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Tensions at the Borders in the U.S. and the E.U.: The Quest for State Distinctiveness and Immigrant Inclusion

Francesca Strumia

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TENSIONS AT THE BORDERS IN THE U.S. AND THE E.U.: THE QUEST FOR STATE DISTINCTIVENESS AND IMMIGRANT INCLUSION

FRANCESCA STRUMIA*

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* S.J.D. 2009, Post-graduate Research Fellow, Harvard Law School; Attorney at Law, Kirkland & Ellis International LLP. I am deeply indebted to Professor Gerald L. Neuman for discussing with me several ideas that went into this article and for comments on an earlier version of it. For helpful comments and insights, I am profoundly grateful to Gráinne de Búrca, Daniela Caruso, Asha Kaushal, Fernanda Nicola, and Jane Bestor. I would also like to thank the American Enterprise Institute, for material support for research and for the opportunity to share some of the ideas discussed in this article in the frame of a conference on Citizenship in Europe and the United States, held in October 2008 in Washington D.C.

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“European unification on the basis of a union of sovereign states under the Treaties may, however, not be realised in such a way that the Member States do not retain sufficient space for the political formation of the economic, cultural and social circumstances of life.”¹

“The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality.”²

INTRODUCTION

Within the broader borders of the European Union and the United States, a constellation of state subunits raise claims for

1. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 2 BvE 2/08, ¶ 249 (F.R.G.), *available at* http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html [hereinafter BVerfG Lisbon Treaty Decision].

2. *Truax v. Raich*, 239 U.S. 33, 42 (1915).

distinctiveness that are similar in nature, albeit different in intensity. At the borders of the European Union and the United States, comparable waves of immigrants press for admission and raise claims for inclusion. The push for federal or union rule in immigration matters, by prompting a reallocation of the power to decide on admission, treatment and naturalization of immigrants between center and periphery, creates a potential tension in both the European Union and the United States between the competing interests of state subunits in distinctiveness and of immigrants in inclusion.³ This article highlights this tension as an entry point to open up and assess intentions, priorities, and outcomes in E.U. and U.S. immigration and citizenship policy. It argues that the policies accommodate competing interests in different ways, and it questions the reasons and consequences for different approaches. Ultimately, it finds that a similar pursuit of national distinctiveness orients citizenship and immigration policies in the E.U. and the U.S.; given the different level that the “nation” occupies in the two entities, this results in different treatment for a certain, important set of

3. In the United States, immigration powers have been in the hands of the federal government since the late nineteenth century. *See* T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 12 (2002) (suggesting that at the turn of the twentieth century, the courts began to adopt an expansive interpretation of the constitutional authority of the United States, including the authority to control borders and the entry of aliens); *see also* *Henderson v. Mayor of New York City*, 92 U.S. 259, 272-73 (1875) (finding that Congress is entrusted with powers relating to the regulation of the “right to land passengers” in the United States from foreign countries). The Constitution also gives the federal government the power to devise a uniform rule for naturalization. U.S. CONST., art. I, § 8. In the European Union, the original vision of an internal market among the member states did not include plans for a common immigration policy. In the 1990s, with the Treaty of Amsterdam, immigration law became proper European law. *See* Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, art. 1(5), 1997 O.J. (C 340) 1, 8 [hereinafter *Treaty of Amsterdam*] (acknowledging new procedures for crossing internal and external borders). The effort to build a common immigration policy has been under way ever since, and it has already yielded some common legislative standards with respect to admission, expulsion, and treatment of immigrants. *See, e.g.*, Council Directive 2004/114, art. 12.2, 2005 O.J. (L 375) 12, 16 (specifying when a student residence permit may be withdrawn); Council Directive 2003/86, 2003 O.J. (L 251) 12 (prohibiting specific derogations from treaty obligations); Council Directive 2009/50, 2009 O.J. (L 155) 17 (providing for residence permits to the European Community).

immigrants' interests in inclusion. Despite similarities in stated intentions and in the immigration challenges that the United States and the European Union face, the former silently protects these interests, while they are endangered in the latter.

Individual states in a multi-tier polity share an interest in affirming a sphere of autonomy for themselves, and in protecting their distinct selves within the wider community. On the other hand, immigrants in a multi-tier polity share a peculiar interest in inclusion:⁴ they aspire to have a broad spectrum of rights, granted in comparable terms in any state subunit, to freely access all those state subunits and to live in their host polity in a condition resembling that of citizens. These interests of states in distinctiveness and of immigrants in inclusion find reward in different allocations of the power to decide on admission, treatment of immigrants and naturalization between the center and the periphery. States gain in distinctiveness if they are free to treat citizens and immigrants in different ways and to include and exclude at will from their legal, political and social community.⁵ Immigrants gain in inclusion, on the other hand, if federal or otherwise central rule sets standard terms for their admission and naturalization, and limits the power of individual states to exclude them or to otherwise single them out for unfavorable treatment.⁶ States interests in distinctiveness are protected, in other words, by bounding the state communities, while immigrants' interests in inclusion are protected by un-bounding and opening them.

4. It is to this peculiar kind of interests that this article refers to, from this point forward, when it talks of immigrants' interests in inclusion.

5. Cf. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 31 (1983) (referring to the political community as a "bounded world," which becomes the theater of fundamental distributive choices, including the choice to distribute membership).

6. This is not meant to suggest that uniformity or coordination of rule among the several subunits necessarily eases integration and inclusion of immigrants. It has been argued, in contrast, that leaving room to states and localities to make their own policy in respect of immigrants might benefit the interests of their integration. See Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1636 (1997) (suggesting that delegation of immigration power to the states may operate as "steam-valve federalism," whereby placing immigration power with the states releases pressure on the national immigration structure on the whole). What is protected by unbounding, however, is a peculiar aspect of the immigrants' interests in inclusion: the interest of being in a condition that resembles, as much as possible, the one of citizens.

Balancing these competing interests involves comparable issues in the United States and the European Union; the two entities share a multi-tier structure of citizenship and a double perimeter of borders, among the states and towards foreign countries. The immigration numbers that they confront are similar,⁷ as are the concerns that an influx of immigrants generate for their polities.⁸

These similarities might suggest that the United States and the European Union pursue a similar balance of distinctiveness and inclusion. Yet, an exploration of the structures of rules of admission, treatment of immigrants, and naturalization in the two entities reveals that this is not the case. This article gradually draws a map of the thickness of internal borders in the European Union and the United States with respect to these three sets of rules: thick internal borders signal an area of autonomy for individual states, thus protecting their distinctiveness, while thin borders represent more homogeneous

7. In 2007, about 660,000 people naturalized into U.S. citizenship. NANCY RYTINA & SELENA CALDERA, DEP'T OF HOMELAND SEC., NATURALIZATIONS IN THE UNITED STATES: 2007, at 1 (2008), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/natz_fr_07.pdf. Estimates suggest that, in 2007, about 12.8 million legal permanent residents resided in the United States. NANCY RYTINA, DEP'T OF HOMELAND SEC., ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2007 (2009), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_pe_2007.pdf. In 2006, 1.8 million people, who were not nationals of an E.U. member state, immigrated into the European Union. See ANNE HERM, EUR. COMM'N, EUROSTAT, RECENT MIGRATION TRENDS: CITIZENS OF EU-27 MEMBER STATES BECOME EVER MORE MOBILE WHILE EU REMAINS ATTRACTIVE TO NON-EU CITIZENS 2-3 (2008), available at http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-08-098/EN/KS-SF-08-098-EN.PDF; see also Craig A. Parsons & Timothy M. Smeeding, *What's Unique About Immigration in Europe*, in IMMIGRATION AND THE TRANSFORMATION OF EUROPE 1, 5-6 (Craig A. Parsons & Timothy M. Smeeding eds., 2006) ("Coherent data is difficult to assemble for stocks and flows of migrants, since European countries categorize immigrants, foreign-born, and citizens in different ways."). The third-country national ("TCN") population in the E.U. in 2003 was about 23 million. GROUPE D'ÉTUDE DE DÉMOGRAPHIE APPLIQUÉE & BERLIN INST. FOR COMP. SOC. RES., MIGRATION AND ASYLUM IN EUROPE 2003 49 (2003), available at http://ec.europa.eu/justice_home/doc_centre/asylum/statistics/doc_annual_report_2003_en.htm.

8. See generally Parsons & Smeeding, *supra* note 7, at 5-20 (discussing demographic, socio-economic, and political issues that immigration raises in Europe); see also THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 14-17 (James P. Smith & Barry Edmonston eds., 1997) (reviewing the economic, social, and cultural arguments that characterize the immigration debate in the United States).

experiences of immigrants' inclusion. The map indicates that the U.S. system of immigration and citizenship is more likely to protect immigrants' interests in inclusion rather than states' interests in distinctiveness; the E.U. system, by contrast, leans towards states' interests in distinctiveness at the expense of immigrants' interests in inclusion.

However, an alternative narrative suggests that the United States and the European Union actually pursue similar goals in the organization of their respective immigration and citizenship policies: each reaches out for national distinctiveness. That national distinctiveness, though, pushes in different directions. In the United States, where external borders mark a civic and cultural community, it pushes for federal rule in immigration and citizenship. It pushes for member states' independence in immigration and citizenship choices in the European Union; while common borders enclose a community of law in which European citizens participate as economic actors, it is the internal borders that guard distinct cultural and civic communities. As a result, the structure of rules of admission, treatment of immigrants, and naturalization differ; the national distinctiveness variable alters the relative weight of states' interests in distinctiveness and immigrants' interests in inclusion.

Ultimately, it is the immigrants' interest in inclusion that faces a different fate in the United States and the European Union. In the United States, the immigrants' interest in being included in each of the several states blends with the interest in national distinctiveness. While not often voiced, the immigrants' interests have found effective protection in the concentration of immigration powers at the federal level. In the European Union, the immigrants' interest in supranational inclusion openly conflicts with, and succumbs to, the interest in national distinctiveness. The very process of integration and the strengthening of European citizenship, however, already threaten national distinctiveness in the European Union from several sides. For these reasons, sacrificing immigrants' interest in inclusion for the sake of national distinctiveness might prove ineffective: in order to avoid a zero sum game of distinctiveness and inclusion, choices in immigration policy in the European Union should rely on a careful evaluation of the interests at stake.

Despite the similar stated intentions and comparable challenges, different obstacles confront policy- and rule-making on either side of the Atlantic. This calls for different emphases in the pursuit of analogous commitments. Part I of this article explores how rules on admission, treatment of immigrants, and naturalization raise a tension between states' interests in distinctiveness and immigrants' interests in inclusion through the lens of a landmark European Court of Justice ("ECJ") case. It maps those rules onto two notions of internal borders: regulatory and definitional. Part II tests the thickness of internal borders respectively in the United States and the European Union. The map it draws shows that internal borders in the United States are, in relevant part, mostly thin, with some thicker spots, while in the European Union, the borders are thick overall, with thinning segments in some parts. Part III interprets the map created in Part II and considers the contrast in the balance of states' and immigrants' interests that emerges at first glance, and then turns to an alternative narrative, which takes into account the variable of national distinctiveness. Finally, it highlights the different destinies of immigrants' interests in inclusion in the United States and the European Union, respectively.

I. STATE DISTINCTIVENESS VS. IMMIGRANTS' INCLUSION: THE ROLE OF INTERNAL BORDERS

A. DISTINCTIVENESS VS. INCLUSION IN THE *CHEN* CASE

States' interests in distinctiveness and immigrants' interests in inclusion are not reserved for scholarly reverie; in both the European Union and the United States, the voices of different actors, beyond scholars, has contributed to give them a concrete shape and expression. Policy makers and judges, for instance, have often paid attention to these sets of interests.

For example, courts in both the E.U. and the U.S. have addressed states' interests in inclusion. The German Constitutional Court, in a recent judgment on the ratification of the Treaty of Lisbon, echoes the interests of E.U. states in distinctiveness: "European unification on the basis of a union of sovereign states under the Treaties may, however, not be realised in such a way that the Member States do not

retain sufficient space for the political formation of the economic, cultural and social circumstances of life.”⁹ On the U.S. side, implied tributes to states’ interests in distinctiveness come from sustainers of the compact theory, according to which the center of political life in the U.S., and the basis of the federation political legitimacy, are the individual states.¹⁰ Justice Thomas, for instance, dissenting in the Term Limits case,¹¹ emphasized that: “[e]ven at the level of national politics, there always remains a meaningful distinction between someone who is a citizen of the US and Georgia, and someone who is a citizen of the US and Massachusetts.”¹²

Turning to immigrants’ interests in inclusion, these are taken into account in legal and policy documents both in the U.S. and in the E.U.¹³ In the E.U., the European Council in Tampere in 1999 highlighted a connection between fair treatment of third country nationals (“TCNs”) and approximation of their condition to the one of European citizens: “The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy

9. BVerfG Lisbon Treaty Decision, *supra* note 1, ¶ 249.

10. Compact theory and national theory offer opposing interpretations of the role and source of central power in the U.S. constitutional model. According to the compact theory, the hub of political life is the state and not the nation as a whole; there is not one people of America, but several, each expressing their political will through the mediating role of the states. According to the national theory, through the federal constitution, the federal states would become one sovereign power whose ultimate source of authority would be directly in the people. *See* SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 20-21, 253 (1993) (“In contrast with compact theory, national theory takes a far more generous view of the powers and responsibilities of the federal government.”); *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting) (“The ultimate source of the Constitution’s authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.”).

11. *Thornton*, 514 U.S. at 859.

12. *Id.*

13. The European Court of Justice has had, up to now, limited review powers with respect to legal instruments adopted on the legal basis of Title IV of the EC Treaty (Area of Freedom, Security, and Justice). As a result, there is little judicial discourse on the goals and priorities of the burgeoning common immigration policy. The discourse is much more developed in policy documents adopted by the Council, Commission, and European Parliament. *See* Consolidated EC Treaty arts. 61-69, 1997 O.J. (C 340) 3 [hereinafter EC Treaty] (adopting measures that govern the freedom to travel within the territory of the member states).

should aim at granting them rights and obligations comparable to those of E.U. citizens.”¹⁴

On the U.S. side, the Supreme Court has interpreted aliens’ interests in having an effective right of abode in the various states. In *Truax v. Raich* it found a state statute which *de facto* limited the ability of aliens to find an occupation in the state to prejudice this right:¹⁵

The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality.¹⁶

“Segregation” of immigrants in a selection of states willing to host them would conflict with immigrants’ interests in inclusion.

Both in the U.S. and in the E.U., these valued interests of states in distinctiveness and of immigrants in inclusion potentially lead to tension in the frame of rules on admission, inclusion, and treatment of immigrants. The kind of rules that would reinforce state distinctiveness indeed tends to sacrifice immigrants’ interests in inclusion. The Chen case, a landmark case, decided in 2004 by the ECJ, and involving contrasting claims of some E.U. member states and of some TCNs, effectively portrays this tension.¹⁷

14. Tampere European Council, Presidency Conclusions (Oct. 16, 1999) [hereinafter Presidency Conclusions], available at http://www.europarl.europa.eu/summits/tam_en.htm.

15. See *Truax v. Raich*, 239 U.S. 33 (1915) (striking down a state statute requiring every employer of more than five employees to employ at least eighty percent native-born citizens).

16. *Id.* at 42.

17. See Case C-200/02, *Zhu v. Sec’y of State for the Home Dep’t*, 2004 E.C.R. I-9925 (construing the issue presented to the court as whether a minor citizen of the European Union, currently in the primary care of her mother, a foreign national, has the right to reside in another member state, and, if so, whether the

Mrs. Chen and her husband were Chinese nationals and worked for a Chinese company in China; Mr. Chen traveled frequently to the United Kingdom for business purposes.¹⁸ In 2000, Mrs. Chen went to Belfast, Northern Ireland (a constituent country of the United Kingdom), to deliver her second child. This allowed her baby, Catherine, to acquire Irish nationality (in the Republic of Ireland) at birth under Irish nationality law in force at the time,¹⁹ and thus also to automatically acquire European citizenship under Article 17 of the E.C. Treaty.²⁰ However, “in enacting the British Nationality Act 1981, the United Kingdom departed from the *jus soli*, so that birth in the territory of that Member State no longer automatically confers United Kingdom nationality.”²¹ As such, Catherine did not automatically acquire British nationality simply by virtue of being born in the United Kingdom.

Relying on the fact that her daughter was a European citizen, Mrs. Chen subsequently applied for a long-term residence permit for herself and Catherine in the United Kingdom, but British authorities denied such permit.²² The Immigration Appellate Authority, to whom the Chens challenged the refusal of the residence permit, referred a number of questions to the ECJ on the rights of Catherine and Mrs. Chen under European law.²³ The ECJ ultimately supported Mrs. Chen’s claim: Catherine was indeed a European citizen and she was validly claiming a right of residence under Article 18 of the E.C. Treaty.²⁴ The Court also held that in order to make effective

mother may also reside there).

18. *Id.* ¶ 7.

19. *See* Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, art. 1(vi), Apr. 10, 1998, 37 I.L.M. 751 (1998) (confirming the people of Northern Ireland’s “right to hold both British and Irish citizenship is accepted by both Governments”).

20. *Id.* ¶¶ 8-11; EC Treaty art. 17.

21. *Id.* ¶ 10. The British Nationality Act, in conjunction with Irish law then in force, had the peculiar result of allowing those born in part of the United Kingdom (Northern Ireland) to gain access to European Union citizenship through the Republic of Ireland (as Catherine was able to do), while preventing those born in the rest of the United Kingdom (England, Scotland, or Wales) from doing the same by denying them the requisite underlying nationality in a member state.

22. Case C-200/02, *Zhu*, ¶ 2.

23. *Id.* ¶ 15.

24. *See id.* ¶ 26 (“Purely as a national of a Member State, and therefore as a citizen of the Union, Catherine is entitled to rely on Article 18(1) EC.”); EC

Catherine's right to move and reside in the United Kingdom as an E.U. citizen, her mother, the parent-care taker, was entitled to a co-extensive residence permit in the United Kingdom.²⁵

While the Chen case was on the ECJ docket, Ireland held a referendum in which relevant constitutional provisions regarding nationality were amended: Ireland qualified its traditional *jus soli* rule for the conferral of citizenship by specifying that, if no parent was an Irish citizen at the time of a child's birth, additional conditions would apply in order for the child to be a citizen.²⁶

Competing interests of member states in distinctiveness and of immigrants in inclusion may be discerned in the folds of the Chen saga. Mrs. Chen sought supranational inclusion in the European Union for herself and for her daughter: she was seeking rights in one member state, Ireland, to export them to another member state, the United Kingdom. Ireland, on the other hand, felt its power to include and exclude by granting or denying citizenship, and consequently an important aspect of its distinctiveness, to be under threat: its nationality rule based on *jus soli* attracted immigrants interested in making instrumental use of it rather than in becoming Irish. Similarly, the United Kingdom was reluctant to open its borders to the residence claim of a dubious European citizen and her TCN mother; it resisted the pressure of European law in this sense, and raised arguments to protect its bounded community and its own capacity to include and exclude immigrants through the grant and denial of residence rights.²⁷

Treaty art. 18 (guaranteeing E.U. citizens the right to move and reside freely in any member state).

25. Case C-200/02, *Zhu*, ¶¶ 45-46.

26. Amendments to the Irish Nationality and Citizenship Act 2004 (Act No. 38/2004) (Ir.), available at <http://www.oireachtas.ie/documents/bills28/acts/2004/a3804.pdf> (last visited June 26, 2010) (specifying that a child becomes an Irish national at birth only if, at the time of his or her birth, at least one of the parents was an Irish citizen or had resided in Ireland for three of the four years immediately preceding the birth); see Ciara Smyth & Donncha O'Connell, *The Irish Citizenship Referendum of 2004: A Solution in Search of a Problem?*, in *MIGRATION, DIASPORAS AND LEGAL SYSTEMS IN EUROPE* 127, 132-35 (Prakash Shah & Werner F. Menski eds., 2006) (explaining that this change came about in part as a result of the *Chen* case, and in part as a response to discomfort over the presence of large numbers of illegal immigrants giving birth to baby citizens in the territory of the Republic).

27. See Case C-200/02, *Zhu*, ¶¶ 14, 18, 29 (describing the United Kingdom and

The distinctiveness/inclusion contrast takes shape in this case around the operation of three kinds of rules. First, rules of admission: on the one hand, Mrs. Chen's and Catherine's claims for a residence permit in the United Kingdom, and on the other, the United Kingdom's attempt to deny the permit. Second, nationality rules: on the one hand, Mrs. Chen's claim for inclusion by giving birth in Northern Ireland, and on the other, Ireland's reaction to defend its distinctiveness by changing its citizenship rules. Third, rules on the treatment of immigrants: the competing claims of Mrs. Chen for free movement rights and for a residence permit, and of the United Kingdom for the satisfaction of additional requirements. These rules raise a number of issues: which conditions do immigrants need to meet to benefit from European Union-wide rights of movement, and which level of inclusion can they claim by means of family reunification? How much can member states discriminate between their own citizens and European citizens, and between European citizens and TCNs? Is this type of discrimination still a viable avenue for states to affirm their distinctiveness?

The Chen case stretches the rules of European citizenship to their extreme to protect inclusion while soliciting the utmost reaction in the name of distinctiveness on the part of Ireland and the United Kingdom. In this way, it shows clearly how a multi-tier entity's rules of admission, treatment of immigrants, and grant of citizenship generate a tension between competing interests of states in distinctiveness and of immigrants in inclusion.

B. THE ROLE OF INTERNAL BORDERS

Whether it is distinctiveness or inclusion that wins in this contest depends on the thickness of the polity's internal borders for purposes of each one of the three sets of rules. Again, the Chen case is enlightening in this sense: Mrs. Chen and her family, on the one hand, and the involved member states on the other, each raise claims for internal borders of different thickness. Mrs. Chen wanted thin

Ireland's arguments that Catherine could not exercise rights under the European Treaties because she was under age, that she had never exercised a right of movement, that rights of free movement under European law are conditioned upon the availability of sufficient resources, and Catherine, while benefiting from her parents' financial support, had no resources of her own).

borders for the purpose of having herself and her daughter admitted into the United Kingdom, and she relied on European law to this extent. The United Kingdom wanted to keep the border thick and thus challenged the bite of European law in this case. Mrs. Chen also wanted thin internal borders for the purpose of inclusion as a citizen, as she wanted her daughter to be able to exercise her rights of citizenship, acquired in Ireland, in the United Kingdom. Ireland and the United Kingdom wanted those same internal borders to be thick: the United Kingdom resisted the claim that the grant of nationality of another member state heightened Catherine's claim for inclusion in the United Kingdom. Ireland quickly changed its rules, showing that, even if the status of inclusion that one gains through nationality is exportable to some extent, the grant at its origin is still entirely the member state's decision according to the criteria that it sets. Finally, Mrs. Chen wanted thin internal borders for the purpose of her rights as an immigrant; she wanted to be able to join her family member in another member state and to have a right of residence there as well. The United Kingdom, on the contrary, wanted the border to be thick so that it would have greater discretion in imposing conditions and requirements on a TCN's ability to claim rights within its territory as a family member of a European citizen and, in general, as an immigrant.

The thickening or thinning of internal borders may thus contribute to the allocation of legal resources in a multi-tier polity between the competing interests of states in distinctiveness and of immigrants in inclusion: the thickening of internal borders in this case would have strengthened the claims of Ireland and the United Kingdom, while their thinning would have strengthened the Chens' claims.

Two notions of internal borders, in particular, are important for drawing a map that may help unravel the tension between distinctiveness and inclusion. In one sense, internal borders have a regulatory role: thick regulatory borders identify individual states as separate and autonomous spaces of regulation;²⁸ thin regulatory

28. Health and police power, for instance, represent fields where internal regulatory borders are thick in the United States. See, e.g., *Maine v. Taylor*, 477 U.S. 131, 151 (1986) ("As long as a State does not needlessly obstruct interstate trade . . . , it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.").

borders are permeable to coordinated, mutually recognized, or centrally harmonized regulation.²⁹ If internal regulatory borders are thick with respect to admission rules, individual states will decide their own categories of visas and residence permits for immigrants from third countries, and it is possible that these visas and permits will be limited in validity to the territory of individual states. If they are thick with respect to treatment of immigrants, individual states will enjoy wider discretion in diversifying the status of aliens within their borders and in putting them at an advantage or at a disadvantage with respect to citizens. If regulatory borders are thick with respect to naturalization rules, rules for access to citizenship will differ in different states; they might give access to a peripheral, sub-central status of citizenship, from which the common citizenship derives according to a rule of automation or derivation. Thin regulatory borders, on the contrary, may find expression in common admission visas or in visas and permits that are otherwise recognized and honored in more than one state; in shared standards and rules for the treatment of immigrants while they remain aliens; and in common criteria for naturalization and access to citizenship, taking into account the duration of residence and employment, and the overall integration of immigrants in more than just one state.

In another sense, internal borders have a definitional role: they mark a certain idea of polity. They might enclose a community with a distinct identity in social, political, and cultural terms, or they might demarcate a region or administratively decentralized unit of the central polity with no strong identity of its own. Admission and naturalization rules, which set integration requirements for prospective entrants and prospective citizens, for instance, may evidence the thickness of internal definitional borders: if individual states can require of entrants and people seeking naturalization proofs of acquaintance with their own laws and tradition, of affinity with their internal societies, and of allegiance to their intimate polity,

29. In the European Union, the principle of mutual recognition, as with respect to the free movement of goods, is an example of thinning of internal regulatory borders. *See generally* Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649 (finding that imposing a minimum alcoholic content requirement for the sale of alcoholic beverages is incompatible with Article 30 of the Treaty Establishing the European Economic Community (the Treaty of Rome)).

this signals that they form autonomous identity poles, and that they draw around their territory a perimeter of thick definitional borders.

Looking at rules on admission, treatment of outsiders, and naturalization through the lens of these two notions of internal borders helps to frame questions that open up the tension between states' interests in distinctiveness and immigrants' interests in inclusion. Thin internal borders, both regulatory and definitional, mean for immigrants a wider spectrum of inclusion and a similarity of status to that of a citizen; for individual states, they mean however a measure of overlap which may harm distinctiveness. Thick internal borders warrant more distinctiveness for the states, but are also a threat for the immigrants' experiences of inclusion in the wider polity. The following section relies on these notions of borders to explore regimes of admission, treatment of immigrants, and naturalization in the United States and the European Union.

TABLE 1 INTERNAL BORDERS CLASSIFICATION

REGULATORY		DEFINITIONAL	
Thin:	Thick:	Thin:	Thick:
Central regulation, harmonized regulation, mutual recognition	Autonomous local regulation, divergent regulation	Overlapping identities of the individual states	Distinct identity for individual states; distinct integration requirements for entrants and prospective citizens

II. A MAP OF U.S. AND E.U. INTERNAL BORDERS

This part examines U.S. and E.U. rules of admission, treatment of immigrants, and naturalization, in order to determine whether internal borders are thin or thick in these respects. It gradually draws a map of the relevant internal borders, which may help in understanding the European and American balance of states' interests in distinctiveness and immigrants' interests in inclusion.

A. ADMISSION AND TREATMENT OF IMMIGRANTS

Rules on admission come together to create a pool of potential citizens; rules on the treatment of immigrants while they remain aliens provide a mirror image of the condition of citizens. Mapping both sets of rules on internal borders evidences the extent to which internal frontiers mark autonomous spaces of inclusion and exclusion. Autonomous spaces of inclusion and exclusion would provide an avenue of expression for state distinctiveness; however, they also contribute to the fragmentation of immigrants' experience of inclusion.

1. Admission and Treatment of Immigrants in the U.S.

a. Admission

The power of handling immigration in the U.S. is a plenary power of the federal government.³⁰ States had some immigration powers in the nineteenth century; they adopted regulations regarding the inspection and acceptance of immigrants, and they had the power to screen off certain categories of immigrants, mainly on the basis of wealth, health, and race considerations.³¹ Courts initially upheld the power of the states to regulate in the field of immigration.³² The 1875 case of *Henderson v. New York*, however, established that state law regulating immigration is unconstitutional, as it impinges on the exclusive power of Congress to regulate commerce.³³

30. See ALEINIKOFF, *supra* note 3, at 16 (describing the meaning and scope of the notion of plenary power, which gives Congress "virtually unlimited" powers in the area of admissions to the United States).

31. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1841 (1993) (describing five categories of immigration policies left to the states: "regulation of the movement of criminals; public health regulation; regulation of the movement of the poor; regulation of slavery; and other policies of racial subordination"); see also William S. Bernard, *Immigration: History of U.S. Policy*, in HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS 486, 488-489 (Stephan Thernstrom et al. eds., 1980) (explaining that regulation of immigration was largely left to states with major ports: Massachusetts, New York, Pennsylvania, and Maryland).

32. See *Mayor of New York City v. Miln*, 36 U.S. 102 (1837) (upholding New York City's regulation of immigrants as an exercise of the police power).

33. *Henderson v. Mayor of New York City*, 92 U.S. 259, 270-71 (1875) (striking down a New York City tax on immigrants as an unlawful regulation of foreign commerce, a power which the Constitution reserves to Congress).

As part of its immigration power, the federal government regulates admission. Admission can take place on the basis of two broad categories of visas: immigrant and non-immigrant.³⁴ In order to gain admission, both immigrant and non-immigrant entrants must comply with specific requirements and may not fall within any of the inadmissibility grounds listed in relevant legislation.³⁵ Immigrants that enter on a non-immigrant visa are considered temporary visitors.³⁶ Those who come in on immigrant visas, instead, immediately become lawful permanent residents (“LPRs”) and are on a track to qualify for citizenship.³⁷ There are four broad categories for admission as immigrants: family-sponsored,³⁸ employment-based,³⁹ diversity,⁴⁰ and refugees and asylees.⁴¹ Each one of these categories faces an annually established numerical limit, with the

34. Immigration and Nationality Act [INA] § 221, 8 U.S.C.S. § 1201(a)(1) (LexisNexis 2010).

35. See INA § 212 (outlining conditions of inadmissibility, including health-related, criminal, and security grounds).

36. See MACREADIE BARR ET AL., DEP’T OF HOMELAND SEC., NONIMMIGRANT ADMISSIONS TO THE U.S.: 2007 (2008), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ni_fr_2007.pdf. (distinguishing temporary visitors as those who generally visit for “business or pleasure, academic or vocational study, temporary employment, and to act as a representative of a foreign government or international organization”).

37. See THOMAS ALEXANDER ALENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS & POLICY 265 (5th ed. 2003) (clarifying that permanent residents may remain in the United States indefinitely, on the condition that they do not become deportable through the commission of crimes or other prohibited acts); see also PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP 187-89 (1998) (explaining that while LPRs are on track for citizenship, they are not granted the right to vote, serve on a jury, or run or be appointed for certain offices, and they are less able to sponsor family members for immigration).

38. INA § 203(a).

39. *Id.* § 203(b).

40. *Id.* § 203(c) (awarding a certain number of immigrant visas every year, through a lottery, to applicants of qualifying nationalities who meet certain minimal requirements); see ALENIKOFF ET AL., *supra* note 37, at 282 (describing the motivation for the diversity lottery as an attempt to preserve the pluralist, multi-national image of the United States as a country that welcomes immigrants from different parts of the world). The qualifying nationalities for the lottery are determined each year through a formula which takes into account the immigration statistics of the previous five years and tends to exclude nationalities which have been overrepresented in recent immigration fluxes. *Id.*

41. INA § 207.

exception of family-sponsored immigration of immediate relatives of U.S. citizens, who face no annual quotas.⁴² There are thus several legal channels for admission to the United States; all of them are based on federal legislation so that, notwithstanding the segment of the U.S. air, land, or sea borders through which an immigrant physically passes, her legal title to admission will not change. In this respect, internal regulatory borders in the United States have thinned up to the point of vanishing since the Nineteenth Century.

b. Treatment of Immigrants

The thickness of internal borders in respect to the treatment of immigrants in the United States depends on the answer to two questions. First, what does the federal government do to determine the status of admitted immigrants, the benefits they are entitled to, and the rights and limitations they face? Second, to what extent and in what ways can the various states affect the condition of immigrant aliens?⁴³

With regard to the first question, the answer is very little; federal immigrants' law is limited. From time to time, the federal government has put in place programs in favor of immigrants: these programs are aimed at fostering the learning of the English language, at detecting discrimination against foreigners with regard to employment, and at reimbursing plans for schools, states, and localities that had to provide aid to relevant groups of immigrants. However, the states have a more prominent role in promoting the integration of immigrants.⁴⁴ On the other hand, with the 1996 welfare reform, the federal government has intervened to limit the rights of

42. INA § 201.

43. In this section, I use the term "immigrant" in a general sense, referencing both LPRs and non-immigrant visitors into the United States. As this article mostly concerns the claims of immigrants who want to build a life in their host country, the category of LPRs is the one that attracts primary attention, but this section also discusses the category of visitors.

44. See Michael Fix & Wendy Zimmermann, *After Arrival: An Overview of Federal Immigrant Policy in the United States*, in IMMIGRATION AND ETHNICITY: THE INTEGRATION OF AMERICA'S NEWEST ARRIVALS 251, 251 (Barry Edmonston & Jeffrey S. Passel eds., 1994) (describing federal immigration policy as liberal and "largely laissez-faire," thus placing the onus on states to facilitate immigrants' assimilation).

immigrants by significantly reducing the eligibility of aliens for both federal and state welfare benefits.⁴⁵

In regard to the second question, while states are allowed to adopt policies favorable to aliens, making them eligible for state provided benefits and providing for targeted means of inclusion,⁴⁶ the equal protection doctrine, which protects aliens and citizens alike, presents an obstacle to singling out aliens for treatment less favorable than that reserved for citizens.⁴⁷ While the federal government can draw lines between aliens and citizens without employing any judicial test more rigorous than rational basis for equal protection purposes,⁴⁸ state-based discrimination of aliens is considered inherently suspect and subject to strict scrutiny in court; so held the Supreme Court in *Graham vs. Richardson*.⁴⁹ In that case, the Court found that state statutes, which make access to welfare benefits dependent upon citizenship or upon a durational residency requirement for aliens, are unconstitutional because they conflict with the equal protection

45. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [PRWORA], 8 U.S.C.A. §§ 1601-45, § 1611(a) (West 2010) (declaring that aliens who are not permanent residents and do not belong to a few other privileged categories are not eligible for any kind of federal public benefit). Ineligibility for supplemental security income and food stamps is extended even to permanent residents. *Id.* § 1612(a). Federal means-tested public benefits are only available to qualified aliens, even permanent residents, five years after entry into the United States. *Id.* § 1613(a). State and local benefits are categorically foreclosed to aliens that are not permanent residents or non-immigrant aliens; for these latter two categories, states remain free to decide eligibility on their own. *Id.* §§ 1621-22.

46. See Nathan Glazer, *Governmental and Nongovernmental Roles in the Absorption of Immigrants in the United States*, in *PATHS TO INCLUSION, THE INTEGRATION OF MIGRANTS IN THE UNITED STATES AND GERMANY* 59, 67-70 (Peter H. Schuck & Rainer Münz eds., 1998) (describing Massachusetts' efforts between 1985 and 1991 to provide to immigrants as many benefits as allowable under federal law).

47. See U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

48. See *Mathews v. Diaz*, 426 U.S. 67, 81-83 (1976) (declining to strike down a Social Security Act provision denying eligibility for a supplemental insurance program to all aliens not admitted for permanent residence and present in the United States for at least five years because Congress is afforded great deference in immigration policy choices and the imposed requirements are not "wholly irrational").

49. 403 U.S. 365, 376 (1971) (applying strict scrutiny where state welfare laws discriminated against aliens).

clause.⁵⁰ Therefore, internal regulatory borders cannot mark areas of heightened exclusion.

Rights to family reunification provide an additional important test case for the relative role of federal and state governments in affecting the treatment of immigrants, and thus may provide additional insight on the two questions introduced above. Indeed, the notion of “family” relevant to family reunification rights may either be established in immigration law or borrowed from the field of family law;⁵¹ as family law is largely state-based in the United States, this might give states an opportunity to indirectly affect the condition of immigrants.

Federal and state determinations concur in deciding what qualifies as “family” for purposes of the concrete exercise of family reunification rights. The case of marriage, the legal link at the basis of the family relationship, provides a valuable example in this sense. The general rule is that marriage is valid for immigration purposes if it was valid in the place where it was celebrated.⁵² This rule admits of some exceptions, with regard to unions, which might be considered offensive to public policy in the place of destination:⁵³ for instance, polygamous marriages are considered to offend U.S. public policy.⁵⁴ Additionally, the Immigration and Nationality Act specifically disqualifies certain kinds of marriages for purposes of obtaining immigration rights.⁵⁵ As a result, the determination of

50. *Id.*

51. Compare INA § 203(a), 8 U.S.C.S. § 1153 (LexisNexis 2010) (defining family for purposes of family sponsorship in immigration law as sons, daughters, spouses, and siblings) with, e.g., *Wood v. Estate of Lewis*, 167 S.W. 666, 669 (Mo. Ct. App. 1914) (defining a family as “a collective body of persons who live in one home, under one head or management”).

52. E.g. CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 36.02.2(a) (rev. ed. 2003).

53. Developments in the Law, *The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2035 (2003); ALEINIKOFF ET AL., *supra* note 37, at 303.

54. See *Matter of Darwish*, 14 I. & N. Dec. 307, 308-09 (B.I.A. 1973) (denying a visa for the spouse of an LPR where the LPR was married to an additional woman and could not demonstrate termination of that marriage). The decision explicitly noted that while Jordanian law allows polygamous marriages, they “offend the public policy of the United States.” *Id.*

55. See INA § 101(a)(35) (excluding marriages where the purported spouses “are not [both] physically present” at the ceremony); ALEINIKOFF ET AL., *supra* note 37, at 303 (noting that the INA excludes “proxy marriages”).

whether a marriage is valid for immigration purposes has been described as a two-step process under which it must be determined: first, whether the marriage in question is valid under the relevant state law; and second, whether such marriage is also valid for purposes of the Immigration and Nationality Act.⁵⁶

In terms of which regulatory borders, internal or external, are relevant to determine the notion of “family” for reunification purposes, the rule has, in practice, cut both ways depending on the issue at hand. For same sex marriage, for instance, case law holds that, while some states now allow such unions, the Immigration and Nationality Act cannot be interpreted to include them.⁵⁷ Federal legislation adopted in 1996 seems to confirm this holding by explicitly defining marriage as a heterosexual union.⁵⁸ With respect to same sex marriage thus, it is federal law and external regulatory borders which are key. Incestuous unions also pose a challenge to the traditional concept of marriage: here, on the contrary, state categories and internal regulatory borders play an important role. In several relevant cases, courts have held that incestuous marriages may be valid for immigration purposes if they are valid in the place of celebration and in the state of destination, or if the cohabitation of the spouses in the state of destination would not give rise to criminal sanctions.⁵⁹ For instance, in the case of a U.S. citizen and a Portuguese citizen, uncle and niece, married in Portugal, where this kind of union is allowed, the Board of Immigration Appeals (“BIA”) held that the marriage conferred immigration status on the Portuguese spouse; indeed, in California, their state of proposed residence in the United States, they would not have incurred any criminal sanction for cohabiting.⁶⁰ Another relevant case touched upon the situation of two first cousins, one of U.S. nationality and one of Italian nationality, who got married in South Carolina in order

56. *Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982) (citing *United States v. Sacco*, 428 F.2d 264, 270 (9th Cir.), *cert. denied*, 400 U.S. 903 (1970)).

57. *See id.* at 1040 (finding no intention to include same sex unions in the INA or its legislative history).

58. Defense of Marriage Act of 1996 [DOMA] § 3(a)7, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006)); *see also* Developments in the Law, *supra* note 53, at 2006 (contrasting marriage equality developments in states with federal codification of traditional marriage).

59. GORDON ET AL., *supra* note 52, § 36.02.5(a).

60. *Matter of E.*, 4 I. & N. Dec. 239, 239 (B.I.A. 1951).

to avoid the prohibition of incestuous marriage in their residence state of Wisconsin. There, the BIA held that the marriage could not “confer immediate relative status” on the Italian spouse.⁶¹ While arguably these cases are marginal, they account for the curious way in which internal regulatory borders have come to impact federal immigration decisions and affect the status of immigrants.

The status of immigrants in the United States appears thus split between a predominant federal dimension and a more subtle, but not irrelevant, state one: different states might provide more or less welcoming environments and, in some cases, the state of settlement might also affect the ability of an immigrant to sponsor family members. While internal borders are thus generally thin in this respect, their thickness is irregular and tends to increase in unexpected ways.

2. Admission and Treatment of Immigrants in the E.U.

a. Admission

In the European Union, admission rights are the result of the overlap and combination of national and Community competences. A first set of European immigration rules has been adopted among a restricted group of member states through the intergovernmental frame of the Schengen agreement.⁶²

France, Germany, Belgium, the Netherlands, and Luxembourg entered into the Schengen Agreement in June 1985.⁶³ The participating states agreed on measures of immediate effect for relaxing controls on persons and goods crossing their internal borders;⁶⁴ other provisions in the agreement introduced

61. Matter of Zappia, 12 I. & N. Dec. 439, 439, 442 (B.I.A. 1967) (dismissing the case on the grounds that marriages entered into in other states for the purposes of “knowingly evad[ing]” the marriage provisions of Wisconsin law are null and void).

62. Agreement Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, June 14, 1985, 2000 O.J. (L 239) 13 [hereinafter Schengen Agreement].

63. *Id.*

64. *See id.* arts. 1-2, 11 (restricting border police to “simple visual surveillance” of persons instead of traffic stops, and agreeing to waive certain border checks of goods).

harmonization measures for issues relevant to the handling of common external borders.⁶⁵ Other member states joined the Schengen system in subsequent years, including Italy in 1990 and Spain and Portugal in 1991.⁶⁶ The 1985 Schengen Agreement was integrated and implemented with a 1990 Convention providing, among other things, for the complete abolition of controls at internal borders, with exceptions only for reasons of public policy and national security.⁶⁷

The Schengen system operated in a domain parallel to, and separate from, that of the European Treaties until the late 1990s. In 1992, the Treaty of Maastricht expanded the scope of the project of European integration by adding two intergovernmental “pillars” to the existing first pillar on the internal market: the second pillar focused on cooperation in foreign and security policy, and the third pillar concerned cooperation in justice and home affairs.⁶⁸ Significantly, the third pillar touched upon themes relevant to the concrete handling of borders and immigration.⁶⁹ The subsequent

65. *See id.* arts. 7-16 (coordinating police authorities and licensing systems for commercial transport, among other things).

66. David O’Keeffe, *The Schengen Convention: A Suitable Model for European Integration?* 11 Y.B. EUR. L. 185, 186 (1991) [hereinafter O’Keeffe, *The Schengen Convention*] (suggesting that the Schengen Agreement was motivated initially by the potential economic benefits that would flow from diminished border controls, but that its relevance evolved toward a more immigration- and asylum-centric focus).

67. Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, June 19, 1990, arts. 1-2, 2000 O.J. (L239) 19, 20 [hereinafter Schengen Implementing Convention]. *See generally* O’Keeffe, *The Schengen Convention*, *supra* note 66 (examining the two Schengen agreements and their impact on free movement of persons).

68. *See* Consolidated Version of the Treaty on European Union Title V-VI, Dec. 24, 2002, 2002 O.J. (C 325) 5, 13-28 (directing the Union to “define and implement a common foreign and security policy covering all areas of foreign and security policy” and to “develop[] common action . . . in the fields of police and judicial cooperation in criminal affairs”).

69. *See* David O’Keeffe, *Can the Leopard Change its Spots? Visas, Immigration and Asylum—Following Amsterdam*, in LEGAL ISSUES OF THE AMSTERDAM TREATY 271, 271-72 (David O’Keeffe & Patrick Twomey eds., 1999) (characterizing the new changes as “radically alter[ing]” the existing visa, asylum, and immigration structure); *cf.* GEORGIA PAPAGIANNI, INSTITUTIONAL AND POLICY DYNAMICS OF EU MIGRATION LAW 16-21 (2006) (“[I]t has been rightly

1997 Treaty of Amsterdam introduced a new Title IV in the E.C. Treaty that “communitarized” borders and immigration policy by introducing a new Title IV devoted to this in the E.C. Treaty.⁷⁰ The Treaty of Amsterdam also incorporated the Schengen *acquis*—the original agreement and convention and all the measures adopted thereunder—into the Treaties system in the form of a separate, attached protocol.⁷¹ This was an important step forward as it made measures adopted in the fields of immigration and handling of borders subject to ordinary Community procedures, to judicial review, and to European Parliament challenges.⁷²

The evolution of the Schengen system and the expansion of the Title IV competence of the European Community have certainly led to the thinning of internal regulatory borders in matters of admission, but not to the extent of replacing member states’ choices in this field with Community choices. For instance, the Schengen agreements provide for uniform visas for short stays in the Schengen area, but the issuance of visas for stays exceeding three months remains a competence of the member states.⁷³

Under Title IV of the E.C. Treaty, instruments have been adopted which provide for uniform terms of admission for certain categories of entrants. This is the case for students, unpaid trainees, and volunteers under a 2004 directive, and for researchers under a 2005 directive.⁷⁴ Indeed, where instruments adopted on the basis of Article 63 of the E.C. Treaty provide for minimum standards for the grant and withdrawal of refugee status and for the reception of asylum seekers, there is also in place a certain level of harmonization in

argued [that] the . . . third pillar was much more of a coordination of the work of all the pre-existing groups, rather than a genuinely new framework.”).

70. Treaty of Amsterdam art. 1(12).

71. Protocol Integrating the Schengen *Acquis* into the Framework of the European Union, 1997 O.J. (C 340) 93.

72. Other measures have contributed to the advancement of immigration law in the European Union, as well. For example, member states recently ratified the Treaty of Lisbon, which expands the use of the ordinary legislative procedure, based on qualified majority voting, in the field of borders and immigration. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 2, Dec. 13, 2007, 2007 O.J. (C306) 43.

73. Schengen Implementing Convention, *supra* note 67, tit. II, art. 5.

74. Council Directive 2004/114, *supra* note 3, pmb. ¶ 2; Council Directive 2005/71, pmb. ¶ 5, 2005 O.J. (L 289) 15.

regard to admission for humanitarian reasons.⁷⁵ For these categories of people, arguably, internal regulatory borders are thinning.

With respect to economic migration, though, internal borders remain significantly thick. However, several Community instruments have called for common standards in this field, as well.⁷⁶ In May 2009, a long expected directive on admission of TCNs for highly qualified employment entered into force.⁷⁷ The directive establishes a fast-track procedure and favorable conditions for the admission of TCNs for purposes of employment that requiring a higher education or at least five years of prior professional experience.⁷⁸ According to the directive, qualifying applicants shall receive a blue card, issued by the member states, which will allow them to enter and re-enter the relevant member state.⁷⁹ The directive is limited to an arguably narrow sector of labor migration, but it induces a concrete thinning impulse for internal borders in the field of economic migration.

The European scenario of admission thus appears to be one in which internal regulatory borders are gradually thinning, but in a spotty and irregular way, and to the benefit of only certain categories of entrants. The E.U. immigration policy concurs with the immigration policies of the member states, making multiple and overlapping categories of admission and thinning segments of

75. See Council Directive 2005/85, pmb. ¶ 3, 2005 O.J. (L 326) 13 (stressing “common standards for fair and efficient asylum procedures in the Member States”); Council Directive 2004/83, pmb. ¶ 6, 2004 O.J. (L 304) 12 (addressing the importance of “common criteria” for those seeking international protection, as well as “ensur[ing] that a minimum level of benefits is available for these persons” throughout the European Union); Council Regulation 343/2003, pmb. ¶ 2, 2003 O.J. (L 050) 1 (setting criteria for evaluation of asylum applications within a “Common European Asylum System,” and asserting that all member states “are considered as safe countries for third-country nationals”).

76. See *Commission Proposal for a Council Directive on the Conditions of Entry and Residence of Third Country Nationals for the Purpose of Paid Employment and Self-Employed Economic Activities*, at 3-4, COM (2001) 386 final (Jul. 11, 2001) (proposing, unsuccessfully, standards for admission of TCNs for employment purposes); *Commission Green Paper on an EU Approach to Managing Economic Migration*, at 5, 12, COM (2004) 811 final (Jan. 11, 2005) (detailing rationales for harmonization in economic immigration provisions).

77. Council Directive 2009/50, *supra* note 3.

78. *Id.* arts. 2(g), 5.

79. *Id.* art. 7.

internal regulatory borders, but with the contextual persistence of other thick ones.

b. Treatment of Immigrants

As underlined above, admission rights have a spotty character in the European Union, and the condition of admitted TCNs also tends to be spotty throughout Europe: TCNs' specific status, their residence permits, and their family status will depend on whether they were admitted under national or domestic law. The fragmented, yet persisting, internal regulatory borders for admission extend their long shadow to color also the status of TCNs even after they have been admitted.

Thus, in order to detect how relevant internal regulatory borders are in respect to their treatment and in the course of their possible escalation to membership, the questions to be asked in regard to immigrants in Europe are slightly different from the ones posed for the United States: do provisions of European law somehow exercise a pull towards equalizing the status of differently admitted immigrants throughout Europe by bringing them under a European umbrella of rights and protections? Do these provisions somehow constrain the freedom of the member states to discriminate between their own citizens, and TCNs? The answers to these questions lay the foundation for understanding whether there is a common European status for immigrants and whether the thickness of internal regulatory borders is correspondingly decreasing.

First indications of a European commitment to provide commonly for the status of TCNs can be found in the previously mentioned conclusions of the European Council meeting in Tampere in 1999: approximation of the status of TCNs to the status of European citizens became, in this context, a Community objective.⁸⁰ In part as a way to give body to the Tampere agenda, two directives were adopted in 2003 providing for rights of long-term residence and rights to family reunification for TCNs.⁸¹ As a result of this

80. See Presidency Conclusions, *supra* note 14, ¶¶ 18, 21 (arguing that TCNs need "legal status" and "rights and obligations comparable to those of E.U. citizens" in order to integrate).

81. See Council Directive 2003/86, *supra* note 3 (imploping member states to extend family reunification rights to TCNs where they legally reside within a

legislation, there is now a minimum of equal rights that all entering TNCs enjoy, notwithstanding the part of the Union in which they have settled. The codification and implementation of these European law rights for TCNs correspondingly reduces the ability of the member states to autonomously intervene on the status of immigrants, differentiating in their rights and residence conditions.

In terms of residence, under the new regime, TNCs are entitled to an E.U.-law long-term residence permit after five years of lawful residence in one member state, provided that they satisfy certain resources requirements.⁸² While the European long-term residence permit *per se* emphasizes the European dimension in the status of an immigrant, its regulation surrenders to the magnetism of internal borders in some relevant respects: to qualify for this permit, a TCN needs to have resided for five years, not in the European Union at large, but in the same member state: cumulating periods of residence in different member states is not an option.⁸³ Additionally, the permit of permanent residence so obtained, and the pertaining rights, regard exclusively the member state in which the permit was granted.⁸⁴

In the European case, as in the U.S. one, the field of family reunification might provide insight with respect to the role of European law relative to that of member states in shaping the status of immigrants. With regard to family reunification, European law provides for relevant rights to the benefit of both family members of TCNs and of TCN family members of migrant European

member state and have family member seeking to enter the European Union, but leaving the decision of what constitutes “family” for the purposes of family reunification to each individual member state); Council Directive 2003/109, 2004 O.J. (L 16) 44 (addressing long-term resident TCNs).

82. Council Directive 2003/109, *supra* note 81, arts. 4, 5.1(a).

83. *Id.* art. 4. The recently adopted blue card directive provides for an exception: TCNs who have been admitted to a member state for purposes of highly qualified employment under the terms of the directive may move to a second member state for purposes of highly qualified employment after eighteen months of residence in the first one, and they can subsequently cumulate, on certain conditions, the residence time spent in different member states for purposes of obtaining the E.U. long-term residence permit. Council Directive 2009/50, *supra* note 3, art. 16.2.

84. See Council Directive 2003/109, *supra* note 81, art. 14 (elaborating that, despite exclusivity of permit, long-term residence status entitles a TCN to move to and reside in a second member state).

citizens.⁸⁵ European law binds the member states to different extents, however, in respect of each one of these two categories; often, indeed, what is a right for family members of migrant European citizens and contextually an obligation for the member states is a mere possibility for the family members of TCNs, and contextually an option for the member states.⁸⁶

In the E.U., as in the U.S., the actual thickness of internal borders in this field depends on the relative roles of European and of domestic law in determining who qualifies as family member and which unions are considered equivalent to marriage for purposes of family reunification. European law includes definitions of family members for purposes of family reunification, which leave some flexibility to the member states in drawing the precise boundaries of the relevant categories. In particular, concrete identification of the kind of unions that qualify for purposes of family reunification is often deferred to national legislation.

The two directives touching upon family reunification rights of TCNs and Union citizens include a definition of family members; under Directive 2003/86, “family members” are the TCN sponsor’s spouse and minor children.⁸⁷ Member states may, but are not required to, authorize the entry and residence of a larger category of family members at their discretion;⁸⁸ in particular, they may decide to extend these rights to unmarried partners in “duly attested stable

85. Parliament and Council Directive 2004/38, 2004 O.J. (L 158) 77 (relating to TCN family members of European citizens); Council Directive 2003/109, *supra* note 81 (relating to TCN family members of TCNs).

86. Many of the prospective rights for family members of TCNs are expressed in a way that allows member states to decide whether or not to pursue those rights when enacting legislation. Member states may choose whether to impose entry requirements specified in the directive, decide to refuse entry on grounds of public health, public policy, or public security, and decide to extend the waiting period imposed on the sponsoring TCN. *See* Council Directive 2003/86, *supra* note 3, art. 6; Adam Luedtke, *The European Union Dimension: Supranational Integration, Free Movement of Persons, and Immigration Politics*, in IMMIGRATION AND THE TRANSFORMATION OF EUROPE, *supra* note 7, at 419, 437 (suggesting that flexible legislative language resulted from member states’ negotiations to avoid “hard legal obligations” to TCNs).

87. Council Directive 2003/86, *supra* note 3, art. 4.

88. *Id.* art. 4.2 (allowing member states to authorize entry and residence of first-degree relatives and adult unmarried children unable to provide for themselves due to health).

long-term relationship[s]” or in registered partnerships.⁸⁹ A recital of the directive adds that rights to family reunification “should be exercised in proper compliance with the values and principles recognized by the Member States”: protection of these values may justify, for instance, restrictive measures against the family reunifications of polygamous households.⁹⁰

Directive 2004/38 squarely includes within the scope of the definition of family members both spouses of an E.U. citizen and registered partners based on the legislation of a member state, but only if the host member state treats registered partnerships as equivalent to marriage.⁹¹ Both instruments are thus deferential to the autonomous choices of the member states.

As to the issue of same sex marriages, European law includes no specific provision demanding that the member states recognize these types of unions for purposes of immigration and residence rights.⁹² The two directives on family reunification only suggest, in their preambles, that member states implement the directives without discriminating among beneficiaries on the ground of sexual orientation, among others.⁹³

National legislation on same sex unions is still vastly heterogeneous throughout Europe, where only four E.U. member states recognize same sex marriages; other member states have introduced civil unions or registered partnerships among same sex

89. *Id.* art. 4.3.

90. *Id.* pmb. ¶ 11.

91. Parliament and Council Directive 2004/38, *supra* note 85, art. 2.2(b).

92. Consolidated Version of the Treaty Establishing the European Community, art. 13, 2002 O.J. (C 325) 33, 43 [hereinafter Consolidated EC Treaty] (granting the Community the competence to adopt legislation prohibiting discrimination on various grounds, including sexual orientation, though the Community has not exercised this competence in the immigration field); *see* Trybunał Konstytucyjny [Polish Constitutional Tribunal], Poland's Membership in the European Union (The Accession Treaty), No. K 18/04, Judgment, ¶ 30 (May 11, 2005), available at http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf (interpreting EC Treaty Article 13's prohibition of discrimination based on sexual orientation as referring to individual persons and not the institution of marriage).

93. Parliament and Council Directive 2004/38, *supra* note 85; Council Directive 2003/86, *supra* note 3.

partners, which confer some rights and benefits analogous to those of marriage.⁹⁴

The Court of Justice, pointing at this heterogeneity of positions among the member states, has so far consistently denied the equivalence of marriage and same sex unions.⁹⁵ In the *Grant* case, the Court made clear that “. . . in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex.”⁹⁶ This position was reiterated in *D. v Council*, where, in upholding the Council determination that a same sex partnership cannot be treated as equivalent to marriage for purposes of a housing allowance awarded to Community officers, the Court insisted that “[i]t is not in question that, according to the definition generally accepted by the Member States, the term ‘marriage’ means a union between two persons of the opposite sex.”⁹⁷ On the other hand, the Court extensively has applied non-discrimination provisions on the basis of sexual orientation to grant same sex partners benefits that are tied to an employment relationship.⁹⁸ That said, the Court has taken care to

94. See *Sweden Allows Same-Sex Marriage*, BBC NEWS, Apr. 2, 2009, <http://news.bbc.co.uk/2/hi/7978495.stm> (recognizing Sweden as the fourth E.U. member state to legalize same sex marriage, after the Netherlands, Belgium, and Spain). See generally Allison O'Neill, *Recognition of Same-Sex Marriage in the European Community: The European Court of Justice's Ability to Dictate Social Policy*, 37 CORNELL INT'L L.J. 199, 200 (2004) (summarizing the legislation of different member states recognizing different forms of same sex partnership).

95. See, e.g., Case C-249/96, *Grant v. S.W. Trains Ltd.*, 1998 E.C.R. I-621, ¶ 35 (holding that the refusal of an employer to grant travel concessions to the same sex spouse of an employee, when such travel concessions are granted to the opposite sex spouse of an employee, does not constitute discrimination).

96. *Id.*

97. Joined Cases C-122/99 P & C-125/99 P, *D. v. Council of the European Union*, 2001 E.C.R. I-4319, ¶¶ 34-37 (acknowledging that, since 1989, many member states have introduced statutory arrangements recognizing various forms of same sex unions, but underscoring that these arrangements vary greatly and are, in any case, regarded as distinct from marriage).

98. See Case C-267/06, *Maruko v. Versorgungsanstalt der deutschen Bühnen*, 2008 E.C.R. I-1757, ¶ 80 (citing Directive 2000/78 as precluding legislation that denies a same sex partner a pension's survivor's benefits equivalent to those that a spouse would receive).

specify that it is for the member states to regulate civil unions and descending benefits.⁹⁹

Thus, the member states retain ample autonomy in regulating the relevant issues. E.U. institutions have not ventured beyond non-binding declarations and policy suggestions,¹⁰⁰ while the last word as to what does and does not qualify as marriage, and ultimately what qualifies as family, stays with the member states.

This overview of relevant provisions suggests that European law has influenced the status of immigrants in the European Union by setting some common standards for their rights of residence and of reunification with family members; in that respect, internal borders are thinning in Europe. However, in other respects, such as in terms of what qualifies as family, internal borders remain thick and well marked in a manner comparable to the United States.

As mentioned above, determining just how relevant internal borders are for the status of immigrants in the European Union entails another consideration: other than through specific provisions for the treatment of TCNs, does European law constrain member states' ability to discriminate between their own nationals and TCNs? European provisions on equal treatment can provide an answer in this sense. Article 12 of the E.C. Treaty prohibits discrimination on the basis of nationality.¹⁰¹ A good part of the case law applying this principle focuses, however, on situations involving nationals of different member states, rather than nationals of third countries.¹⁰² In addition, under the TCN legislation, long-term residents benefit from a guarantee of treatment equal to nationals of the member state where they reside.¹⁰³ This non-discrimination right

99. *Id.* ¶ 59.

100. *See, e.g.*, European Parliament Resolution of 26 April 2007 on Homophobia in Europe, 2008 O.J. (C74E) 776 (condemning hate speech against homosexuals and reiterating the Parliament's "request to the Commission to ensure that discrimination on the basis of sexual orientation in all sectors is prohibited").

101. Consolidated EC Treaty art. 12.

102. *See, e.g.*, Case 71/76, *Thieffry v. Conseil de l'ordre des avocats à la cour de Paris*, 1977 E.C.R. 765 (relating to the conditions for admittance to the legal profession in Paris); *see also* Case 186/87, *Cowan v. Trésor Public*, 1986 E.C.R. 195 (regarding the right to travel to a member state as a recipient of services).

103. Council Directive 2003/109, *supra* note 81, art. 11 (encompassing within equal treatment equal access to employment, education, social security, tax benefits, and access to goods, services, and housing).

becomes effective, however, only when the TCN has acquired long-term residence status.¹⁰⁴ Pending qualification as long-term residents, TCNs can, at most, benefit from the provisions of the race directive and framework directive on equal treatment, which apply to “all persons” within the scope of Community power.¹⁰⁵ Considering the kinds of discrimination that these instruments target and their fields of application, they are likely to constrain the ability of member states to extend to TCNs treatment less favorable than that to their own nationals.¹⁰⁶ Yet, both directives explicitly exclude from their scope differences in treatment on the basis of nationality and, as a result, what member states can manage to classify as a difference based on nationality, rather than on race or ethnicity, should pass muster under the directives.¹⁰⁷

One of the first judicial applications of the race directive seems, however, to bypass this textual limitation. In a 2008 case, a business owner’s publicly rendered statement expressing his intention not to hire immigrants because his customers would not want immigrant workers in their houses was subject to scrutiny under the race directive, and was found to conflict with the provisions of the instrument.¹⁰⁸ The statements at issue referred to immigrants but did not include any explicit racial or ethnic connotation.¹⁰⁹ Notwithstanding this, neither the Advocate General in the case, nor the Court, considered the problem of the explicit exclusion of discrimination on the basis of nationality from the scope of the

104. *Id.*

105. Council Directive 2000/43, art. 3, 2000 O.J. (L 180) 22 (explicitly extending the reach of the Directive’s equal treatment measures to “all persons, as regards both the public and private sectors”); Council Directive 2000/78, art. 3, 2000 O.J. (L 303) 16 (same).

106. *See* Council Directive 2000/43, *supra* note 105, art. 3 (aiming to implement equal treatment, irrespective of racial and ethnic origin, to sets of rights connected to the labor market); Council Directive 2000/78, *supra* note 105, arts. 1, 3 (targeting fields of discrimination similar to those covered in the race directive, but instead focusing on discrimination on the basis of religion, belief, disability, age, or sexual orientation).

107. Council Directive 2000/43, *supra* note 105, art. 3.2; Council Directive 2000/78, *supra* note 105, art. 3.2.

108. Case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV, 2008 E.C.R. I-5187, ¶ 28.

109. *See id.* ¶¶ 3-4, 18 (reporting that the refusal to hire did not refer to any racially or ethnically distinct class).

directive. The Court's reading suggests a silent assumption that discrimination against immigrants implies racial or ethnic discrimination, even if immigrants are singled out at first sight only for their nationality. If further case law confirms this expansive reading of the race directive, it will become an important tool for European law to constrain member states' ability to treat immigrants less favorably than their own citizens. Internal borders would, in this case, further thin with respect to the treatment of immigrants. This is, however, a conjecture that only future case law can confirm. For now, non-discrimination legislation at the European level certainly limits, to some extent, member states' discretion in reserving benefits and rights for their own nationals, and in singling out TCNs for unfavorable treatment.¹¹⁰ In any event, such limitations do not reach the breadth of the *Graham v. Richardson* doctrine in the United States.¹¹¹

The European Union has moved towards setting common standards for the treatment of its immigrants. In doing so, it has certainly induced a thinning impulse for regulatory internal borders. However, the tying of benefits and opportunities to residence in a single member state, the discretion that member states retain in implementing family reunification provisions, and their ability to treat TCNs less favorably than their own citizens preserve an important role for internal regulatory borders. In light of all of this, the best characterization of this aspect of internal borders with respect to the treatment of immigrants in the European Union is, perhaps, one that highlights their "optional thinning."

110. See Charter of Fundamental Rights of the European Union, art. 21, 2007 O.J. (C 303) 1 (listing a more extensive and less constrained list of prohibited grounds of discrimination, such as genetic features, language, and birth, which might change this conclusion if the European Charter of Fundamental Rights becomes binding law).

111. *Graham v. Richardson*, 403 U.S. 365 (1971) (considering state-based discrimination of aliens inherently suspect and subject to strict scrutiny in court); see also text accompanying notes 49-54 (discussing the *Graham* decision, and comparing it to case law on the discrimination of aliens by the federal government in the United States).

B. NATURALIZATION

Rules on naturalization identify, in the pool of admitted immigrants, those eligible for full inclusion in the host community through the achievement of citizenship. Also, these rules may be mapped on different notions of internal borders, depending in large part on the autonomy that the states retain in setting their own requirements for, and in making their own decisions about, inclusion and exclusion. Setting the requirements for naturalization and deciding on the grant or denial of citizenship may be seen as important ways for individual states to express their distinctiveness, bound their community, and safeguard their own identity.

1. Naturalization in the United States

The Fourteenth Amendment of the U.S. Constitution indicates that aliens are naturalized into federal citizenship and, as a consequence, also obtain the citizenship of the state in which they reside.¹¹² Rules on nationality and naturalization are decided upon at the federal level.¹¹³ In the aftermath of the American Revolution, each state was free to set forth its own criteria according to which their residents, previously classified as British subjects, could re-qualify as citizens of the new independent polities.¹¹⁴ While for the entire first century of constitutional history of the United States the individual states maintained an admission power,¹¹⁵ they rapidly lost the naturalization power to the federal government: the Constitution of the United States, in fact, grants Congress the power to establish a uniform rule of naturalization.¹¹⁶ In the years immediately following the adoption of the Constitution, Congress began to exercise its immigration

112. U.S. CONST. amend. XIV, § 1 (“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.”). U.S. citizens who are not resident in a U.S. state lose their state citizenship, meaning they are only U.S. citizens. Among the concrete results of this is that they cannot sue in federal courts on the basis of diversity jurisdiction, but rather must rely on state courts. CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3621 (3d ed. 1998).

113. U.S. CONST. art. 1, § 8.

114. See JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870* 213-16 (1978) (suggesting that, for states, an individual’s participation in the cause of the Revolution generally proved allegiance to republican ideals).

115. See Naturalization Act of 1790, 1 Stat. 103.

116. U.S. CONST. art. 1, § 8.

power by adopting several subsequent naturalization acts, and, between 1790 and 1952, extended or reduced the required residence period to qualify for naturalization and enacted more or less stringent requirements in line with the political moods of the time.¹¹⁷ While the states lost the power to legally include, they retained a voice in determining the rights of naturalized citizens; as a result, rights could potentially differ from state to state, depending on the relative weight of state and federal citizenship in the early United States.¹¹⁸ With federal citizenship gradually overshadowing state citizenship, remnants of state power in this field were rapidly lost, and internal regulatory borders with respect to naturalization have been thin ever since.

Under current rules, legal permanent residents are entitled to naturalize after five years of continuous residence in the United States,¹¹⁹ or three years for spouses of U.S. citizens.¹²⁰ All applicants for naturalization must be at least eighteen years of age and they

117. The first Naturalization Act was passed in 1790, see *supra* note 115, and required a minimum residence of two years in the United States in order to qualify for naturalization. This requirement was increased to five years with a 1795 act. Significantly harsher rules were introduced with the Alien Act of 1798, passed by the Federalist government, which increased the minimum required period of residence for naturalization to fourteen years. The Republican Party eventually passed another act in 1801, bringing the threshold residence for naturalization back to five years. See generally Bernard, *supra* note 31 (summarizing the history of Congress' exercise of its immigration power).

118. The relative weight of federal and state citizenship has changed significantly since the eighteenth century. Neither the Articles of Confederation, nor the Constitution of 1787, contemplated a definition of national citizenship, and state citizenship was initially the most important legal status. The twist in the relationship between state citizenship and U.S. citizenship came with the Civil War. In the decades leading up to the war, the idea that federal citizenship ensued from state citizenship created tensions and difficulties, especially in the Southern states, which would not accept the practice of non-slave states' admission of free black men to state citizenship. The post-war constitutional amendments brought about the express prohibition of slavery and the codification of the relationship between state and federal citizenship. See Reed Ueda, *Naturalization and Citizenship*, in HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS 734, 738 (Stephan Thernstrom et al. eds., 1980) (recounting the issues of federalism presented by the citizenship debate in the lead-up to and aftermath of the Civil War); see also U.S. CONST. amend. XIV, § 1 (providing for both federal and state citizenship).

119. INA § 316(a).

120. *Id.* § 319(a).

must demonstrate proficiency in reading, writing, and speaking the English language.¹²¹ They must prove that they have some knowledge of U.S. history and civics,¹²² and they must be of good moral character.¹²³ Prospective citizens must show, in particular, that they are “attached to the principles of the Constitution of the United States, and well disposed to the good order and the happiness of the United States.”¹²⁴ These constitutional principles have been found to include, among others, the protection of life, liberty, property, the principle of representative government, and hostility to dictatorship and minority rule.¹²⁵

More generally, this requirement implies an understanding of the process of law-making in the country and a disposition to abide by the laws that are so enacted, together with the understanding and acceptance of the means of change that the Constitution prescribes and allows.¹²⁶

In addition to the aforementioned requirements, prospective citizens must swear allegiance to the United States according to an oath, in which they undertake to submit themselves to the U.S. Constitution and to renounce any previous allegiance to a foreign

121. *Id.* §§ 312(a)(1), 334(b); *see also* GORDON ET AL., *supra* note 52, § 95.03[4](b) (clarifying that exceptions are granted to persons over fifty years of age and lawfully admitted for permanent residence for periods totaling twenty years, or to persons over fifty-five years of age and having lived in the United States in legal permanent residence status for over fifteen years).

122. INA § 312(a)(2); *see* ALENIKOFF ET AL., *supra* note 37, at 66 (providing a set of sample questions for the required oral exam, which include “Who elects the President of the United States?” and “What is the Bill of Rights?”).

123. INA § 316(a); *see* GORDON ET AL., *supra* note 52, § 95.04[1](a) (noting that moral character is dependent on fluctuating social norms, but should still be assessed in relation to the “moral standards of the average person”).

124. INA § 316(a).

125. *Stasiukevich v. Nicolls*, 168 F.2d 474, 478 (1st Cir. 1948) (quoting *Schneiderman v. United States*, 320 U.S. 118, 181 (1943) (Stone, C.J., dissenting)).

126. Disobedience of the laws in itself, however, has not been found sufficient to show a disposition contrary to the good order of the United States. *See Yin-Shing Woo v. United States*, 288 F.2d 434, 435 (2d Cir. 1961) (holding that repeated disobedience to parking laws did not sufficiently show a disposition contrary to the ‘good order’ of the United States); *see* GORDON ET AL., *supra* note 52, § 95.04.2.b (discussing controversial, and subsequently overruled, Supreme Court decisions holding that an immigrant unwilling to take up arms to defend the United States could not be “attached and favorably disposed to this country”).

government.¹²⁷ While this does not necessarily imply rescission of all emotional or rational ties to cultural and political origins that the applicant is leaving behind, this profession of allegiance entails embracing an ideal of life that is shared among the several united states. Gaetano Salvemini, an Italian politician and anti-fascist, effectively captures the intent of the oath in a description of his own experience of naturalization in the United States:

When I took my oath I felt that really I was performing a grand function. I was throwing away not my intellectual and moral but my juristic past. I threw it away without any regret. The Ethiopian war, the rape of Albania, the Spanish crime, and this last idiotic crime, had really broken my connection with sovereigns, potentates, and all those ugly things which are enumerated in the formula of the oath. It is a wonderful formula. Your pledges are only juridical and political. You are asked to sever your connections with the government of your former country, not with the people and the civilization of your former country. And you are asked to give allegiance to the Constitution of your adopted country, that is, to an ideal of life.¹²⁸

The prospective citizen in the U.S. is thus asked to commit to the common values of the country, to the Constitution and to a shared set of ideals. Acquaintance and familiarity with the community of a specific state have little role here, and this points to the thin character of internal definitional borders. Thus, when it comes to naturalization of immigrants, internal borders in the United States are transparent, both in their regulatory and definitional value.

2. Naturalization in the European Union

Under the definition of European citizenship, found in article 17 of the E.C. Treaty, everyone who is a national of a member state of the European Union shall be a European citizen.¹²⁹ Access to European citizenship is thus mediated by the acquisition of nationality of a member state.

127. INA § 337(a); see ALEINIKOFF ET AL., *supra* note 37, at 80 (providing the current version of the oath).

128. *Baumgartner*, 322 U.S. at 675 (internal citation omitted).

129. Consolidated EC Treaty art. 17, §1.

Each member state sets forth its own naturalization rules, which tend to be widely different in the quality and quantity of requirements.¹³⁰ First, every member state requires that an applicant for naturalization has resided legally on the territory of that member state for a certain number of years. The length of the residency requirement varies from state to state, from a minimum of three to a maximum of ten years.¹³¹ While in some member states double nationality raises no issues, in others the acquisition of citizenship is conditional upon renunciation, release, or loss of any previous citizenship.¹³² Wealth is also a requirement for naturalization in some cases: some member states demand that prospective citizens have sufficient and stable resources to maintain themselves and possibly their families.¹³³ Children of immigrants born on the territory of a member state also face widely different options with respect to the achievement of citizenship; some naturalization statutes allow for children of immigrants to acquire nationality at birth if at least one

130. See Francesca Strumia, *European Citizenship: Mobile Nationals, Immobile Aliens, and Random Europeans*, in *CITIZENSHIP IN AMERICA AND EUROPE: BEYOND THE NATION-STATE?* 45, 54 (Michael S. Greve & Michael Zöller eds. 2009) (analyzing various requirements for naturalization in different member states, such as length of residency or multiple nationalities).

131. See Code de la Nationalité Belge [Code of Belgian Nationality] § 5, art. 19 (2006), available at http://www.juridat.be/cgi_loi/loi_F.pl?cn=1984062835 (requiring three years of residence on a non-temporary residence permit); Irish Nationality and Citizenship Act, 1956, art. 15(1)(c) (Act No. 26/1956) (Ir.), available at <http://www.inis.gov.ie/en/INIS/consolidationINCA.pdf/Files/consolidationINCA.pdf> (requiring a residence period of one continuous year immediately before the date of the application, but a total of four years); Law n. 91/1992, Nuove Norme sulla Cittadinanza art. 9(f), Feb. 5, 1992, Gazz. Uff. No.38, Feb. 15, 1992 (Italy), available at http://www.interno.it/mininterno/export/sites/default/it/sezioni/servizi/legislazione/cittadinanza/legislazione_30.html (indicating a ten-year residence requirement).

132. See, e.g., Consolidated Act on Danish Nationality §§ 4(A)1, 7, No. 422/2004 (Den.), available at http://www.nyidanmark.dk/NR/rdonlyres/52136BD4-FA62-4818-AABB-5709AABAC6A6/0/consolidation_act_no_422_7_june_2004.pdf (requiring proof of the loss of existing nationalities as a condition to acquiring Danish nationality).

133. See Bundesgesetz über die Österreichische Staatsbürgerschaft of 1985 [Staatsbürgerschaftsgesetz StbG] [Law on Austrian Citizenship], BGBl. No. 311/1985, as amended 2008, BGBl. I 4/2008 and BGBl. I 104/2008) § 10, ¶ 1 (7), available at http://www.bmi.gv.at/cms/BMI_Staatsbuergerschaft/Staatsbuergerschaftsgesetz_1985.doc (requiring availability of means of support for naturalization); see also Staatsangehörigkeitgesetz as amended by Law of Feb. 5, 2009, BGBl. I, at 158, art. 1 § 10 (1) 3 (same).

parent has previously resided in the state of birth.¹³⁴ Others allow children born on the territory of the state to naturalize even independently of their parents once they reach majority.¹³⁵ Even after naturalization, the constraints immigrants face in the European Union are different depending on where they obtained the national citizenship that, in turn, grants them automatic European citizenship. If they naturalized in Malta or in Cyprus, for instance, they face the risk of losing their national citizenship by virtue of the rules attendant to that naturalization. For example, if they remained absent from the Maltese or Cypriot territory for periods of seven years or longer without a positive statement of the intent to remain citizens, they would lose their national citizenship, and indeed such immigrants would risk losing also their European citizenship.¹³⁶ As such, internal regulatory borders remain thick: European citizenship is singular, but the ways toward acquiring it are several and disparate. The opportunities for an immigrant to obtain European citizenship through the achievement of a member state citizenship will vary widely depending on where he first landed and where his admission documents allow him to plan his European life.

Acquisition of citizenship marks not only a change in legal status, but also the admission into a political and affective community that claims a right to self-definition. This is why many naturalization laws also include integration requirements, which target an applicant's familiarity with cultural, linguistic, and constitutional features of the receiving polity:¹³⁷ the content and scope of these requirements in European naturalization laws may illustrate whether the member states of Europe consider themselves branches of a

134. Irish Nationality and Citizenship Act, 1956, art. 6(a).

135. See *Nouve Norme sulla Cittadinanza* art. 4(2) (allowing children who have resided in Italy continuously since birth to naturalize independently of their parents upon reaching majority).

136. Republic of Cyprus Citizenship Law 1967 art. 8(4), (Act No. 43 of 1967 as amended 1999), *translation available at* http://www.coe.int/t/e/legal_affairs/legal_co-operation/foreigners_and_citizens/nationality/documents/national_legislation/Cyprus-The%20Republic%20of%20Cyprus%20Citizenship%20Law%201967.pdf; Maltese Citizenship Act art. 14(2)(d) (Act XXX/1965 as amended 2007), *available at* http://docs.justice.gov.mt/lom/legislation/english/leg/vol_4/chapt188.pdf.

137. See, e.g., Code Civil (C.CIV.) art. 21-24 (Fr.), *translation available at* http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm (requiring proof of language competence and assimilation into the community before naturalization).

common European polity, or rather as distinct and independent polities. In other words, the focus of integration requirements provides a hint of the extension of the idea that each member state harbors of itself; where the integration requirements no longer lay claims on potential citizens, the definitional borders of the polity have been passed.

Three kinds of integration requirements may be distinguished in European naturalization laws: 1) language requirements; 2) requirements of knowledge of history, culture, and the laws of a polity; and 3) requirements to render a solemn declaration of allegiance. Of the three kinds of integration requirements, the definitional value of language can, perhaps, be more easily reduced to a matter of pragmatism: in most skill cases, familiarity with the local language is a prerequisite for an applicant to properly function in his future society of belonging, to receive an education, to work in the host society, and to interact with its members. On the other hand, language is also the gate to the culture, literature, collective memory, and, more generally, the collective heritage of the host polity. The prospective European faces not one language, but twenty-four, and not one culture, but twenty-seven. The fragmentation of his inclusion experience begins here, where he is called upon to prove that there is one society in the European Union whose language he speaks and whose literature he can read.

Some member states also require that applicant citizens show knowledge of the history, the culture, and/or the Constitution and relevant laws of their country.¹³⁸ Rarely, if ever, do requirements of this kind include a reference to Europe. One such reference can be found in Austrian legislation, which provides that the evaluation of a foreigner's integration into Austria entails considering his attitude towards the "fundamental values of a European democratic state and its society."¹³⁹

138. *See id.* (requiring proof of assimilation); *see also* Staatsangehörigkeitsgesetz (StAG) [Citizenship Law], Jul. 22, 1913, BGBl. III 102-1, as amended by Law of Feb. 5, 2009, BGBl. I, at 158, art. 1, § 10(1)7, available at <http://bundesrecht.juris.de/rustag/BJNR005830913.html> (requiring a familiarity with the laws of Germany).

139. *See* Bundesgesetz über die Österreichische Staatsbürgerschaft of 1985 [Staatsbürgerschaftgesetz StbG] [Law on Austrian Citizenship], BGBl. No. 311/1985, as amended 2008, BGBl. I 4/2008 and BGBl. I 104/2008) § 11,

Many naturalizing immigrants are also required to render declarations of allegiance. The text of many of these oaths emphasizes requirements of loyalty to the naturalizing state and commitment to protect its interest.¹⁴⁰ For instance, the prospective Lithuanian has to swear, “to be loyal to the Republic of Lithuania, to observe the Constitution and laws of the Republic of Lithuania, to defend the independence of the State of Lithuania, the territorial integrity of the state and the constitutional order.”¹⁴¹ He also swears to “respect the state language of Lithuania, its culture and customs, to strengthen the basic principles of democracy and the rule of law in Lithuania.”¹⁴² Not far away, in Latvia, a citizen-to-be would rather say:

I . . . , pledge that I will be loyal only to the Republic of Latvia. I undertake to fulfil the Constitution and laws of the Republic of Latvia in good faith and with all vigour to protect them. I undertake, without regard to my life, to defend the independence of the State of Latvia and to live and work in good faith, in order to increase the prosperity of the State of Latvia and of the people.¹⁴³

A prospective Hungarian would instead pronounce the following words:

I . . . , do solemnly swear that I shall consider Hungary my country. I shall be a loyal citizen of the Republic of Hungary, shall honor and observe the Constitution and laws thereof. I

available at http://www.bmi.gv.at/cms/BMI_Staatsbuergerschaft/Staatsbuergerschaftsgesetz_1985.doc.

140. See Strumia, *supra* note 130, at 55-56 (analyzing the national dimension’s centrality to the process of naturalization of an immigrant in the European Union and arguing that oaths of allegiance underline this aspect of the naturalization process).

141. Istatymas [Law on Citizenship], art. 15(2), Sept. 17, 2002, Act No. IX-1078, last amended March 19, 2009, Act XI-205), Valstybės žinios, 2002-10-02, Nr. 95-4087 (Lith.), translation available at <http://www.coe.int/t/dghl/standardseetting/nationality/National%20legislation/Lithuania-Law%20on%20Citizenship%202003.pdf> (official translation).

142. *Id.*

143. Pilonības likums 1994 § 18 [Citizenship Law], Aug. 25, 1994, as amended 1998 (Lat.), translation available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan018407.pdf>.

shall defend my country as far as my strength allows, and shall serve it according to the best of my abilities.¹⁴⁴

It is true that many of these words represent symbolic and celebratory value rather than the concrete undertaking of a task. Yet, no prospective European citizen is required to swear allegiance to the European Union and to its interest, which might even conflict with the interest of a single state. It is probably difficult for the immigrant, who declares his allegiance in these words and thereby becomes a national of Lithuania, Latvia, or Hungary, respectively, to remember that he is also becoming a citizen of Europe.

Integration requirements may be seen as an indication of where the idea of the European polity exhausts itself. And this tends to happen, in the European Union, at the frontier of each member state. As a result, those TCNs that European law addresses as a homogeneous group are facing not one, but several, disparate experiences in pursuing inclusion in the multi-tier European polity. The divergence in naturalization laws among the member states signals that internal regulatory borders, with respect to inclusion, are thick. And similarly thick are the definitional internal borders throughout the European Union.

TABLE 2 THE MAP OF INTERNAL BORDERS

	IMMIGRATION		NATURALIZATION	
	ADMISSION	TREATMENT OF IMMIGRANTS	INCLUSION (REGULATORY BORDERS)	INCLUSION (DEFINITIONAL BORDERS)
UNITED STATES	Thin	Thin with thick spots	Thin	Thin
EUROPEAN UNION	Thinning by category	Thinning by option	Thick	Thick

144. Act on Hungarian Citizenship § 7(4), Act LV of 1993, Jun. 1, 1993, translation available at <http://www.mfa.gov.hu/NR/rdonlyres/63EF366D-8DD1-446D-B513-7B3EF006C865/0/078Hungariancitizenship.pdf>.

III. DISTINCTIVENESS AND INCLUSION IN THE UNITED STATES AND THE EUROPEAN UNION

A. UNITED STATES INCLUSION AND EUROPEAN UNION DISTINCTIVENESS

With respect to the rules of admission, treatment of immigrants, and naturalization process, the map of internal borders reveals perimeters of different levels of thickness in the United States and in the European Union. Internal borders are generally thin in the United States, as compared to the generally thick borders of the European Union, even if those borders are gradually thinning for certain purposes.

The rules of admission and the treatment of immigrants overlap more than do the rules of citizenship and naturalization. Indeed, U.S. internal borders are thin with respect to both admission and the treatment of immigrants; however, intermittent thick spots do exist. For instance, in the United States, state family law and federal immigration law cooperate in determining the family reunification rights of immigrants. On the other hand, the same kinds of borders remain thick in the European Union. Increasing regulation at the E.U. level yields a thinning impulse throughout the system so that the status of TCNs becomes gradually more homogeneous and the divisive effect of internal borders more tenuous. In the field of access to citizenship and naturalization, the contrast between the United States and the European Union is remarkable: thin borders in the United States, where the route to federal citizenship is singular, regardless of state residence, contrasted with extremely thick borders in the European Union, where naturalization happens according to the terms of multiple diverging regimes of law that impose requirements differing in quantity and quality.

This map of internal borders suggests, at first sight, that the United States and the European Union have different priorities with respect to accommodating the competing interests of states in distinctiveness and immigrants in inclusion. The United States seems inclined to give immigrants a wide spectrum of inclusion, while sacrificing states' interests in distinctiveness. The European Union, on the contrary, appears strongly committed to its member states' interest in

distinctiveness, even if this entails a fragmentation of an immigrant's inclusion experience.

Thin borders in the United States guarantee immigrants an ample spectrum of inclusion in the phase of admission, while they live as foreigners in the country, and, eventually, when they qualify and apply for U.S. citizenship. In all these phases, their immigration status and the associated rights are similar in each one of the fifty states. Immigrants can move from one state to another without facing barriers and without sacrificing any residence time that qualifies them for naturalization; their condition is homogeneous and provides a clear mirror image of the condition of citizens. On the other hand, the states can hardly use immigration policy and alien/citizen distinctions as a way to protect their own spheres of autonomy and their distinct identities. They do remain free to treat immigrants on particularly favorable terms by enacting autonomous integration programs, and they retain a marginal power to use family law categories to limit, to some extent, immigration rights. The states' powers to select their own citizens are, however, reduced to a minimum; consequently, states' expressions of distinctiveness must seek other avenues.

Thick borders in the European Union protect, instead, a sphere of distinctiveness for the member states. While coping with some intrusions on the part of the European Union, member states are still able to admit, exclude, and, to some extent, choose the immigrants that they are willing to let in; though some visas are common, annual quotas for admission are decided on a state by state basis.¹⁴⁵ European law dictates some rules in terms of how states must treat immigrants that they have let in, but in many areas, member states may still distinguish and preserve some room to discriminate between their own nationals and TCNs. Finally, and most importantly, the member states administer the undisturbed power to grant citizenship. In other words, the member states retain many different tools to affirm their distinctiveness by deciding who is an "insider" and who is an "outsider" within their borders. Bounding and excluding on the part of the member states results in a fragmentation of the inclusion experience of immigrants. The

145. Consolidated Version of the Treaty on the Functioning of the European Union art. 79(5), 2008 O.J. (C 115) 47, 78.

condition of an immigrant depends on the corner of the Union in which he finds himself, which in turn affects the kind of residence permit that he may rely on, the rights he enjoys, and the family he can bring. Of course, it will also affect how long he has to wait and which requirements he must meet to become a European citizen.

Immigrants, in principle, cannot move from one member state to another; if not for short stays that might be allowed depending on the kind of visa that they obtain, they have no right to relocate to a second member state. Even if they find an opportunity to work in a member state other than the one they first accessed, in order to take advantage of such opportunity, they would need to comply with the admission rules of the second country—they would have to immigrate once again.¹⁴⁶ Long-term resident immigrants have some limited rights to move among the member states,¹⁴⁷ but considering how thick internal borders are for naturalization purposes, even the exercise of this right comes at a high cost. In moving, they would lose the time they might have accrued that would count toward the naturalization qualification of a certain member state. The immigrants would then have to start the accrual of time all over again in the new host member state. Thus, the rules of admission, treatment of immigrants, and naturalization processes in the European Union protect the distinctiveness of the member states, but restrict the scope of inclusion of immigrants to the territory of each single member state. In doing so, they also create additional divisions between citizens and immigrants by providing for mobility to the former, and immobility to the latter, within the internal borders of the European Union.¹⁴⁸

At first sight, the United States and the European Union, despite valuing both the distinctiveness of individual states and the inclusion

146. As an exception, TCNs admitted for highly qualified employment are able to move to a second member state after eighteen months of legal residence in the first member state. Council Directive 2009/50, *supra* note 3.

147. See Council Directive 2003/109, *supra* note 81 (allowing residence in a second member state for the “exercise of an economic activity in an employed or self-employed capacity,” “pursuit of studies or vocational training,” or “other purposes”).

148. See Strumia, *supra* note 130, at 48-52 (describing a “hierarchy of mobility” in the European Union dependent upon the both a person’s citizenship status, as well as the amount of time spent within the European Union and/or a given member state).

of immigrants, seem to allocate their priorities differently and pursue different goals with respect to the balance of these competing sets of interests.

B. AN ALTERNATIVE NARRATIVE: THE PURSUIT OF NATIONAL DISTINCTIVENESS

Adding a variable to this story, though, might alter the scenario that the map of internal borders suggests. The United States and the European Union, through the allocation of the power to admit, treat, and naturalize immigrants between the center and the periphery, may actually be seen as pursuing the same goal: national distinctiveness.

Anthony Smith's definition of a nation refers to "a named human population sharing a historical territory, common memories and myths of origin, a mass, standardized public culture, a common economy and territorial mobility, and common legal rights and duties for all members of the collectivity."¹⁴⁹ The community for which a definition of this kind resonates is different in the United States as compared to the European Union. The United States is a nation and shares, at large, many of the elements to which Smith refers, while the European Union is a collection of national states that have pooled part of their sovereignties, but remain individually bound within diverse cultural and civic perimeters. Some of Smith's elements of a nation arguably have found room at the European level, but Smith's words resonate strongest at the level of the member states.

National communities jealously guard themselves and protect their civic and cultural features.¹⁵⁰ Decisions on national inclusion and

149. Anthony D. Smith, *National Identity and the Idea of European Unity*, 68 INT'L AFF. 55, 60 & n.9 (1992) (drawing upon earlier definitions proffered by Karl Deutsch and Walker Conner which encompassed other categories such as ethnic groups).

150. Cf. JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 106-14 (Ciaran Cronin & Pablo De Greiff eds., 1998) (noting that the national idea weaves a narrative of commonality, which justifies the existence of the political community and its self determination). The nation has also been described as an "imagined community." See BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 22, 113-40 (rev. 2d ed. 1991) (describing the nation as an "imagined community," in which the spread of new communication technologies, such as the press, coincides with a maturation of the conception of time, and through which it is conceivable that several people exist and are engaged simultaneously in different

exclusion represent, for them, a fundamental opportunity to express their distinctiveness and to accurately select the pool of their members so that any entrance from outside does not dilute the cohesiveness of the nation or alter the civic and cultural premises of its identity. Thus, the national community has a strong interest in distinctiveness, which it may pursue, in part, through the articulation of the rules on admission, treatment of immigrants, and naturalization processes.

In a multi-tier polity, interests in national distinctiveness may alter the relative weight of immigrants' interests in inclusion and states' interests in distinctiveness. In the cases of the United States and the European Union, national distinctiveness diverges with respect to the rules of admission, treatment of immigrants, and naturalization processes. In the United States, by pushing for federal rule in immigration matters, national distinctiveness overshadows the interest of individual states to have their own identities. By contrast, national distinctiveness in the European Union amplifies the interest of member states in distinctiveness, resulting in a stronger resistance to pooling their sovereignties for purposes of creating a common immigration policy.

A sign that the states' interest in distinctiveness pales in comparison to national concerns may be found in U.S. cases that have confirmed and consolidated the exclusivity of federal rule in the immigration sphere: "For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."¹⁵¹

With these words, the Supreme Court upheld the provisions of an amended treaty with China, under whose terms a Chinese laborer who temporarily left the United States after a lawful residence was deemed deportable and held in detention upon return, even if he had

enterprises).

151. *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889); *see also* ALENIKOFF, *supra* note 3, at 12 (identifying a judicial inclination at the turn of the twentieth century in favor of reinforcing the power of the federal government by acknowledging its authority to act in all capacities requisite to operate as a world power).

in his possession a certificate entitling him to return.¹⁵² The justices emphasized that:

While under our constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory.¹⁵³

Including and excluding aliens by ruling on their admission, treatment, and naturalization is seen here as one of the ways in which the American nation affirms its distinctiveness vis-à-vis foreign nations.¹⁵⁴ Keeping the nation safe and guarding its borders justifies the silencing of the states in immigration matters;¹⁵⁵ national distinctiveness, in other words, overrides state distinctiveness.

By contrast, several passages in the legal texts that gradually elaborate on a common immigration policy in the European Union evidence how concerns for national autonomy amplify the interest in member states' distinctiveness and lead member states to express reservations while pooling their sovereignties. The Declaration on Nationality attached to the Treaty of Maastricht in 1992, along with the simultaneous introduction of European citizenship, are the first signs of the member states' attempts to defend their bounded national communities.¹⁵⁶ They alone would retain the power to decide who is

152. See *Chae Chan Ping*, 130 U.S. at 582 (explaining that the appellant was detained onboard the ship on which he arrived).

153. *Id.* at 604. Justice Field further cautioned that the United States must secure itself against aggression, the source of which could be an overt act by a foreign nation or "from vast hordes of its people crowding in upon us". *Id.* at 606.

154. See ALEINIKOFF, *supra* note 3, at 13-14 (recognizing that sovereignty, in addition to the simple ability to control one's borders, also means the ability to "construct an 'American People' through the adoption of membership rules").

155. See *id.* (identifying in the *Chinese Exclusion Case* the expression of a "double sense of danger," the threat that immigration poses to both U.S. territorial integrity and the composition of its population).

156. See Treaty on European Union: Declaration on Nationality of a Member State, 1992 O.J. (C 191) available at <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html#0098000022> ("The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the

a *national* for community purposes. European institutions, on the other hand, seem reluctant to interfere with the member states' discretion to draw the boundaries of their national sphere. Even the European Court of Justice, ever-ready to investigate the many areas of the member states' competence to benefit the Union, has been very deferential in matters of nationality. For instance, the Court has held that a member state can extend the right to be active electors for the European Parliament to people who are not technically nationals, but who are nonetheless European citizens and have, in any case, a close link to the nation.¹⁵⁷ On the other hand, European judges have also found that a member state can legitimately exclude a person who is a national and European citizen residing overseas from voting for the European Parliament.¹⁵⁸ The new Treaty on the Functioning of the European Union, though extending the European Union's immigration competence, explicitly excludes any harmonization of the relevant laws of the member states;¹⁵⁹ nobody doubts that the member states are to retain a measure of autonomy in adopting regulations that pertain to inclusion and exclusion of the national community.

The overlap between the sphere of the nation and the sphere of the member states demonstrates, in the European Union, the states' interest in distinctiveness. The endeavor to develop and consolidate a common immigration policy stops short of affecting independently drawn national boundaries. Maintaining some extent of control over the admission, treatment of immigrants, and naturalization process is a fundamental way for the member states of the European Union to protect twenty-seven distinct national identities.

Thus, the United States and the European Union seem to give, through their regimes of admission, treatment of immigrants, and naturalization process, different levels of significance to the interests of individual states in distinctiveness. It is the shift in significance

Member State concerned.”).

157. See Case C-145/04, *Spain v. United Kingdom*, 2006 E.C.R. I-7917, ¶¶ 91-93 (affirming the right of the United Kingdom to extend the vote to citizens of Gibraltar, a British territory).

158. CASE C-300/04, *EMAN V. COLLEGE VAN BURGEMEESTER EN WETHOUDERS VAN DEN HAAG*, 2006 E.C.R. I-8055, ¶ 72.

159. Consolidated Version of the Treaty on the Functioning of the European Union art. 79(4)-(5).

between the United States and the European Union with respect to national distinctiveness that alters the relative weight of these interests. A different role of the center and the periphery in immigration matters and a different attention to states' interests in distinctiveness mask what is, in fact, an analogous commitment: protecting well-bounded national communities, making sure that acceding outsiders do not dilute their cohesiveness, and ensuring continuity in their cultural and civic identities.

C. THE REAL DIFFERENCE: IMMIGRANTS' INTERESTS IN INCLUSION

Considerations of national distinctiveness help to reconcile what appeared at first a stark contrast in goals between the United States and the European Union's rules on immigration. In light of this enlarged scenario, immigrants' interest in inclusion still seems to fare in profoundly different ways on opposite sides of the Atlantic. For immigrants entering the United States, the process of inclusion is nationwide and includes all fifty states. As suggested above, on the other hand, immigrants entering the European Union face widely different destinies depending on the specific member state they are entering.

In the United States, the national interest in distinctiveness blends with immigrants' interest in being included into the several states and living in circumstances similar to those of citizens: both entail the federal power to handle immigration. Indeed, federal rule has resulted in admission visas that are valid for the entire national territory, leaving immigrants free, from a legal point of view, to relocate among the several states. Uniform naturalization rules ensure that immigrants exercise their right to travel in a way comparable to citizens without any negative consequences to their qualifications for American citizenship; equal protection doctrines protect immigrants from any attempt on the part of individual states to put them at a disadvantage with respect to state citizens.

This situation descends from the organization of the rules of admission, treatment of immigrants, and inclusion of immigrants. U.S. courts have sometimes justified the distribution of power between the center and the periphery as guaranteeing effective

decisions on exclusion and national security,¹⁶⁰ rather than in ensuring fair treatment of immigrants.

In *Henderson v. Mayor of New York City*,¹⁶¹ a case which is considered finally to strip the states of their powers in immigration matters,¹⁶² the Supreme Court struck down as a violation of the commerce clause a New York statute which required any shipmaster to submit a report and pay a bond to the state for each passenger coming in from a foreign country.¹⁶³ The Court underlined the need for uniformity in these kinds of regulations:

It is equally clear that the matter of these statutes may be, and ought to be, the subject of a uniform system or plan. The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco.¹⁶⁴

While the Court, in this case, did not explicitly link the need for uniformity of rule with the desire to defend the community against intrusion from the outside, a few years later in the *Chinese Exclusion Case*,¹⁶⁵ it emphasized a similar justification for the federal exercise of immigration powers:

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence.¹⁶⁶

And further:

If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of

160. See ALENIKOFF, *supra* note 3, at 12-13 (noting that Justice Field considered the preservation of the nation's independence to be its highest duty).

161. 92 U.S. 259 (1875).

162. Cf. Neuman, *supra* note 31, at 1833-35 (1993) (recognizing 1875 as a watershed moment in the history of American immigration law).

163. See *Henderson*, 92 U.S. at 271 (characterizing the transport of passengers from Liverpool to New York as a commercial interaction with a foreign nation).

164. *Id.* at 273.

165. *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

166. *Id.* at 603.

a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.¹⁶⁷

Here, in the context of confirming the exclusivity of federal power in the immigration field, the Court seemed to ignore the interests of immigrants in treatment comparable to citizens, as well as their interest in inclusion beyond the boundaries of a single state.

Some subsequent cases adjudicating the rules on immigration and the treatment of aliens began, however, to justify the exclusivity of the federal power in the immigration field with the need to ensure a welcoming environment for aliens, where their conditions of inclusion are homogeneous throughout the several states. In the previously mentioned case of *Truax v. Raich*, the Supreme Court seemed preoccupied with the inclusion of aliens: it stresses that only the federal government has the authority to control immigration, and individual states cannot deny to aliens the means of earning their livelihoods, resulting in the denial of the right to an abode.¹⁶⁸ The justices were worried that a policy of this kind would result in the de facto segregation of aliens in the few states willing to host them.¹⁶⁹ This would be contrary to immigrants' interest in inclusion in the several states.

Some years later, the Court invalidated a California statute barring the issuance of commercial fishing licenses to persons ineligible for U.S. citizenship.¹⁷⁰ Once again, the justices emphasized that states cannot interfere with the power of the federal government to include:

[States] can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon

167. *Id.* at 606; *see also* ALEINIKOFF, *supra* note 3, at 28-29 (comparing the exclusivist tone of this case with cases concerning the status of the territories of the United States and their inhabitants, and finding that they project similar notions of Anglo-Saxon superiority and "civilization").

168. *See Truax v. Raich*, 239 U.S. 33, 42 (1915) (recognizing that, typically, one cannot live where one cannot work).

169. *Id.*

170. *Torao Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948).

the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration¹⁷¹

Following this path in *Graham vs. Richardson*, a more recently decided case, the Supreme Court applied a strict scrutiny standard of review to state-based discrimination based on alienage:¹⁷² aliens were found to be, indeed, the epitome of a “discrete and insular minority.”¹⁷³ Still, in *Graham*, the Court seemed preoccupied with ensuring that the condition of aliens residing in the United States resembles that of citizens: aliens lawfully present “have a right to enter and abide in any state in the Union ‘on an equality of legal privileges with all citizens under nondiscriminatory laws.’”¹⁷⁴

Immigrants’ interests in benefiting from inclusion in the several states and in living in the United States in a condition akin to that of citizens were probably not the basis for the 19th century impetus for federal rule in the immigration field. Subsequently, however, interests of this kind found de facto accommodation in the structure of the rules on admission, treatment of immigrants, and naturalization process. Gradually, these interests also found room in judicial discourse as an additional justification for the exclusivity of federal power in the immigration field. While in potential contrast with the states’ interests in distinctiveness, the recognition of immigrants’ interest in inclusion simultaneously pushed the United States in the direction of preserving national distinctiveness: inclusion interests found protection through federal immigration rules, thus limiting the ability of the states to draw autonomous boundaries and discriminate between immigrants and citizens. This harmony of interests has eased its way into immigration rules that expand the rights of immigrants to the entire nation rather than restricting those rights to individual states.

The balance of immigrants’ interest in supranational inclusion is quite different in the European Union. There, the process of integration and the introduction of notions of citizenship and membership beyond the nation has led to the ripening of immigrants’

171. *Id.* at 419.

172. *Graham v. Richardson*, 403 U.S. 365 (1971).

173. *Id.* at 372.

174. *Id.* at 377-78 (citing *Torao Takahashi*, 334 U.S. at 420).

interest in inclusion beyond the national level: being European and fully benefiting from the European way of life means being acknowledged as economic participants in the Europe-wide legal community in a way parallel to European citizens. This was already clear to policy makers at the time of the Tampere European Council. In the Conclusions of the Presidency it is highlighted that:

The European Union has already put in place for its citizens the major ingredients of a shared area of prosperity and peace The challenge of the Amsterdam Treaty is now to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all. . . . This freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory.¹⁷⁵

Supranational inclusion, in this sense, would entail the enjoyment of a right of free movement among the member states, the absence of negative consequences in access to citizenship by the fact of having exercised these free movement rights, and the ability to cumulate periods of residence and employment in different member states for purposes of inclusion through citizenship. In more general terms, an interest in supranational inclusion would be satisfied if TCNs, as immigrants into the European Union, were able to decide in which member state to organize their lives, and to change their decisions at any time, without constraints. This would effectively reduce the difference between immigrants' conditions and those of European citizens.

Improving the condition of TCNs remains a firm commitment in the framework of the European common immigration policy. Interests of immigrants also find mention in very recent policy documents and legal texts. According to the words of the 2008 Pact on Immigration and Asylum, "[t]he European Council stresses the importance of adopting a policy that enables fair treatment of

175. Presidency Conclusions, *supra* note 14, ¶¶ 2-3.

migrants and their harmonious integration into the societies of their host countries.”¹⁷⁶ Consistently, under the terms of the prospective Treaty on the Functioning of the European Union: “The Union shall develop a common immigration policy aimed at ensuring, at all stages, . . . fair treatment of TCNs residing legally in the Member States”¹⁷⁷ In order to develop this policy, the European Parliament and the Council may legislate, in particular, on the definition of the rights of TCNs residing legally in a member state and on their rights to move to and reside in other member states.¹⁷⁸

Despite this proclaimed commitment to the fair treatment of immigrants, immigrants’ interest in supranational inclusion conflicts directly with national interests in distinctiveness: the twenty-seven member states protect their national distinctiveness by deciding autonomously who is a national and who is not, by keeping a voice on admission and residence rights, and by deciding on the kind of treatment to accord to outsiders. In other words, states are reluctant to open national boundaries to the claims of immigrants who seek supranational inclusion. Their reluctance, in this sense, represents an important obstacle to any ambitious project in the sphere of a common immigration policy aimed at effectively protecting immigrants’ interest in inclusion. When it comes to the rules of admission, treatment of immigrants, and naturalization process, immigrants’ interest in supranational inclusion tends to become subordinate to interests in national distinctiveness.

Initially, a balance of this kind may seem legitimate and satisfactory in the context of the European Union: this is indeed a union of sovereign states that want to preserve their diversities and their distinct identities. Protecting a sphere of autonomy for the member states and respecting their diversity is a fundamental condition for the advancement of the project of integration.¹⁷⁹ The European Union would lose legitimacy and betray its origins and

176. Council of the European Union, European Pact on Immigration and Asylum 5 (Sept. 24, 2008), <http://register.consilium.europa.eu/pdf/en/08/st13/st13440.en08.pdf> (last visited June 30, 2010).

177. Consolidated Version of the Treaty on the Functioning of the European Union art. 79(1).

178. *Id.* art. 79(4).

179. *See* Consolidated Version of the Treaty on European Union art. 6(3) (“The Union shall respect the national identities of its Member States.”).

goals if it merely took the place of the member states, substituting its own goals for the independent ones of the component states.¹⁸⁰

From this perspective, immigrants' interests in supranational inclusion are quite naturally subordinate to overriding national interests in distinctiveness. However, before settling for a balance of this kind in the European Union, one should consider whether a sacrifice in terms of immigrants' inclusion effectively adds an additional measure of national distinctiveness.

It is not only the building of a common immigration policy that threatens national distinctiveness. The European citizenship, which brings about free movement and corollary rights for nationals of the member states, contributes to the penetration and alteration of distinct national spaces, opening them to naturalized TCNs that specific member states have never chosen to admit. As a result, the European citizenship imposes a high toll in terms of national distinctiveness at the expense of the member states.

D. ENDANGERED DISTINCTIVENESS: THE EUROPEAN CITIZENSHIP PERSPECTIVE

European citizenship, through the opportunities that it opens up for E.U. nationals, erodes the member states' power to include and exclude. In particular, the regime of free movement rights that the European citizenship transmits may be seen as challenging the effectiveness of the member states' attempts to protect their national distinctiveness by autonomously deciding on the admission, treatment of immigrants, and naturalization process.¹⁸¹

Free movement rights have become a way to extend the same entitlements of national citizens to E.U. citizens, whom a host

180. Cf. Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 631-33, 637 (1999) (envisioning European integration as the ultimate product of administrative delegation evolved through the post-war constitutional settlement, and arguing that the member states remain the principals in the European Union).

181. See Karolina Rostek & Gareth Davies, *The Impact of Union Citizenship on National Citizenship Policies*, 10 EUROPEAN INTEGRATION ONLINE PAPERS 5, 11-12 (2006), available at http://www.eiop.or.at/eiop/index.php/eiop/article/view/2006_005a/22 (underlining the interdependence of member states' nationality policies as a result of European citizenship and free movement rights).

member state has not selected as its nationals according to its own criteria. In this sense, free movement rights and the power to include and exclude, as expressed in the rules on admission, treatment of immigrants, and naturalization process, are inversely proportional: the more free movement rights expand, the more the power of each member state to include and exclude wanes. At its apex, where free movement rights allow free moving E.U. citizens to do everything national citizens can do and to claim everything national citizens can claim, the power of a member state to include and exclude is annulled. Each member state becomes de facto subject to any other member state's choices of inclusion and exclusion of TCNs.¹⁸²

The potential corollaries of a recent French case regarding citizenship provide a telling example in this respect. In June 2008, a Moroccan woman married to a French man of Moroccan origin applied to obtain French nationality as the spouse of a French national.¹⁸³ Under French nationality law, one of the requirements for naturalization is assimilation of the applicant into the French community.¹⁸⁴ The French government can oppose the request of naturalization on the ground of lack of assimilation, as so happened in this case; governmental authorities found that the applicant woman's engagement in radical religious practices evidenced her lack of assimilation.¹⁸⁵ The Conseil d'Etat upheld the position of the French government, concluding that the applicant's practice of a radical form of Islam and her habit of wearing a niqab were incompatible with French secular values and with the principle of equality of the sexes in the Republic.¹⁸⁶

This decision raises a number of different concerns: whether citizenship is the proper context to defend the community from the fragmenting effects of potentially unwelcome religious practices;

182. See Strumia, *supra* note 130, at 62-63 (arguing that European citizenship and its operation reduces member states' power of self-definition).

183. No. 286798, Conseil D'Etat [CE] (Fr. Jun. 27, 2008) (considering the applicant's appeal of a May 16, 2005 decision refusing to grant the applicant French citizenship).

184. Code Civil (C.CIV.) arts. 21-4, 21-24 (Fr.), available at http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm.

185. See No. 286798, CE.

186. See *id.* (asserting that the May 16, 2005 decision neither had the intent to, nor the effect of, infringing upon the applicant's rights to religious freedom, religious expression, or any other fundamental human rights).

whether a defense of this kind should take place through institutions other than citizenship; whether denying citizenship to the Moroccan wife of a French-Moroccan man based on a violation of the principle of the parity of sexes is denying protection to the very sex that the logic of the rule is meant to protect; whether the practice of religion in a private, albeit radical, way can be considered to conflict with the secular values that a political community is premised on; and whether cultural assimilation is a necessary element for coexistence in a civic community, and thus a proper criterion of distinction between insiders and outsiders. All these questions pose important issues that cannot be disregarded when reevaluating rationales of membership in a demographically changing society such as the European Union. At the same time, the framework of European citizenship raises questions about the effectiveness of nationality: protecting the secular values of the national community is a way to affirm a form of state and national distinctiveness.

The Moroccan woman has the option of moving to another member state of the European Union, perhaps Belgium, which does not impose any assimilation requirement to grant nationality.¹⁸⁷ She may reside there for the necessary time and naturalize into Belgian nationality, thereby becoming a European citizen. At this point, she could return to France, claim her right to reside there as a European citizen, exercise some political rights, and claim non-discrimination on the French labor market.¹⁸⁸ The question arises as to whether, as a resident and European citizen, she poses less of a threat to French secular values and French distinctiveness than as a French national. In addition, some day she might apply for French nationality as a European citizen. French authorities would, at this point, be confronted with the difficult task of arguing that a European citizen fails the test of assimilation into French society. Can a person be a European citizen, an insider in both the European Union and in another member state, and yet not fit in French society? One could certainly argue this is the case, and that the fact that one is a national

187. See Code de la Nationalité Belge [Code of Belgian Nationality], as amended 2006 (1984), available at http://www.juridat.be/cgi_loi/loi_F.pl?cn=1984062835.

188. See Parliament and Council Directive 2004/38, *supra* note 85, art. 20 (prohibiting discriminating against European citizens present in a members state on the basis of nationality).

of another member state does not guarantee a good fit in French society. Yet there would be something jarring in allowing a person to be a European citizen, with a measure of political voice, a right to reside, a claim to social inclusion, and an implied assumption of some shared identity, and yet arguing that this person does not fit in a given national social fabric well enough to be a national citizen.

The case of Mme. M. illustrates how, in the wake of the extension and consolidation of the rights of European citizenship, the power of member states to protect national distinctiveness by autonomously including and excluding tends gradually to disappear.

The independent choice of a member state to include TCNs by granting them national citizenship affects all other member states. Because these TCNs also obtain European citizenship through national citizenship, other member states are no longer free to deny them admission or otherwise limit their rights. On the other hand, the choice of a member state to exclude TCNs by denying them admission or naturalization may be deprived of its effect if the excluded TCN obtains European citizenship through another member state. Member states that pursue distinctiveness by firmly holding some powers over immigration are losing those same powers at the hand of European citizenship.

E. THE CHALLENGE OF DISTINCTIVENESS AND INCLUSION IN LIGHT OF A COMMON IMMIGRATION POLICY

In an effort to build a common immigration policy and set its priorities, the toll imposed by European citizenship and its dynamics on national distinctiveness should not be forgotten. This leads to questioning the wisdom of sacrificing immigrants' interests in supranational inclusion for the sake of an otherwise endangered national distinctiveness.

In particular, in rethinking the balance between national distinctiveness and immigrants' inclusion, two elements should be taken into account. First, the E.U. immigrants' interest in supranational inclusion is important. It may serve broader immigration policy and integration goals: immigrants who are mobile on the internal market in a way comparable to European citizens may more readily respond to discrepancies between the supply and the demand for employment in different parts of the

European Union. It may even be easier for an immigrant to relocate from one member state to another than it is for a European citizen, provided that the immigrant has a right to do so and would not lose residence time for naturalization purposes.¹⁸⁹ In addition, protecting supranational inclusion may aid in avoiding the consolidation of artificial insider/outsider divisions between immigrants and European citizens, whereby the latter are free to move on an integrated internal market, while the former are constrained within the economic and political space of a single member state. This distinction may be detrimental for the long-term integration of immigrants, their evolving sense of European-ness, and, ultimately, their blending into European society. Finally, protecting interests of supranational inclusion may help to correct paradoxical situations where similarly situated immigrants face disparate legal treatments in the European Union. Presently, immigrants who have benefited from more liberal naturalization laws, through having entered the European Union more recently, may find themselves in more advantageous positions than immigrants who perhaps have resided and worked in the European Union longer, but face harsher requirements for naturalization, or have resided in multiple states without satisfying the requirements for citizenship for any of those states.¹⁹⁰

A second element to take into account is the other ways that exist to protect immigrants' interests in supranational inclusion without detracting from national distinctiveness more than the operation of the European citizenship already has; interests in inclusion do not require central rule or complete harmonization of rules on admission,

189. European citizens have proven quite reluctant to concretely take advantage of rights of free movement. As of 2006, only about 8 million European citizens, or about two percent of the population of the European Union, reside in a member state other than the one of their nationality. ALAIN LAMASSOURE, *LE CITOYEN ET L'APPLICATION DU DROIT COMMUNAUTAIRE*, RAPPORT AU PRÉSIDENT DE LA RÉPUBLIQUE 9, Jun. 8, 2008 (Fr.), available at <http://lesrapports.ladocumentationfrancaise.fr/BRP/084000379/0000.pdf>; see also PIONEUR Res. Group, *Pioneers of European Integration 'From Below': Mobility and the Emergence of European Identity Among National and Foreign Citizens in the EU, 5th Framework Program-Eur. Comm'n, Final Conf.* (Mar. 6, 2006), available at <http://www.obets.ua.es/pioneur/difusion/PioneurExecutiveSummary.pdf> (analyzing trends in E.U. migration).

190. See Strumia, *supra* note 130, at 56-57 (noting that similarly situated immigrants are potentially treated differently).

treatment of immigrants, and naturalization process. Many interests of immigrants in the European Union might be sufficiently protected through forms of mutual recognition among the member states with respect to relevant rules.¹⁹¹ For instance, member states may come to recognize immigrants' periods of residence in other member states for purposes of complying with their own residence requirements for naturalization.¹⁹² Additionally, a birth within the territory of another member state might be equated with birth on the territory of the host member state for purposes of the naturalization of immigrants' children.¹⁹³ Or, a host member state might grant leniency in the language requirements for naturalization if an immigrant is making an effort to learn the official language of a different member state.¹⁹⁴ Reforms in this direction would not necessarily open the borders of member states more than they have already been forced open through the process of integration and the operation of European citizenship. Internal borders would remain thick where a member state wants them thick, but they would become somewhat more flexible.

The current balance between national distinctiveness and immigrants' inclusion in the European Union is precarious: the kind of national distinctiveness that may be protected by setting aside interests of Europe-wide inclusion is endangered by the very operation of European citizenship. It would be unhelpful to avoid more daring choices in common immigration policy with the excuse of protecting distinctiveness. It might result in a dangerous zero-sum game, where both distinctiveness and inclusion are defeated.

CONCLUSION

In both the United States and the European Union, allocating the power to decide on the admission, treatment, and naturalization of immigrants between the center and the periphery raises the challenge of accommodating competing interests of immigrants in inclusion and individual states in distinctiveness.

191. *See id.* at 59-61 (suggesting that the value of citizenship in ordering the coexistence of states and in the preservation of individual communities would not be diminished).

192. *Id.* at 60.

193. *Id.*

194. *Id.*

At first glance, the United States and the European Union seem to respond to such a challenge in different ways. The United States appears to favor immigrants' interest in inclusion, where thin internal borders reveal that states have little say with respect to the admission, treatment, and naturalization of immigrants. On the other hand, the European Union appears to favor state distinctiveness, where member states retain relatively thick borders in the same domains.

An alternative narrative indicates, however, that the United States and the European Union are quite consistent in their pursuits: choices in immigration and citizenship matters hide the intention to preserve and reinforce national distinctiveness. Apparent initial contrasts with respect to state distinctiveness thus find partial reconciliation in considerations of national distinctiveness.

It is the immigrants who face different destinies with respect to their comparable interests in inclusion: immigrants' interests blend with interests in national distinctiveness and find *de facto* accommodation in the United States. There, immigrants, like U.S. citizens, are free to move among the several states and plan their lives in any one of them. In the European Union, immigrants' interests conflict directly with national distinctiveness and tend to remain subordinate. Consequently, immigrants are constrained to the physical and legal space of one particular member state.

The balance of national distinctiveness and immigrants' inclusion is a fragile one in the European Union: reluctant choices with respect to common immigration policy tend to sacrifice an important interest of immigrants in supranational inclusion for the sake of a national distinctiveness already otherwise endangered by the corollaries of European citizenship. The quest for distinctiveness and inclusion, which raise shared challenges for the United States and the European Union and their policies on immigration and citizenship, appears particularly pressing in the European Union, and calls for an immigration policy consciously aiming for a synergy of results.