

WHEN IMMIGRATION BORDERS MOVE: THE IMPLICATIONS FOR CITIZENSHIP, MEMBERSHIP, & COMMUNITY

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INTRODUCTION

Under current law, a person has to prove her legal immigration status in order to get a driver's license,¹ obtain need-based government assistance (like food stamps),² get a job,³ board an airplane,⁴ and in some jurisdictions, rent a home.⁵ Proposed laws, past and present, would require a person to prove legal immigration status in order to obtain medical care (even if she paid for the care herself),⁶ enroll in public schools,⁷ or get food from a soup kitchen.⁸

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¹ Many states require proof of legal immigration status before issuing drivers' licenses. Once the federal REAL ID act takes effect, all states will be required to do so in order to use state-issued licenses for federal purposes like boarding airplanes or entering federal buildings. REAL ID Final Rule: Questions & Answers, available at http://www.dhs.gov/xprevprot/programs/gc_1172767635686.shtm (last visited Feb. 9, 2008) [hereinafter REAL ID Final Rule].

² The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 made most noncitizens ineligible for federally-funded public benefits. 8 U.S.C. § 1601(a)(5) (Supp. III 1997). The 2002 Farm Bill restored food stamp eligibility for some categories of immigrants (long-term immigrants, immigrants receiving disability assistance, and immigrant children), but these immigrants must still demonstrate legal immigration status. U.S. Department of Agriculture Food Stamp Eligibility, available at http://www.fns.usda.gov/fsp/applicant_recipients/eligibility.htm#immigrant (last visited Feb. 9, 2008).

³ In 1986, Congress enacted the Immigration Reform and Control Act that, among other things, required employers to verify the legal immigration status of all employees before hiring. Those employers who do not comply with verification requirements or knowingly hire unauthorized workers face fines and other penalties. INA § 274A(b)(1), 8 U.S.C. § 1324a(b)(1) (2000 & Supp. IV 2004). Some state and local governments have passed their own employer sanction programs, requiring employers to verify employees' lawful immigration status as a condition for receiving government contracts or business licenses. See Huyen Pham, *Private Enforcement of Immigration Laws*, 96 GEO. L.J. (forthcoming 2008).

⁴ REAL ID Final Rule, *supra* note 1.

⁵ Cities and counties across the country have passed laws requiring landlords to verify the legal immigration of tenants before renting to them or face substantial financial penalties. Many of these housing laws have been struck down on preemption and other grounds. See Pham, *supra* 3.

⁶ In 2004, Rep. Dana Rohrabacher introduced House Resolution 3722, which would have required hospitals to ascertain immigration status of patients before providing medical care. H.R. Res. 3722, 108th Cong. (2004). Among other provisions, the bill prohibited hospitals from providing most types of medical care to undocumented patients, unless the care was needed to "protect the health and safety" of U.S. citizens." The bill was defeated 331 to 88. Zachary Coile, *Hospitals Won't Be Required To Report Illegals*, SAN FRANCISCO CHRON., May 19, 2004, at A3.

⁷ In 1994, California voters passed Proposition 187, which, among other things, barred public elementary and secondary schools from enrolling undocumented children. Cal. Prop. 187 (1994) (codified at CAL. PENAL

The requirement that legal immigration status be proven at so many important junctures is the result of two converging legal trends. The first trend consists of the numerous federal, state, and local laws that limit government benefits to those lawfully present in the U.S., and in many cases, just to citizens. This trend accelerated after federal welfare reform in 1996, which made undocumented immigrants and even most documented immigrants ineligible for need-based federal benefits programs.⁹ State governments followed suit, accepting the federal government's invitation to make legal immigration status, and more specifically, citizenship, a prerequisite for receiving state need-based aid.¹⁰ And in the most recent expansion of this trend, state and local governments like Colorado and Prince William County, Virginia have passed laws requiring proof of legal immigration status before using even minor government services like substance abuse counseling.¹¹

The second trend is the growth of laws that obligate private parties to check immigration status before granting a private benefit. The most significant private enforcement laws are the 1986 federal employer sanctions, which require employers to verify the legal immigration status of all workers or face fines and other penalties.¹² Local governments have passed their own private enforcement laws in the employment and housing areas.¹³ Proposed private enforcement laws would have also obligated doctors, teachers, and even charities to check

CODE §§ 113–14). The law was struck down on constitutional grounds, and the case was finally settled by special mediation, with both sides accepting the district court's decision. Patrick J. McDonnell, *Davis Won't Appeal Prop. 187 Ruling, Ending Court Battles*, L.A. TIMES, July 29, 1999, at A1.

⁸ In 2007, the Virginia House passed House Bill 2937, which prohibited charities receiving state or local government funding from using those funds to provide services to undocumented immigrants. H.B. 2937, 2007 Gen. Assemb., Reg. Sess. (Va. 2007). The bill was referred to the Senate Committee on Rehabilitation and Social Services, where it was passed by indefinitely. Va. Gen. Assemb. Legislative Information System, HB 2937, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=071&typ=bil&val=hb2937> (last visited Oct. 18, 2007).

⁹ See Raquel Aldana, *On Rights, Federal Citizenship, and the "Alien,"* 46 WASHBURN L.J. 263, 272-73 (2007).

¹⁰ *Id.*

¹¹ See Kristen Mack, *Immigration Initiative Is Left Out of Budget*, WASH. POST., Jan. 22, 2008, at B08 (describing the financial problems that Prince William County faces in trying to limit use of county services like substance abuse counseling and programs for the elderly to those with legal immigration status); Mark P. Couch, *Immigration Laws Stymied, Little Enforcement a Year After State Leaders Passed Hard-Line Legislation*, DENV. POST, Aug. 6, 2007, at B01 (describing the financial, bureaucratic, and legislative problems that Colorado faces in enforcing the state's recently passed immigration laws).

¹² See footnote 3 and accompanying text.

¹³ See footnotes 3 and 5 and accompanying text.

immigration status before granting a private benefit.¹⁴ The effect of these laws is to make legal immigration status a prerequisite for obtaining private employment, rental housing, and possibly medical care, education, and charity.

These two legal trends have converged to create a new paradigm, where immigration borders are moving and multiple, affecting all residents, both in the interior and at the boundaries. Traditionally, we think of borders as fixed, physical boundaries, demarcations that define a state's territory, jurisdiction, and membership. This representation of the border draws upon the Westphalian model of a sovereign state that has so strongly influenced contemporary political thinking.¹⁵ Under this model, the state's power over people and property is defined by (and limited to) its physical territory.¹⁶ Accordingly, the border is seen as a "permanent and *static* barrier that stands at the frontier of a country's territory."¹⁷

Because the state only exercises power over individuals within its borders, the border is where proof of legal immigration status becomes relevant. The border is where those seeking entry are required to prove that they have the state's permission to do so. Those outside of the border are not subject to the state's power and, in most cases, cannot claim the state's legal protections. But once inside the border, citizens and non-citizens alike are subject to the state's control and protection, so that proof of legal immigration status becomes secondary. In the United States, this notion of "legal spatiality"—that legal rights correspond with geography—permeates our constitutional law.¹⁸ As the Supreme Court explained in *Zadvydas v. Davis*, "It is well-established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the

¹⁴ See footnotes 6 - 8 and accompanying text.

¹⁵ Signed in 1648, the Treaty of Westphalia ended the Thirty Years War and, many believe, ended the medieval system of overlapping loyalties and allegiances. In its place, the Treaty introduced a new political system, where a single sovereign state exercised absolute power within its defined territory. Kal Raustiala, *The Geography of Justice*, 73 *FORDHAM L. REV.* 2501, 2508 (2005).

¹⁶ *Id.*

¹⁷ Ayelet Shachar, *The Shifting Border of Immigration Regulation*, *STAN. J. C.R.-C.L.* (forthcoming 2008) (emphasis in the original).

¹⁸ Raustiala, *supra* note 15 at 2501.

United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”¹⁹

With the new paradigm, however, proof of legal immigration status becomes centrally important. That proof is needed not only to gain admission at the border but to obtain essential benefits and services in the interior. The laws requiring such proof are being passed at both the federal and local levels, and the combined effect of these laws is to create a system where proof of legal immigration status becomes a prerequisite for obtaining housing, employment, transportation, need-based government assistance, and other essentials. The laws, in effect, serve as moving, internal borders, triggered when an applicant seeks a restricted benefit.

For example, many states require proof of legal immigration status to obtain a driver’s license; when REAL ID takes effect in May 2008, all states will be required to do so, in order to use state identification to board airplanes, federal buildings and for other federal purposes.²⁰ An applicant seeking a driver’s license must prove her legal immigration status in order to obtain a driver’s license; without such proof, the applicant is denied government permission to drive on U.S. roads. And if the applicant doesn’t have access to any other government-issued photo identification, then the applicant may also effectively be denied permission to travel by plane. The same process repeats itself when the applicant seeks employment and need-based government aid, as both federal and local governments limit these benefits to those who have legal immigration status. And if proposed laws, past and present, took effect, medical care, education, and even charitable assistance would be restricted benefits and would be denied to those unable to prove legal immigration status.

How do these laws operate like borders? Unlike physical borders, these laws do not deny physical entry. Rather, applicants who cannot provide proof of legal immigration status are denied benefits but, in most cases, are not physically removed from the country. Yet when their collective impact is considered, the laws do operate like borders. A person may be able to get by in the United States without a driver’s license (for example, by taking public transportation or asking others for transportation), but what if she is also denied a job, an apartment, and

¹⁹ 533 U.S. 678 (2001).

²⁰ REAL ID Final Rule, *infra* note 1.

access to medical care because she is unable to prove legal immigration status? In the latter scenario, the applicant is more like the person turned away at the physical border; without access to essential benefits, the applicant is effectively denied the ability to live in the United States.

And it should be noted that moving borders affect many more people than the physical border. The physical border, for the most part, only affects those who are seeking entry to the United States, and by this definition, only non-citizens can be turned away. In contrast, moving borders nominally affect everyone. As written, the laws require everyone, citizen and non-citizen, to prove their legal immigration status before receiving a restricted benefit. And though there are serious problems with discriminatory enforcement (so that people who look or sound foreign are more often targeted), moving borders laws are designed to affect all residents of the United States.

What is the significance of this moving borders paradigm? What does it mean for the United States as a nation, when we subject everyone living within our physical borders to these moving borders? This Article explores the implications of this paradigm. Looking first for explanations, I conclude that the policies driving the growth of moving border laws are multiple and varied: to supplement physical border immigration enforcement; to preserve resources (particularly publicly funded resources) for citizens and others lawfully present; and to express frustration with federal immigration policies and, in some instances, prejudice toward immigrants and toward certain ethnic groups of immigrants.

While these explanations are important, I suggest that they tell only part of the story of this paradigm. At a structural level, we may be seeing changes in the way that the nation defines itself and its membership. First, that we require residents to prove legal immigration status in order to go about their everyday lives suggests that we are very vigilant about the membership of our country. A lot of thoughtful analysis has been written about how we define membership in the United States, focusing mostly on the differences (real and perceived) between citizens and non-citizens.²¹ But with the moving borders paradigm, the dividing line now is between those with lawful

²¹ See e.g., LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN* (Princeton Univ. Press 2006); T. Alexander Aleinikoff, *SEMBLANCES OF SOVEREIGNTY, THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* (Harvard Univ. Press 2002); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005).

immigration status and those without. Whereas illegal immigration may once have been viewed primarily as an infraction, it is now increasingly treated as a criminal violation.²² Consistent with the trends to criminalize immigration offenses, the moving border laws seek out those with illegal immigration status and deny them any sort of membership benefit based on that status.

Second, as part of this membership vigilance, we want to find and exclude not only the obvious “illegal” (someone attempting to cross the physical border without authorization) but also those who have successfully crossed and seek to blend into our communities. In this regard, moving border laws may be attractive precisely because they are enforced through everyday transactions.

Why this shift in focus to the community level? The historian Mae Ngai, in explaining why deportations increased in the 1920s, described the problem that restrictionists in that period faced: “illegal aliens were an invisible enemy in America’s midst.”²³ Immigrants during this time period increased in number and diversity, and they were diffused throughout the country, particularly in large cities. So the sought after illegal alien could likely be a neighbor, a co-worker, even a spouse or a parent, and often, the only thing illegal about this person was her immigration status.²⁴

The “invisible enemy” problem resonates in our times. Today, undocumented immigrants continue to fan out throughout the United States, even to a greater degree than during the period Ngai described. According to the Pew Hispanic Center, increasing numbers of undocumented immigrants are settling in the South and (to a lesser extent) the Midwest. Consider that in 1990, about 88% of undocumented immigrants lived in only six states (California, Florida, Texas, Illinois, Florida, and New Jersey).²⁵ By 2004, only 61% of the undocumented immigrant population lived in these states;²⁶

²² See Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005).

²³ MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 63 (Princeton Univ. Press 2004).

²⁴ *Id.* at 62.

²⁵ Jeffrey S. Passel, *Estimates of the Size and Characteristics of the Undocumented Population 3*, Pew Hispanic Center, available at <http://pewhispanic.org/files/reports/44.pdf> (March 21, 2005).

²⁶ *Id.*

furthermore, states like Arizona, North Carolina, Georgia, and Colorado that have not traditionally been immigrant receiving areas experienced significant growth in their undocumented populations between 2000-2004.²⁷

As undocumented immigrants move into the interior of the country, we may be more concerned that they will become integrated into our local communities and become invisible as the otherwise-integrated neighbor, co-worker, spouse or parent. Though today's undocumented immigrants are overwhelmingly Latino²⁸ and arguably less likely to be able to blend into interior communities, there is still the possibility and the perception that they could do so. Moving border laws address this concern by using everyday transactions to separate undocumented immigrants from the rest of the community.

Finally, given the real possibility that moving border laws will increase racial and national origin profiling against those who look or sound foreign, the laws may mean that some Americans will never be accepted as members of this country, though they may have formal citizenship status. Moving border laws, particularly those requiring enforcement by private parties like landlords and employers, are susceptible to discriminatory enforcement.²⁹

The problem, briefly stated, is that immigration law is complex, with many different categories of legal status and many ways to obtain or lose that status. Without one definitive document to prove legal status and without immigration law training, many charged with enforcing these laws are likely to resort to profiling—only asking those who look or sound foreign to prove legal immigration status or circumventing the documentation process altogether and just outright denying benefits.³⁰ This is apparently what happened with federal employer sanctions. In 1989, shortly after the employer sanctions took effect, the General Accounting Office (now the General Accountability Office) surveyed employers to find out whether the sanctions caused them to discriminate against prospective employees.³¹ Its survey revealed that 461,000

²⁷ *Id.* at 6.

²⁸ The Pew Hispanic Center estimated that in 2004, Mexicans made up 57% of the total undocumented population; an additional 24% of the total came from other Latin American countries. Passel, *supra* note 25 at 2.

²⁹ See Pham, *supra* note 3.

³⁰ *Id.*

³¹ U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS, IMMIGRATION REFORM: EMPLOYER

employers (or ten percent) engaged in illegal national origin discrimination (based on a person's foreign appearance or accent) as a result of the sanctions.³² GAO also found that an additional 430,000 employers (nine percent) engaged in illegal citizenship discrimination as a result of the sanctions.³³

Thus, one very tangible consequence of moving borders is that those who look or sound foreign—here, mostly Latinos—will more likely be asked to prove legal immigration status or may be wrongly denied benefits altogether. In other words, the moving border laws are more likely to exclude certain people, based on national origin or appearance, and this may be the result, even if they have American citizenship. Moving border laws, then, provide proof of the difference between formal and substantive citizenship: that certain groups of people (here, racial or ethnic minorities) may have formal citizenship but are still treated as non-citizens or second class citizens because of discrimination.³⁴

In Part I of this Article, I describe the different laws that have converged to create this paradigm of moving borders. I look specifically at government trends, federal and local, to limit government benefits to those with lawful immigration status. I also examine the trend of private immigration enforcement: requiring private parties like landlords and employers to verify an applicant's immigration status before granting a private benefit. Looking at the combined effect of these trends, I explain how these laws operate like borders, comparing them to traditional, fixed borders.

In Part II, I consider different explanations for the growth of these laws. I conclude that there are multiple and varied policies driving this growth. Perhaps the most obvious is that moving borders laws are enacted to supplement immigration enforcement at the physical border, because we don't trust the physical border to stop illegal immigration. Moving border laws are also attractive because they promise to preserve resources (particularly publicly funded resources) for citizens and others

SANCTIONS AND THE QUESTION OF DISCRIMINATION 38–39 (1990) [hereinafter GAO 1990 DISCRIMINATION REPORT].

³² *Id.* at 5.

³³ *Id.* at 38.

³⁴ Others have written insightfully on this distinction. See e.g., Robert S. Chang and Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 Cal. L. Rev. 1395 (1997) (arguing that natavistic racism creates boundaries for non-whites).

with lawful immigration status. So even if we are unable to stop illegal immigration into the country, moving border laws seek to insure that undocumented immigrants will not have access to the country's resources. Finally, moving border laws have strong symbolic value: to express local governments' frustration with federal immigration policies and, in some instances, to express prejudice toward immigrants and undocumented immigrants.

In Part III, I explain why these pragmatic explanations for the growth of moving border laws only tell part of the story. If we take a step back to look at the bigger picture, what we see is that the nation is changing the way it defines its membership. First, there is increased attention paid to legal immigration status as the dividing line between those who belong as members and those who do not. Simply stated, legal immigration status has become much more important in our nation's discourse about membership. Second, that attention to immigration status is focused on the community level, as undocumented immigrants move away from big cities and other traditional immigrant receiving areas into the country's interior and into smaller communities. With this demographic change, there is more opportunity and more apprehension about undocumented immigrants blending into local communities. Moving border laws, which are triggered by everyday transactions, may be appealing because they can separate out undocumented immigrants from the rest of the community. Finally, because moving border laws are so vulnerable to discriminatory enforcement, they raise the real possibility that citizens who look or sound foreign will never be fully accepted as such.