sup>35</sup> if not exactly territorial then situational.

Ten years later, not long before the Maastricht Treaty was to enter into force, the Court would confirm that this equality also extended back into a member state national's own member state when she returned from another member state. Surinder Singh was the Indian husband of Rashpal Purewal, a British citizen (again, we see an obvious case of the line of nationality dividing two family members who are both descended from British colonial

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<sup>33</sup> Spijkerboer, T.P., 'Analysing European case-law on migration: options for critical lawyers' in L. Azoulai and K.M. Vries, eds., *EU migration law: legal complexities and political rationales* (Oxford, United Kingdom : Oxford University Press, 2014), p. 198-199.

<sup>34</sup> 'ECJ *D.M. Levin v Staatssecretaris van Justitie*', C-53/81 (23 March 1982). *See also* Bierbach, p. 285-290.

<sup>35</sup> *ibid.*, p. 13.

subjects), and had a right of residence in West Germany while Ms. Purewal worked there. They then moved to the United Kingdom, and Mr. Singh claimed the applicability of Community law to his rights of residence there. The British government claimed, on the other hand, that allowing Community law to apply to family members of British citizens in Britain would increase the “risk of fraud associated with sham marriages”.<sup>36</sup> (Implicitly, therefore, the British government was presenting one of its ostensible justifications for strict British rules for family reunification.) The Court granted Singh’s claim with the consideration that the applicability of Community law to this situation served a purpose: if Ms. Purewal, at the outset of going to Germany to work, had known that she be able to bring her husband with her, but not bring him back with her under equally favorable conditions, it would have a “deterrent effect” on her use of the freedom of movement of workers.

This ruling opened the doors for many sedentary EU citizens to intentionally make use of the freedom of movement—moving to another member state for a time, where their third-country national family members could get a right of residence with them—and then moving back to their home member states in a so-called “U-turn”. (This has been especially popular among nationals of member states with strict family reunification rules: the Netherlands, Denmark,<sup>37</sup> and the United Kingdom.) And every time a member state has tried to reject the applicability of EU law due to the fact that the EU citizen clearly intended to circumvent the member state’s immigration law,<sup>38</sup> tried to claim that a third-country national could not get a right of residence in the host member state without having a legal immigration status to start with,<sup>39</sup> or tried to claim that EU law does not apply when the EU citizen goes to work in a host member state, but then goes on public assistance after his return to his home member state,<sup>40</sup> it has been rebuffed by the Court. This cross-border equality of EU law, which intervenes between a member state and its own nationals on the basis of their EU citizenship, has thus been reinforced.

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<sup>36</sup> 'ECJ *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department*', C-370/90, (7 July 1992), par. 14.

<sup>37</sup> Staver, Ch. 3, p. 84-85.

<sup>38</sup> 'ECJ *Secretary of State for the Home Department v Hacene Akrich*', C-109/01 (23 September 2003), see Bierbach, p. 371.

<sup>39</sup> 'ECJ *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform*', C-127/08 (25 July 2008), see Bierbach, p. 374-378.

<sup>40</sup> 'ECJ *Minister voor Vreemdelingenzaken en Integratie v R. N. G. Eind*', C-291/05 (11 December 2007), see Bierbach, p. 370-374.

Moreover, in light of other decisions of the Court concerning EU citizenship (such as *Grzelczyk*<sup>41</sup>) and the enactment of Directive 2004/38, as well, the freedom of movement for EU citizens has been significantly expanded beyond only those who go to another member state to work. The Court has kept pace with this development by widening the parameters of the “U-turn” to cover the situation that the EU citizen did not work in the host member state, but simply genuinely lived there as a self-supporting person together with their third-country national family member.<sup>42</sup>

Finally, a new frontier of the “U-turn” to combat discrimination of EU citizens belonging to minority groups may be opened if it can be used not only to circumvent the strict, economically and culturally justified rules of family reunification of Northwest European member states, but also to circumvent the lack of recognition of same-sex marriages and partnerships in Southern and Eastern European member states.<sup>43</sup>

## US

I have now completed my review of reverse discrimination in EU law and the tactics that EU citizens can use, making use of a cross-border equality, to escape it. I finally arrive at the comparative portion of this paper, in which I touch on similar doctrines of US constitutional law that African Americans have been able to mobilize to escape the applicability of racially discriminatory laws of US states. And I will answer the question: have cross-border equalities, and the reverse discrimination they expose, ceased to be as prominent in US law as they still are in EU law?

I am most interested in a line of case law of the Supreme Court concerning the acceptability of state-mandated or state-tolerated racially segregated accommodations in cross-border situations. As is well known, the Supreme Court initially denied attempts by African Americans to mobilize the Fourteenth Amendment to the Constitution, in and of

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<sup>41</sup> 'ECJ *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*', C-184/99 (20 September 2001)

<sup>42</sup> 'ECJ *O. v Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v B.*', C-456/12 (12 March 2014), see Bierbach, Ch. 10.

<sup>43</sup> See A. Tryfonidou, “Awaiting the ECJ Judgment in *Coman*: Towards the Cross-Border Legal Recognition of Same-Sex Marriages in the EU?” <  
<http://eulawanalysis.blogspot.nl/2017/03/awaiting-ecj-judgment-in-coman-towards.html>>

itself, against local laws mandating “equal but separate” accommodations.<sup>44</sup> However, in 1941, an African American Congressman from Chicago, Arthur W. Mitchell, succeeded in mobilizing a federal statute from 1887, the Interstate Commerce Act, that regulated all common carriers across state lines.<sup>45</sup> Mitchell argued that if he was traveling on an interstate train through Arkansas, an Arkansas law mandating that he leave the first-class Pullman car to go to a clearly inferior “colored” car could not apply to him. After all, the Interstate Commerce Act, based as it was on the Commerce Clause of the Constitution (thus establishing the supremacy of federal law on that subject matter), provided that carriers had to charge equal rates for equal services over equal distances traveled. Mitchell’s claim was granted not so much on the basis of his US citizenship as on the basis of the equal protection of the Interstate Commerce Act as mandated by the Fourteenth Amendment, and the fact that “separate” was clearly not “equal” in the case of the accommodations he was forced to use despite having paid for a first-class ticket.

Five years later, Irene Morgan, an African American woman who had been arrested in Virginia for riding in the “white” section of an interstate bus and thereby violating Virginia law, made a similar claim before the Supreme Court.<sup>46</sup> Only this time, rather than claiming that the Interstate Commerce Act applied to her situation or that the “colored” section was not equal in quality, Morgan successfully invoked the Dormant Commerce Clause, i.e. the doctrine that because Congress had the power to regulate interstate commerce, even if it had not used it, any state law affecting interstate commerce had to be invalid. However, implicitly, this ruling of the Supreme Court left open that a state was still free to mandate or tolerate segregation of transportation that did not cross any state lines.<sup>47</sup>

When Bruce Boynton, an African American law student who was traveling on an interstate bus, was told that he had to move out of the “white” section of the restaurant in the Trailways Bus Station in Richmond, he was clearly conscious of the preceding case law. He told the waitress that he was an interstate passenger, and therefore could not be compelled to move to the “colored” section.<sup>48</sup> When Boynton continued to refuse to move, he was ultimately arrested for trespassing. (Admittedly, it was not a state-mandated segregation

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<sup>44</sup> 'Plessy v. Ferguson', 163 U.S. 537, (1896). See Bierbach, p. 168-170.

<sup>45</sup> 'Mitchell v. United States', 313 U.S. 80, (1941). See Bierbach, p. 180-182.

<sup>46</sup> 'Morgan v. Virginia', 328 U.S. 373, (1946).

<sup>47</sup> Bierbach, p. 184.

<sup>48</sup> Pollak, L., 'The Supreme Court And The States: Reflections On *Boynton v. Virginia*', *Calif.Law Rev.*, 49 (1961)15, p. 18.

statute he was convicted of violating, but a state law on trespassing that was clearly tolerant of segregation policies of private parties.<sup>49)</sup> Interestingly, however, the Supreme Court went further than Boynton's original claim, ruling that because the entire restaurant, being in a bus station and being clearly in the business of serving passengers of an interstate bus line, was integrally involved in the business of interstate transport, it was just as subject to the Interstate Commerce Act as an interstate bus was.<sup>50</sup>

It is Boynton's original claim, however, that I find most interesting for a comparison to the phenomenon of reverse discrimination in EU civil rights. If the Supreme Court had granted the claim on that limited basis, it would have opened up a situation similar to what exists in the EU. In the EU, as we have seen, two EU citizens, even with the nationality of the same member state, can obtain completely divergent treatment (i.e. the applicability of two completely different legal systems) based not on the territorial applicability of the law, but the situation the EU citizen has placed herself in: the one is in a "purely internal" situation, while the other, who has moved to another member state and back, is in a "cross-border" situation. If Boynton's original claim had been granted, then one African American passenger who was holding an interstate bus ticket would have been allowed to sit in the "white" section of the bus station restaurant, but another, holding only an intrastate ticket, would not have. Apparently with *Morgan*, the fact that a segregation regime would apply inside the one bus, and not inside the other, did not create any such feeling of dissonance, perhaps because the reverse discrimination in favor of the interstate passenger would not have been so clearly rubbed in the face of the intrastate passenger, nor would the difference have to be enforced with a complex casuistry.

In fact, however, Pollak, commenting at the time, shows that the Supreme Court's reasoning in *Boynton*, basing the link to federal law on a judgment whether the restaurant is an integral part of the interstate bus network or just an incidental "roadside restaurant", is almost just about as arbitrary<sup>51</sup> as we would have found a granting of Boynton's original claim to be. Reverse discrimination still could exist under the *Boynton* doctrine, only behind the fig

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<sup>49</sup> *ibid.*, p. 20.

<sup>50</sup> '*Boynton v. Virginia*', 364 U.S. 454, (1960). See Bierbach, p. 185.

<sup>51</sup> Pollak, 15, p. 36-38. Also critically, Bell, D., *Race, racism and American law*, (Boston etc.) : Little, Brown, 1980), p. 287.

leaf of segregation being permissible behind the walls of one establishment, but not the other. How did the possibility of this divergence end in the history of the US, then?

In fact, perhaps the indeterminacy of *Boynton* inspired the civil rights activists known as “Freedom Riders” to challenge the limits of state segregation by riding in racially mixed groups on interstate buses through the South.<sup>52</sup> Not only did many of the resulting arrests spawn more cases for the Supreme Court to decide on, but violent attacks on the Freedom Riders by white mobs attracted national attention to the cause of civil rights and helped to provide Congress with the necessary impetus to enact further legislation. Did that legislation establish a uniform equality for US citizens everywhere, no longer reliant on establishing that there was an interstate dimension in order for a cross-border ban on segregation to apply?

Perhaps somewhat surprisingly: no, not at least when it came to banishing segregation by private parties. The Civil Rights Act of 1964 did arguably claim the direct authority of Congress and federal courts based on US citizenship itself to deal with state authorities’ violations of civil rights on voting (Title I), and state and local authorities’ segregation of public facilities (Title III). But when it came to segregation and racial discrimination on the part of private parties (Title II), Congress essentially built on and stretched the *Boynton* definition of “interstate commerce”. Any inn, hotel or motel with more than five rooms was considered to be engaged in interstate commerce. A restaurant or gas station was not solely considered to be engaged in interstate commerce if it predominantly served interstate travelers, but also if a substantial portion of the food it served or gasoline it sold had moved in interstate commerce. A movie theater, concert hall or stadium was considered to be engaged in interstate commerce if most of the films it showed, or live acts or sports teams it presented, had moved in interstate commerce. Title VII, banning discrimination in private employment, stretched interstate commerce even further: any employer with more than 25 employees was implicitly considered to be involved in interstate commerce. All of the equalities established by Title II and Title VII were therefore still technically cross-border equalities; but crucially, a citizen of a state no longer had *herself* to cross a border to profit from these equalities, as long as an establishment she was patronizing, or an employer she was working for, could be considered to be involved in cross-border activities.<sup>53</sup>

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<sup>52</sup> *ibid.*, p. 287, n. 4.

<sup>53</sup> Bierbach, p. 186-187.

The cross-border situation was thus expanded so much in the US that reverse discrimination became almost imperceptible, remaining only in holdouts such as private clubs.<sup>54</sup>

### Civil rights without cross-border elements, baby steps toward eliminating reverse discrimination

By the comparison in the previous section I hope to demonstrate that the differences between the US and the EU are not as great as are usually supposed, and cannot be simply accounted for by a supposedly uniform culture and political system in one, and a politically incoherent and diverse set of sovereign states in the other. In both federal legal systems, any federal legislation mandating equality still has to have a proper constitutional basis (be it freedom of movement of citizens, in the EU, or equal protection of the laws or interstate commerce, in the US) in order to be able to supersede the discriminatory laws or practices of a (member) state. If equal treatment for federal citizens can only be found in a cross-border situation, then citizens will seek that situation out. If the resulting reverse discrimination is perceived as blatantly unjust or arbitrary, it can bring about a political movement to expand the equality, perhaps only by defining the cross-border situation more broadly.

I would therefore suggest that reverse discrimination regarding family reunification, due to the possibility of making a “U-turn” through EU law, simply has not achieved a sufficiently widespread perception of being unjust to motivate political change in either direction. Not for those using it, and not for those who would oppose it: even among the most fanatical opponents of immigration in EU member states with strict family reunification laws, the availability of the “U-turn” barely seems to register as a phenomenon threatening society (which may also have something to do with the fact that family reunification, in the first place, was not actually such a threat). It is a rather obscure subject,<sup>55</sup> although when its

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<sup>54</sup> Bell, p. 101 *ff*

<sup>55</sup> Out of the package of reforms offered to the United Kingdom if it did not vote to leave the EU, one of them aimed to close the “U-turn” for EU citizens. See Peers, S. “The draft renegotiation deal: EU immigration issues” <<http://eulawanalysis.blogspot.nl/2016/02/the-draft-renegotiation-deal-eu.html>>, under the header “EU citizen’s family members”. However, it is questionable whether a decisive number of British voters for “Leave” were aware of this particular offer on the table, or even knew about the “problem” that it was supposed to solve.

political opponents do mention it, it seems to be accompanied by aspersions cast on the true “Europeanness” of member state nationals (i.e. of color) who make use of EU law in this way.<sup>56</sup>

In both the US and the EU, of course, certain areas of civil rights have also developed as uniform equalities for all citizens everywhere in the federal order, without the need for reference to a cross-border situation or repurposing of economic freedoms. In the US, quite some time before *Boynton*, the Supreme Court had already established uniform equality for one group of African American US citizens in 1954, by reference only to their citizenship and the Fourteenth Amendment: specifically children, with regard to their right not to be forced to go to segregated schools.<sup>57</sup>

Likewise in the EU, the Court of Justice has seen fit to dispense with the necessity for EU citizens to flee to a cross-border situation for family reunification when it comes to very young sedentary EU citizens. Those children’s EU citizenship itself (based on art. 20 TFEU) has been deemed to give them the right to have (both) third-country national parents with them to raise them in their member state of nationality.<sup>58</sup> This coming May 10, the Court will clarify that situation even further, possibly clearly extending that right to EU citizen children with only one third-country national parent.<sup>59</sup> Progress comes in baby steps, and for the most vulnerable citizens first of all.

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<sup>56</sup> For an example from the Dutch political debate coming from the vehemently anti-immigrant PVV party of Geert Wilders, see Bierbach, p. 378-381.

<sup>57</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483, (1954). See Bierbach, p. 184.

<sup>58</sup> 'ECJ Gerardo Ruiz Zambrano v. Office National d'Emploi', C-34/09 (8 March 2011). See Bierbach, , p. 399-406.

<sup>59</sup> Case C-133/15, *Chavez-Vilchez et al.*