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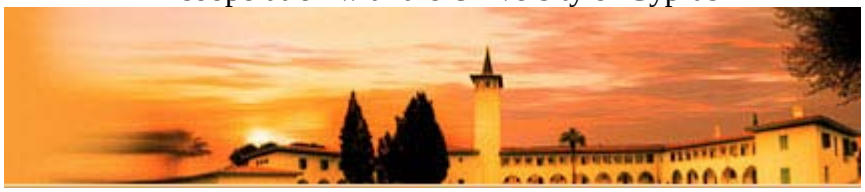

The Rhetoric of Citizenship

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The rhetoric surrounding discussions about citizenship necessarily shapes legal decisionmaking. In the process of developing its own identity, the European Union has had the opportunity to influence the meaning of citizenship in the context of a confederation of cooperating states. Through a series of cases, the European Union has forged a meaning of citizenship that accords with underlying principles found in Article 20 of its Treaty for the Functioning of the European Union:

> "Citizens of the Union shall have. . . (a) the right to move and reside freely within the territory of the Member States. The Treaty gives its Council and parliament the authority to ensure that member state laws do not interfere with this right to move and reside freely within the territory."[1]

The rhetoric of this underlying principle –freedom of movement across the territory – opens up possibilities in the meaning of citizenship that may not exist in a state like the United States, whose history is bounded by the meaning of border, and its implications. As a result, the U.S., in its evolution from state regulation of

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[1] *See* European Union, Consolidated Version of the Treaty on the Functioning of the European Union, art. 20, Mar. 25, 1957, 2010 O.J. C 83/47.

immigration and naturalization[2] to federal regulation of immigration and naturalization,[3] for a very long time maintained an immigration system that emphasized border protection[4] and racialized naturalization.[5] The result in the U.S.: a less robust, more highly contested meaning of citizenship that is a legacy of its history.

In this paper, I will first discuss the rights of EU citizens vis-a-vis member nation's immigration regulatory schemes and show how an opening has been created in recent EU Court of Justice cases that protects the principle of freedom of movement across the territory. These cases raise the possibility the right to economic sustenance provided by a parent might be implicated by national immigration laws.[6] The right to enjoy the full benefits of EU citizenship might implicate the need to stay in the EU. Instrumentally, this right extends to undocumented parents a right to stay in an EU member country that might not otherwise allow them to stay in the country under their own immigration laws. Second, I will discuss the U.S. citizenship scheme, which is intertwined with race and the notion of the border, thus limiting the rights of citizen children to stay in the United States once their parents are deported. Third, I will evaluate the opportunity that EU citizenship and its meaning can bring to the U.S. experience. I will also discuss the danger of arguments restricting immigration that are tinged with race-based assumptions and border-protection rhetoric.

1. The EU Experience

The Court of Justice has articulated its evolving principle of citizenship in a series of recent cases. In the first of these cases, Ruiz Zambrano v. Office National de

[2] *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 Colum. L. Rev. 1833 (1993). *See, e.g.*, Act of Feb. 10, 1787, 1787 Ga. Acts 40 (Georgia state law excluding felons from limits of the state); Act of Feb. 14, 1789, ch. 61, § 7, 1789 Mass. Acts 98, 100-01 (Massachusetts state law prohibiting the importation of persons convicted of a crime); Act of Mar. 19, 1831, ch. 150, § 1, 1831 Mass. Laws 719, 719-20 (Massachusetts state law requiring bond to indemnify towns for expenses arising with respect to arriving aliens considered a public charge).

[3] Chae Chan Ping v. United States, 130 U.S. 581 (1889) (federal government has an inherent sovereign power to exclude noncitizens from the United States). *See* Arizona v. U.S, 567 U.S. ____ (2012) (State of Arizona may not impose criminal sanctions upon noncitizens that violate certain federal immigration laws).

[4] *See Arizona*, 567 U.S. ___ (Scalia, J., dissenting).

[5] *See e.g.*, Chinese Exclusion Act, Pub. L. No. 71-47, 22 Stat. 58 (1882).

[6] Case C-34/09, Zambrano v. Office national de l'emploi (2011) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0034:EN:HTML.

L'emploi in the Court of Justice of the European Union (Mar. 8, 2011), the distinction between regulations governing freedom of movement of EU member nationals and regulations governing internal affairs, like acquisition of nationality, was tested.[7] In this case, Ruiz-Zambrano and his wife, Columbian nationals, applied for and were denied asylum in Belgium.[8] After they were ordered to leave, the government deferred their removal in accordance with the principle of *non-refoulement* and the couple gave birth to their second and third children, who acquired Belgian citizenship.[9] Ruiz Zambrano continued to work in Belgium, and then applied for unemployment benefits when he lost his job.[10] He was denied them because he did not comply with the foreign residence requirements and was not entitled to work in Belgium.[11] The couple also submitted an application for residence in Belgium as the parents of a Belgian national.[12] The Belgium authorities rejected their application, however, reasoning the couple could not take up residence in Belgium

> because [they] had disregarded the laws of [Columbia] by not registering [their] child[ren] with the [Columbian] authorities, but had correctly followed the procedures available to [them] for acquiring Belgian nationality [for their children] and then trying on that basis to legalise [sic] [their] own residence.[13]

Mr. Zambrano initiated proceedings before the Employment Tribunal in Belgium, challenging the decisions denying him residence and unemployment benefits on the ground that he and his wife are entitled to reside and work in Belgium as the "ascendants of minor child[ren] who [are] national[s] of a Member State [of the European Union]."[14] In turn, the Employment Tribunal submitted to the Court of Justice of the European Union the question of whether, by virtue of his parental relationship to minor Belgium citizen children, Mr. Ruiz Zambrano may rely on

[7] *Id*.
[8] *Id*. ¶¶ 14-15.
[9] *Id*. ¶¶ 15, 19 & 22.
[10] *Id*. ¶¶ 18, 20, 25-28.
[11] *Id*.
[12] *Id*. ¶¶ 21-22.
[13] *Id*. ¶ 23.
[14] *Id*. ¶¶ 34-35.

European Union law to reside and work in Belgium, even though Mr. Ruiz Zambrano's children have never exercised their right of free movement within the territory of the Member States.[15]

It was undisputed that the Zambrano children were Belgian nationals under Belgian law.[16] The Court observed that while a member state has sole jurisdiction to set the conditions for acquisition of the nationality,[17] European Union law trumps national laws that deprive citizens of the Union of the "genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union."[18] Refusing to grant Mr. Zambrano a work permit and residence in Belgium, where his dependent minor children reside and are citizens, has the effect of depriving those children of the "genuine enjoyment of the substance of their rights" as citizens of the Union because the children would have to leave the territory of the Union.[19] Without residing in the European Union, the children would be unable to fully exercise the substance of their rights as citizens of the Union.

The Court concluded that in circumstances like that of the Zambranos, where minor E.U. citizen children are dependent upon a third country national, European Union law precludes a Member State from refusing the third country national a right of residence or a grant to work, insofar as those actions deprive the citizen children of the "genuine enjoyment of the substance of the rights attaching to the status of the European Union citizen."[20] In essence, the ruling gave EU citizen children the right to remain with their noncitizen parents in a member state that would otherwise deny the noncitizen parent legal residence or naturalization under its own laws. The ruling protects the EU's basic principle highlighting the importance of freedom of movement --and a concomitant right to reside or remain within the territory of the Union.[21]

Subsequent cases have given life to the meaning of the Court's pronouncement and have created the contours of the rights of EU citizen

[15] *Id*. ¶¶ 35-36.
[16] *See Id*. ¶¶ 37, 40.
[17] *Id*. ¶ 40.
[18] *Id*. ¶ 42.
[19] *Id*. ¶¶ 43-45.
[20] *Id*.
[21] *See id*. ¶ 44.

dependents vis-a-vis governments seeking to restrict the privileges of non-citizens within their boundaries. [22] In this set of cases following Zambrano, several EU countries challenged the applicability of the European Union treaty providing for European Union citizenship (Art. 20 TFEU) on the grounds that since the Union citizens concerned had never exercised their right of freedom of movement by crossing Member State borders, each of the applicants' disputes was purely an internal dispute.[23] The Court noted that in determining whether the denial of residence of a third-country national will lead to the denial of the Union citizen's genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status The Court would look to whether the Union citizen will be forced to leave the territory of the Union.[24]

To sum up, the rhetoric of freedom of movement has developed an increasingly clear set of rights that attaches to EU citizenship. The question for the Court in these cases is whether the member citizen is dependent on the non-member such that forcing the non-member to leave would also expel the member citizen, thus implicating the "genuine enjoyment of the substance of rights conferred by status as an EU citizen."

2. The United States Experience

The question implicating citizen children's rights in the immigration context is quite different in the United States. Citizen children of undocumented parents do not the right to keep their deportable parents in the United States because U.S. law in general does not accord the same level of deference to freedom of movement for the sake of economic stability that the EU does. In the case of immigration regulation, individual rights paradigms are analyzed by balancing the interest in the government in regulating entry and expulsion and the interest of the individual

[22] Case C-256/11, Dereci and Others v. Bundesministerium fur Inneres (2011) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0256:EN:HTML; Case C-434/09, McCarthy v. Secretary of State for the Home Department (2011) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0434:EN:HTML.

[23] *See, e.g., id*. ¶¶ 39-40; *Zambrano*, *supra* note 6 ¶ 37;

[24] *Dereci*, *supra* note 22 ¶¶ 66-68.

seeking immigration relief.[25] The right of the citizen seeking reunification with family members gets little attention, as the citizen lacks standing to make a claim. The right of the child to stay in the country with her noncitizen parent, however, has been adjudicated and found not to exist.[26] Instead, the immigration statute establishes a set of rules that take into account the hardship to a citizen child if parents are removed from the country.[27] The hardship standard is very high, and the subsistence that the parent provides, by itself, is not enough to meet the standard.[28] Because the right to subsistence is not recognized as a fundamental right in the U.S., the courts will determine only whether the government's action with respect to undocumented parents is reasonable in light of its overall goal of regulating immigration. Thus, the citizen child of undocumented parents lives an insecure and unstable existence whose rights are limited when compared to the rights of citizens whose parents are also citizens. In immigration regulation, the federal government's power is almost sacrosanct, so much so that individual rights arguments have little effect.

How did we get to this doctrinal immigration regime, in which federal authority is plenary and citizen children do not have a right to keep their undocumented parents with them in the U.S.? The underlying principles of border protection and racialized immigration and naturalization play a big role.[29] Citizenship and naturalization law in the United States is bounded by racialized notions of who should belong to the political community. Since the early days of federal immigration regulation, Congress has passed laws defining who can become a

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[25] See e.g., *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Clark v. Martinez*, 543 U.S. 371 (2005) (holding that the Due Process Clause limits the activities of the federal government with respect to individual claimants, whether residents or not, seeking relief from removal).

[26] See e.g., *Hamdi, ex rel. Hamdi v. Napolitano*, 620 F.3d 615, 620-29 (6th Cir. 2010) (removal of mother does not violate U.S. citizen child's constitutional or international rights); *De Mercado v. Mukasey*, 566 F.3d 810, 812-13 (9th Cir. 2009) (denying cancellation of removal does not implicate a due process right to family unity).

[27] *See* 8 U.S.C. §§ 1182(h) - (i); 8 U.S.C. § 1229B.

[28] Id.

[29] Kevin Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998).

citizen, and who cannot.[30] In the 1880's, the federal government prohibited the entry of Chinese laborers, and forbid the naturalization of Chinese based on their race.[31] The Chinese Exclusion Act, and related laws excluding people based on race, were not repealed until 1952.[32] Until then, the notion of race-based naturalization was a reality, and nativists in the U.S. made it their mission to expand the race-based categories of exclusion.[33] Interestingly, it was the eugenics movement, and the science behind it, that contributed to the race-based ideas that form a part of the United States immigration legal history.[34] It was eugenicists who were an early part of the creation of immigration regulation, and they were at the forefront of restricting immigration based on racial characteristics of different populations.[35] The relationship between Mexicans and the United States reveals the example of immigration regulation's trajectory and its race-based nature, even if immigration regulation today might be facially neutral.[36] From early interactions with Mexicans in the later nineteenth century, Anglo writers painted Mexican laborers as racially different. Their abilities and strengths were explained as part of Mexican nature. They were the perfect stoop laborers, for example, or the perfect workers for jobs and occupations that required hard labor.[37] They were also described as nomadic, restless, and unable to settle down, which complemented the narrative that they were the perfect temporary workers. Under no circumstances, however, were they citizenship material. The emasculating and race-based traits ascribed to the Mexican laborer made it difficult for him to become the self-made civic participant role

[30] *See e.g.*, Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882); An act to amend an act entitled 'An Act to execute certain treaty stipulations relating to Chinese,' ch. 220, 23 Stat. 115 (1884); An act to supplement an act entitled 'An act to execute certain treaty stipulations relating to Chinese,' ch. 1064, 25 Stat. 504 (1888); An act to prohibit the coming of Chinese persons into the United States, ch. 60, 27 Stat. 25 (1892).

[31] Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 28-29 (1998).

[32] An act to Repeal the Chinese Exclusion Acts, to Establish Quotas, and for Other Purposes, ch. 344, 57 Stat. 600 (1943) (codified at 8 U.S.C.A. §§ 262, 297, 229 (2012)); Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (ended Asian exclusion, and introduced an employment preference and family preference immigration system).

[33] Johnson, *supra* note 29.

[34] Beverly Hosburgh, *Schrdegreesodinger's Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-Income Women of Color*, 17 CORDOZO L. REV. 531, 549-555 (1996).

[35] Hosburgh, *supra* note 34.

[36] LAURA E GÓMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE (2007).,

[37] MARK REISLER, BY THE SWEAT OF THEIR BROW: MEXICAN IMMIGRANT LABOR IN THE UNITED SATES, 1900-1940 (1976).

model of American masculinity. The Mexican laborer was juxtaposed to the self-made, rugged, independent, citizen Anglo. As one commentator noted: "The peon could be directed and used to perform the lowest class of labor, but he was incapable of carrying on independent projects in pursuit of progress. Given their image of the Mexican worker, Americans could easily reject Mexican immigrants as candidates for assimilation, equality, and acceptance. From the Anglo perspective, the immigrant from south of the border was always the peon laborer and never the potential citizen."[38]

The narrative served its purpose in immigration law, as bills were passed that prohibited non-whites from naturalization. For decades, the debate over whether Mexicans were white engaged the public discourse. As a result, the compromises that were ultimately made in immigration law highly restricted the immigration of Mexicans to the United States, except as temporary workers. Even after the passage of the Civil Rights Act of 1964, which prohibited discrimination based on national origin,[39] the immigration law placed additional restrictions on the travel and immigration of Mexicans into the United States.[40] The racial legacy, in other words, remains long after the civil rights law made it illegal.

Today, that discourse over immigration regulation –the need to protect our borders, and to keep certain undesirables out – goes one step further and is carried out in the debate about who should be considered a citizen in the United States. The so-called birthright-citizenship movement seeks to challenge current Fourteenth Amendment jurisprudence guaranteeing citizenship to anyone born in the United States.[41] The movement seeks to limit the citizenship rights and status of those born to undocumented parents.[42] The argument is that fewer rights should attach to one who is born of undocumented parents because that person's loyalties are suspect.

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[38] MARK REISLER, *supra* note 37, at 143.

[39] Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.).

[40] *See* Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C.); Immigration and Nationality Act, Pub. L. No. 94-571, 90 Stat. 2706 (1976).

[41] *See* Birthright Citizenship Act, H.R. 140, 112th Cong. (2011) (unenacted federal bill introduced to Congress in April 2011 and would eliminate birthright citizenship for children born to undocumented immigrants in the U.S.)

[42] Marc Lacey, *Birthright Citizenship Looms as Next Immigration Battle*, N.Y. TIMES, Jan. 5, 2011, at A1, *available at* http://www.nytimes.com/2011/01/05/us/politics/05babies.html?pagewanted=all.

The rhetoric behind the movement is similar to the rhetoric used to highly restrict immigration from Mexico –people who are unassimilable are seeking to enter and stay in the United States and take advantage of the rights guaranteed by the Constitution. The rhetoric includes terms such as anchor baby, connoting parents using children as anchors to establish legal status in the United States.[43] While the rhetoric is not that different from Belgium's argument in Zambrano, the EU has a strong counternarrative that challenges the rhetoric. The U.S. does not.

Conclusion: Lessons from Today's System about the Contestability of Citizenship and Rights

As you can see from the examples above, questions of citizenship and immigration are seen through a lens of sovereignty, rather than through the lens of individual rights of the affected individual. The political debate is bound up in rhetoric that highlights protection of borders, maintenance of sovereignty, and the need to maintain vigilance against those who seek to invade the United States. It is this combination of self-defense and race-based notions of who belongs that make for a highly restrictive naturalization and immigration system. The dynamic creates a meaning of citizenship that can and does change depending on how well it captures the underlying rhetoric of protecting borders. In the EU, by contrast, we actually see an opening in the meaning of citizenship that is less border-bound and more amenable –by necessity but also by treaty arrangements -- to acceptance of movement across a territory. It is this border-reducing rhetoric that I hope to see flourish in the U.S. based on the EU's example. I understand however, that history is also bound up in the EU experience, and that individual states, just like in the U.S., will utilize the rhetoric of border protection to continue to restrict their own immigration and naturalization schemes. For this reason, I think the U.S. example is a good one to mine when thinking about the dangers of race-based and border protection rhetoric in political debates around immigration.

[43] *See id.*; *The Debate Over 'Anchor Babies' and Citizenship* (NPR radio broadcast), *transcript available at* http://www.npr.org/templates/story/story.php?storyId=129279863.