12-2009

When Immigration Borders Move

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WHEN IMMIGRATION BORDERS MOVE

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Abstract

With recent immigration enforcement efforts, we have created a completely new paradigm of moving borders: laws, enacted at all levels of government, that require proof of legal immigration status in order to obtain a driver's license, a job, rental housing, government need-based assistance, and numerous other essential benefits. Unlike the fixed physical border, these laws require proof of immigration status at multiple, moving points within the country's interior and are triggered through everyday transactions; if unable to prove her legal status, a person is denied the restricted benefit. If a person is denied access to multiple essential benefits, then she is effectively denied the ability to live in the United States.

What is the significance of the moving border paradigm? Why are federal, state, and local governments, in so many different parts of the country, enacting these laws? To answer these questions, this Article explores the formation of moving border laws and the policies driving the growth of moving border laws: to reinforce our physical borders, to preserve resources (particularly government-funded resources) for those lawfully present, and to communicate symbolic messages including prejudice toward immigrants and certain ethnic groups identified as immigrants.

Yet, to truly understand the significance of moving border laws, we need to understand how these laws have influenced our notions of national membership. Now more than ever, legal immigration status has become the threshold characteristic when defining our national community. Thus, in an effort to emphasize legal status, undocumented immigrants have been pushed from the periphery, where they once exercised limited but real rights, to outside the boundaries of our national membership. However, in trying to elevate lawful immigration status, moving border laws have had the ironic and unintended effect of devaluing all forms of legal status. Stated simply, the enforcement of moving border laws increases racial and ethnic profiling against Latinos and others who don't "look American," even if they have legal status or

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* Professor of Law, Texas Wesleyan University School of Law; A.B., 1992 Harvard College; J.D., 1996 Harvard Law School. I had the opportunity to present this paper in several forums and would like to acknowledge the helpful comments I received from participants at the Baldy Center for Law & Social Policy, University at Buffalo Law School; the Fourth Annual Gloucester Summer Legal Conference in Gloucester, England; the Law & Society Association International Meeting in Berlin, Germany; and Stetson University College of Law. I want to offer special thanks to Jennifer Chacon, Jason Gillmer, Keith Hirokawa, Hiroshi Motomura, Van Pham, and Carla Pratt for their thoughtful feedback and to Melissa Jaffar for her excellent research assistance.

even citizenship. For them, the laws create permanent borders of discrimination.

I. 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

1. Most states require proof of legal immigration status before issuing driver's licenses. The federal REAL ID act, which took effect May 11, 2008, requires all states to check for legal immigration status in order to use state-issued licenses for federal purposes like boarding airplanes or entering federal buildings. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 311 (codified as amended at 49 U.S.C.A. § 30301 (West 2009)). Currently, all states have been granted extensions to comply with this and other REAL ID requirements. Department of Homeland Security, REAL ID: States Granted Extensions, http://www.dhs.gov/files/programs/gc_1204567770971.shtm (last visited Oct. 12, 2009). The Department of Homeland Security's Final Rule sets forth the process by which states can seek an extension until May 11, 2011 to comply with REAL ID requirements. 6 C.F.R. § 37.63 (2009).

2. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 made most non-citizens ineligible for federally-funded public benefits. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 400, 110 Stat. 2105, 2260 (1996) (codified at 8 U.S.C. § 1601 (2000)). 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. United States Department of Agriculture, Food and Nutrition Service, Supplemental Nutrition Assistance Program, Eligibility, http://www.fns.usda.gov/fsp/applicant_

some jurisdictions, rent a home.[5] Previously proposed laws also would have required 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]

As explained in Part II, this paradigm of moving borders, which requires proof of legal immigration status at so many important junctures, results from the convergence of three legal trends. The first trend consists of the numerous federal, state, and local laws that limit government benefits to those lawfully present in the United States, and in many cases, only to citizens. This trend accelerated after federal welfare reform in 1996,[9] which made undocumented immigrants and even most documented immigrants ineligible for need-based federal

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recipients/eligibility.htm# (last visited Oct. 12, 2009).

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. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.). Those employers who do not comply with verification requirements or knowingly hire unauthorized workers face fines and other penalties. Immigration and Nationality Act § 274A(b)(1), 8 U.S.C. § 1324a (2006). 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, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 787–91 (2008).

4. 49 U.S.C.A. § 30301 (West 2009).

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. *See* Pham, *supra* note 3, at 790–93, 790 n.64. Many of these housing laws have been struck down on preemption and other grounds. *Id.*

6. In 2004, Representative 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 United States citizens." *Id.* The bill was defeated 331 to 88. Zachary Coile, *Hospitals Won't Be Required To Report Illegals: House Rejects Bill, Citing Dire Health Consequences*, 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 (codified at CAL. PENAL CODE §§ 113–14 (West 1994)). 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.R. 2937, 2007 Gen. Assem., Reg. Sess. (Va. 2007). The bill was referred to the Senate Committee on Rehabilitation and Social Services, where it was passed by indefinitely. Virginia General Assembly Legislative Information System, H.R. 2937, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=071&typ=bil&val=hb2937 (last visited Oct. 12, 2009).

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

benefits programs.[10] 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.[11] 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, such as substance abuse counseling.[12]

The second trend contributing to the formation of moving borders is 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.[13] Additionally, state and local governments have passed their own private enforcement laws in the employment and housing areas.[14] Some proposed private enforcement laws would also have obligated doctors, teachers, and even charities to check immigration status before granting a private benefit.[15] 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.

The third trend, implicit in the descriptions of the other trends, is the increased involvement of sub-federal governments in the enforcement of immigration laws. Traditionally, immigration enforcement has been treated as an exclusively federal responsibility, with the federal government exercising sole authority to promulgate and enforce immigration laws.[16] But now, state and local governments have become

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10. *Id.*

11. *Id.*

12. *See* Mark P. Couch, *Immigration Laws Stymied, Little Enforcement a Year After State Leaders Passed Hard-Line Legislation, Agencies Haven't Followed Up Because of Strained Resources*, DENV. POST, Aug. 6, 2007, at B1, *available at* http://www.denverpost.com/search/ci_6552322 (describing the financial, bureaucratic, and legislative problems that Colorado faces in enforcing the state's recently passed immigration laws); Kristen Mack, *Immigration Initiative Is Left Out of Budget: Chairman Says Funds Will Be Found*, WASH. POST, Jan. 22, 2008, at B8 (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).

13. *See supra* note 3 and accompanying text.

14. *See* Pham, *supra* note 3 and accompanying text; *see also* Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004).

15. *See supra* notes 6–8 and accompanying text.

16. *See* Pham, *supra* note 14, at 987–95 (2004) (explaining that because of its presumed effect on foreign policy, courts have traditionally treated the immigration power as an exclusively federal one).

actively involved, enacting moving border laws and other legislation that affects immigrants within their local jurisdictions. The proliferation of moving border laws at the sub-federal level has increased the reach of these laws into aspects of everyday life.

These three 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 of the United States. However, we traditionally think of borders as fixed, physical boundaries, demarcations that define a state's territory, jurisdiction, and membership.[17] This representation of the border draws upon the Westphalian model of a sovereign state that has so strongly influenced contemporary political thinking.[18] Under this model, the state's power over people and property is defined by (and limited to) its physical territory.[19] Accordingly, the border is seen as a "permanent and *static* barrier that stands at the frontier of a country's territory."[20]

In the immigration context, the border serves an exclusionary function: to separate outsiders from insiders. Under the traditional model, the physical border is the site of that exclusion: Those who seek to enter the country must prove that they have permission to do so (or alternatively, find a way to cross illegally) and those who have entered and are deemed undesirable are often deported back across the border. It is the border then where proof of legal immigration status becomes centrally important, affecting people as they enter and exit the country. But once inside the border, we engage in economic, social, and other transactions, without regard for immigration status. In the United States, we see this notion of "legal spatiality"—that legal rights correspond with geography—permeating much of our constitutional law.[21]

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17. *See infra* Part II.A.

18. Signed in 1648, the Treaty of Westphalia ended the Thirty Years War and, many believe, ended the medieval system of overlapping loyalties and allegiances. Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2508 (2005). In its place, the Treaty introduced a new political system, where a single sovereign state exercised absolute power within its defined territory. *Id.* at n.32.

19. *Id.* at 2508–09.

20. Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 STAN. J. C.R. & C.L. 165, 168 (2007) (describing how U.S. immigration regulations reach both outside and inside of the physical border through pre-inspection at foreign ports and other mechanisms).

21. Raustiala, *supra* note 18, at 2503. As the U.S. 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 United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.

533 U.S. 678, 693 (2001) (citations omitted).

With the new paradigm, however, proof of legal immigration status becomes centrally important at multiple points both at the border and inside the country. That proof is needed not only to gain admission at the border but to obtain essential benefits and services once in the interior.[22] The laws requiring such proof are being enacted at both the federal and sub-federal 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.[23] The laws, in effect, serve as moving, internal borders, triggered when an applicant seeks a restricted benefit.

How do moving border laws exclude? Unlike traditional physical borders, these new laws do not deny physical entry nor result in deportation. Rather, applicants who cannot provide proof of legal immigration status usually are only denied benefits.[24] Yet when their collective impact is considered, the laws operate like borders. For example, a person may be able to get by in the United States without a driver's license (by taking public transportation or asking others for transportation), but what if she is also denied a job, an apartment, and access to medical care because she is unable to prove legal immigration status? In the latter scenario, the applicant more closely approximates the person turned away at the border or deported across the border. Without access to essential benefits, the applicant may be effectively denied the ability to live in the United States. In this way, moving borders serve the same exclusionary function as physical borders, separating outsiders from insiders.[25]

What is the significance of this moving borders paradigm? What does it mean for us as a nation when we require proof of legal immigration status before conducting everyday transactions? In Part III, this Article explores why moving border laws are formed, analyzing the multiple and varied policies driving their growth: to supplement

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22. *See supra* Part I.

23. *See supra* Part I.

24. *See supra* Part I.

25. Indeed, advocates of moving border laws often argue that the laws will cause undocumented immigrants to "self-deport." *See, e.g.*, Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach To Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 155, 157 (2008) (arguing that increased enforcement of employer sanctions and increased government enforcement of immigration laws would cause undocumented immigrants to self-deport); FED'N FOR AM. IMMIGRATION REFORM, ENCOURAGED REVERSE MIGRATION: A SENSIBLE SEVEN-STEP STRATEGY FOR PROMOTING THE OUTBOUND FLOW OF ILLEGAL IMMIGRATION 1–2 (2006), http://www.fairus.org/site/DocServer/research_backgrounder_may102006.pdf?docID=981 (arguing that increased worksite enforcement and the elimination of state and local benefits, combined with current deportation efforts and other enforcement, will "cause the attrition (self-deportation) of the majority of those here illegally and greatly restrict the inbound illegal flow").

physical border immigration enforcement; to preserve resources (particularly publicly funded resources) for citizens and others lawfully present; and to express symbolic messages, including prejudice toward immigrants and toward certain ethnic groups identified as immigrants.

While these explanations are important, I suggest in Part IV that they tell only part of the story. At a structural level, we are seeing changes in the way that the United States defines its membership. If membership is the national project of defining our identity, then moving border laws show that legal immigration status has become the threshold characteristic of that identity. Proof of legal immigration status is now a prerequisite to engaging in many everyday transactions, causing undocumented immigrants to be pushed outside the boundaries of national membership. Before the advent of moving border laws, undocumented immigrants had limited but real rights that allowed them to engage in economic, social, and other transactions. Those transactions included the ability to work, enforce their workplace rights, obtain a driver's license, rent a home, and even receive some forms of need-based government aid. Undocumented immigrants were able to engage in these transactions, despite their immigration status; in short, they were tolerated and even tacitly accepted in our national community.[26]

With the moving borders paradigm, however, legal immigration status has become centrally important, as everyday transactions now require proof of that legal status. From a membership perspective, moving border laws push undocumented immigrants from the periphery of our national community to the outside of its boundaries. Moving border laws have also expanded the jurisdiction of the physical border (and all the immigration concerns it represents) into the interior, resulting in differential treatment of people in public and private spheres based on alienage.[27] This expansion is not inevitable; in fact, before the advent of moving border laws, we had a system of immigration enforcement that concentrated on border areas. What moving border laws represent, then, is the triumph of our concerns about alienage over our commitments to legal spatiality and equal personhood within our national borders.

However, in trying to elevate lawful immigration status, moving border laws have had the ironic and unintended effect of devaluing all forms of legal status for Latinos and others who look like immigrants. Stated simply, immigration law is complex, and its enforcement

26. *See infra* notes 190–95 and accompanying text.

27. *See* Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1055–56 (1994) (arguing that legal ambivalence about how to treat aliens results from a jurisdictional dispute about whether immigration control concerns should affect our treatment of aliens already residing in the interior).

requires complicated, discretionary decisions about legal immigration status. When people without immigration law training are required to make those decisions (as moving border laws require), they are likely to resort to racial and ethnic profiling[28]—only asking people who look or sound foreign to prove legal immigration status or circumventing the documentation process altogether by denying benefits outright. We saw substantial evidence of that discrimination after federal employer sanctions were implemented in 1986.[29] Moving border laws that require enforcement by private parties like landlords and employers are particularly susceptible to discriminatory enforcement.[30]

For Latinos and others commonly identified as immigrants, moving border laws create permanent borders of discrimination, even though they may have legal status or even citizenship. In the worst case scenario, individuals in this group will be wrongly denied essential benefits that they need to live in this country. In the best case scenario, they will be subject to questions about their status while others who "look American" are not. Under either scenario, they are targeted for discrimination based on their race, ethnicity, or national origin. Like undocumented immigrants, they too are pushed outside the circle of national membership by moving border laws, but their expulsion occurs not because of their immigration status, but *in spite of it.* That they may have legal non-resident status, permanent legal status, or even citizenship does not protect them from this discrimination. Moving border laws, then, provide proof of the difference between formal citizenship and substantive citizenship: 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.[31]

II. HOW MOVING BORDERS ARE FORMED

The growth of the moving borders paradigm is really quite startling, limiting the availability of employment, transportation, housing, and government need-based assistance to those who can prove legal immigration status. This growth cannot be traced to a single event or

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28. *See infra* Part IV.B.

29. Bosniak, *supra* note 27, at 1054 & n.18. This discrimination is apparently what happened when employers were required to enforce federal employer sanctions. Bosniak, *supra* note 27, at 1125–26; *see also* U.S. GEN. ACCT. OFFICE, REP. NO. GAO/GDD-90-62, REPORT TO THE CONGRESS, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 38–39 (1990) [hereinafter GAO 1990 DISCRIMINATION REPORT].

30. *See* Pham, *supra* note 3, at 819–26.

31. Others have written insightfully on this distinction. *See, e.g.*, Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CAL. L. REV. 1395, 1399–1405 (1997) (arguing that nativistic racism creates boundaries for non-whites).

point of time, but is rather the result of three converging legal trends: (1) the actions of governments to restrict benefits to those lawfully present, (2) the requirement on private parties to check for legal immigration status before dispensing private benefits like employment or housing, and (3) the increased involvement of state and local governments to enforce immigration laws.[32] With the convergence of these trends, proof of legal immigration status has become a prerequisite to obtaining benefits that are essential for living in the United States.

As an initial matter, it is important to understand the parameters of the change that is described here. To say that we are shifting to a paradigm of moving borders is not to say that fixed borders are no longer important. Obviously, the physical, fixed borders retain their importance and, indeed, their dominance in our immigration law enforcement scheme.[33] Rather, what the moving borders paradigm seeks to describe is a shift in emphasis in how we think about immigration law enforcement.

Moreover, though there are other laws creating interior checkpoints, the focus here is on laws creating checkpoints that deny benefits. While federal immigration agents and, increasingly, state and local police check immigration status at various points within the nation's interior,[34] these interior checkpoints enforce immigration laws in a very direct way, as those unable to prove legal immigration status at these checkpoints are often placed in removal proceedings. Therefore, these laws of the interior law enforcement are qualitatively different from the moving border laws studied here. The former enforce immigration directly by law enforcement officers who likely have immigration law training, particularly if they work for a federal agency like Immigration and Customs Enforcement (ICE) while the latter enforce immigration laws indirectly because they do not ordinarily result in removal.[35]

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32. *See supra* notes 1–5 and accompanying text.

33. In fiscal year 2008, for example, Customs and Border Protection, the federal agency responsible for border enforcement, processed 503 million people seeking admission to the United States (including airline passengers) and apprehended over 900,000 people trying to enter illegally. U.S. CUSTOMS & BORDER PROTECTION, PERFORMANCE AND ACCOUNTABILITY REPORT 6 (2008), http://www.cbp.gov/linkhandler/cgov/newsroom/publications/admin/fiscal_2007_pub.ctt/par_fy08.pdf.

34. *See* Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1178–89 (2008) (arguing that protecting the privacy of immigration and citizenship status information serves important social purposes in the context of immigration enforcement by law enforcement officials); Pham, *supra* note 14, at 998–1000 (suggesting that immigration law enforcement by state and local police violates the constitutional requirement of uniform immigration laws).

35. *See* Anil Kalhan, *Immigration Enforcement and Federalism After September 11, 2001*, 2 *in* IMMIGRATION, INTEGRATION AND SECURITY: EUROPE AND AMERICA IN COMPARATIVE PERSPECTIVE (Ariane Chebel d'Appollonia & Simon Reich eds., Univ. of Pittsburgh Press, 2008), *available at* http://papers.ssrn.com/abstract=1145666 (distinguishing between direct and indirect forms of immigration law enforcement).

Moreover, the enforcement mechanism of moving border laws is very different. Moving border laws are triggered by applicants who seek a restricted benefit rather than by government action, and they are enforced through everyday transactions, often by private parties who do not have any immigration law training. These differences have important pragmatic and membership implications that deserve special analysis.

A. *Restrictions on Benefits as Border Formation*

Before analyzing the substance of moving border laws, it is important to understand how these laws form immigration borders. To do this, we need to understand the role that borders play in immigration law enforcement. Traditionally, we think of borders as fixed, physical boundaries, dividing one government's territory and authority from another's.[36] While state sovereignty in economic, military, and technological terms has eroded, states continue to assert sovereignty through their immigration and citizenship policies and "national borders, while more porous, are still there to keep out aliens and intruders."[37]

Thus, the border serves as a boundary, to separate outsiders from insiders and to exclude those who are not wanted. In its most basic form, the border is a physical demarcation, an actual physical space that must be crossed by those seeking entry into the country. Much insightful scholarship has been written about the border in its more complex forms, both in its conceptualization and operation. Conceptually, some have argued that beyond the physical border, the institutions and legal rules we choose for implementing our immigration policies may create borders or barriers of their own.[38] Operationally, others have pointed out that the immigration functions of separation and exclusion are not limited to the physical border but also occur through more nuanced mechanisms. For example, United States immigration officials working in foreign ports and airports "pre-inspect" non-citizens

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36. This traditional conception of borders is rooted in the Westphalian model of state sovereignty, where a state's authority is absolute within, but yet limited to, its boundaries. *See supra* notes 18–19 and accompanying text.

37. SEYLA BENHABIB, THE RIGHTS OF OTHERS 6 (Cambridge Univ. Press 2004); *see also* Chang & Aoki, *supra* note 31, at 1398 ("[T]he nation-state is reasserting (and perhaps re-creating) itself through control over immigration and the immigrant.").

38. *See, e.g.*, Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 205 (2002) (arguing that process obstacles created by agencies implementing immigration laws distort our substantive immigration policies); Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 836–39 (2007) (observing that during the twentieth century, America has increasingly relied on ex post screening where immigrants are selected on the basis of post-entry information, such as their avoidance of criminal activity while in the country).

who seek to fly into the United States;[39] those who are deemed inadmissible by these immigration officials are not allowed to board any ship or plane bound for the United States.[40] And through the process of interdiction, immigration officers stop and interview would-be asylum seekers in international waters, before they reach United States' shores.[41]

In all of these different analyses, the border's primary function continues to be that of separation and exclusion. From that perspective, moving border laws also operate as borders in a way that may not be obvious at first glance. After all, when a moving border law is enforced, the effect is to deny a person a desired benefit, not to remove that person from the United States. So a job applicant who is unable to produce the documents necessary to prove legal immigration status is not placed into deportation but is simply denied the job.[42] The job applicant is arguably in a better position than an immigrant who is denied entry or deported across the border. But what if she is also denied access to transportation, housing, and medical care? In that event, she more closely resembles the deported immigrant because she is excluded from benefits that are essential to life in the United States. When their collective impact is considered, moving border laws can have the effect of physical borders—separation and exclusion. Indeed, advocates for these laws argue that the laws are an essential part of immigration enforcement because they will cause the "self-deportation" of undocumented immigrants.[43]

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39. Shachar, *supra* note 20, at 175.

40. Shachar, *supra* note 20, at 175

41. Hiroshi Motomura, *Haitian Asylum Seekers: Interdiction and Immigrants' Rights*, 26 CORNELL INT'L L.J. 695, 716 (1993) (arguing that U.S. interdiction policy may unintentionally create judicial protections for those who are interdicted).

42. For example, federal employer sanctions prohibit employers from hiring unauthorized workers but do not place any affirmative obligation on them to report unauthorized workers to immigration authorities. *See generally* 8 U.S.C. § 1324a (2006) (discussing unlawful employment of aliens). Of course, an employer could choose to report the worker to immigration authorities, but that would be on her own initiative and not a result required by federal law. *Id.* The employer sanctions law enacted in Hazleton, Pennsylvania, comes closest to requiring employers to report undocumented workers to immigration authorities. HAZLETON, PA., ORDINANCE § 2006–18 (2006). In provisions that have yet to be enforced because of ongoing legal challenges, the city requires employers seeking to reinstate their business licenses after suspension to fire the undocumented workers and to submit an affidavit that includes the "name, address and other adequate identifying information of the unlawful workers" hired. *Id.* § 4. For subsequent hiring violations, the city forwards this affidavit, the complaint received, and other related documents to federal authorities. *Id.*; *see also* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 538 (M.D. Pa. 2007) (striking down the city's ordinances that barred the employment and harboring of undocumented immigrants and required renters to prove legal residence in order to obtain occupancy permits as preempted by federal law).

43. "The twelve to twenty million illegal aliens in the United States need not be rounded up and forcibly removed through direct government action. Illegal aliens can be encouraged to

The extent to which moving border laws cause undocumented immigrants to leave is largely unknown. There is some anecdotal evidence suggesting that moving border laws, especially those passed by sub-federal governments, are causing immigrants to leave. For example, after Colorado passed strict statewide laws that, among other things, impose state employer sanctions and deny state services without proof of legal immigration status, farmers, construction companies, and other employers complained of labor shortages.[44] The complaints were serious enough for the state to start a pilot program to send prisoners into fields to harvest crops.[45] And Arizona, which in January 2008 started enforcing its Fair and Legal Employment Act, which severely punishes employers who knowingly hire undocumented immigrants, has experienced flight by Latino immigrants.[46] For example, in heavily Latino areas of Phoenix, a city where the sheriff has made it a practice to arrest people suspected of being in the country illegally, apartment vacancy rates have risen and school enrollments have dropped.[47] Cities and towns that have passed restrictive immigration legislation are also reporting significant losses of Latino residents.[48]

Beyond this anecdotal information, statistical information suggests that in recent years, the number of undocumented immigrants in the United States has not grown and may in fact have decreased. Government census data estimates that the number of undocumented immigrants decreased from 11.8 million in January 2007 to 11.6 million in January 2008, the first time since 2005 (when the Department of Homeland Security started producing these annual estimates) that there

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depart the United States on their own, through a concerted strategy of attrition through enforcement." Kobach, *supra* note 25, at 156.

44. *See* Nicholas Riccardi, *Going Behind Bars for Laborers*, L.A. TIMES, Mar. 1, 2007, at A1.

45. *See* Dan Frosch, *Inmates Will Replace Wary Migrants in Colorado Fields*, N.Y. TIMES, Mar. 4, 2007, at 25; *see also* Myung Oak Kim, *New Era for Colorado: Owen Puts Pen to Tough Immigration Bills Aimed at Identifying Legal Citizens*, ROCKY MTN NEWS, Aug. 1, 2006, at 5A.

46. Randal C. Archibold, *Arizona Seeing Signs of Flight by Immigrants*, N.Y. TIMES, Feb. 12, 2008, at A13.

47. *Id.* During the fourth quarter of 2007, apartment vacancy rates rose from 9% to 11.2%, compared with the same quarter in 2006. *Id.* In heavily Latino neighborhoods, those vacancy rates are 15% or higher. *Id.* And school districts in heavily Latino areas have reported sudden drops in enrollment—one school district in West Phoenix reported a loss of 525 students during the 2007–2008 school year, while enrollment in the district had been stable or increased during previous years. *Id.*

48. *See* Ellen Barry, *City's Immigration Law Turns Back Clock; Latinos Leave Hazleton, Pa., in Droves in the Old Coal Town's Crackdown*, L.A. TIMES, Nov. 9, 2006, at A10 (reporting an estimate by Hazleton's mayor that as many as 5,000 Latinos have left since the town adopted some of the nation's first local immigration legislation); Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, at A1.

has not been an annual increase in the undocumented population.[49] Consistent with government estimates, the Pew Hispanic Center's estimate of the undocumented population was 11.9 million in March 2008.[50] And though the Pew Center could not conclude that the population actually declined since 2007 (because of the margin of error in its estimates), it did find that the undocumented population grew more slowly from 2005 to 2008 than it did earlier in the decade.[51]

Combined, the anecdotal and statistical information show that the undocumented population is slowing in its growth and possibly moving from certain jurisdictions. Whether these moving border laws affect either demographic trend is a politically charged issue. The Center for Immigration Studies (CIS), a group that favors immigration restrictions, attributes the decline in the undocumented population in part to increased enforcement of immigration laws, including the enforcement of moving border laws.[52] But the Immigration Policy Center (IPC), a group favoring immigration liberalization, disputes that conclusion and argues that the nation's economic downturn and subsequent loss of jobs are primarily responsible for the immigration decline.[53]

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49. MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., POPULATION ESTIMATES: ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2008 1 (2008), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2008.pdf.

50. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CENTER, TRENDS IN UNAUTHORIZED IMMIGRATION: UNDOCUMENTED INFLOW NOW TRAILS LEGAL INFLOW 1 (2008), http://pewhispanic.org/files/reports/94.pdf; *see also* PEW HISPANIC CENTER, INDICATORS OF RECENT MIGRATION FLOWS FROM MEXICO 1–3 (2007), http://pewhispanic.org/files/factsheets/33.pdf (looking at employment data, remittance receipts, and Border Patrol apprehensions data, the Pew Center concluded that immigration from Mexico "began to increase again in 2004," but then experienced "less rapid growth in the first quarter of 2007 and perhaps also in the second half of 2006 compared to 2004 and 2005").

51. PASSEL & COHN, *supra* note 50.

52. STEVEN A. CAMAROTA & KAREN JENSENIUS, CTR. FOR IMMIGRATION STUDIES HOMEWARD BOUND: RECENT IMMIGRATION ENFORCEMENT AND THE DECLINE IN THE ILLEGAL ALIEN POPULATION 2, 9 (2008), http://www.cis.org/articles/2008/back808.pdf (concluding that because the decline in the illegal immigrant population occurred before there was a significant rise in their unemployment rate, increased enforcement is likely responsible for part of the decline).

53. IMMIGRATION POLICY CTR., ATTRITION THROUGH RECESSION: CIS REPORT MARRED BY INACCURACIES, CONTRADICTIONS, AND WISHFUL THINKING 1, 4–5 (2008), http://www.immigrationpolicy.org/images/File/factcheck/CISPopulationReport7-30-08.pdf (arguing that CIS's report is flawed because, *inter alia*, specific industries like construction that employ large numbers of undocumented workers started shedding jobs much earlier than CIS acknowledges). The policy implications of determining the effect of moving border laws are significant. If immigrants are responding to increased enforcement (as CIS claims), then arguably government policies can be used to decrease illegal immigration in a more permanent way. By continuing or increasing enforcement of immigration laws, including moving border laws, the federal government and even state and local governments could decrease illegal immigration in their jurisdictions. If, however, undocumented immigrants are leaving primarily because of the economic downturn

However, without more methodical study, it is not possible to draw causality and conclude with any certainty that moving border laws are affecting the undocumented population.[54] Though the undocumented population may be slowing in its growth, it is unclear whether the slowdown is resulting from fewer arriving immigrants, more departing immigrants, or a combination of the two. In its recent study of Mexican immigrants (who make up about 59% of all undocumented immigrants in the United States),[55] the Pew Hispanic Center found decreased Mexican immigration to this country since mid-decade, but for Mexicans already in the United States, it found no evidence of increased emigration back to Mexico.[56] So if this finding is correct and holds true for undocumented immigrants generally, it suggests that moving border laws are not affecting the out-country movement of undocumented immigrants in any significant way. Even if moving border laws discourage those seeking to immigrate to the U.S., other factors—namely, the economic recession and the subsequent evaporation of jobs—seem to be influential as well.

Having considered out-country movement, we turn to the interior and ask whether moving border laws are affecting the movement of undocumented immigrants *within* the United States. As noted earlier, anecdotal evidence points to some Latino movement out of jurisdictions with restrictive laws, but the dimensions of that movement are unclear.[57] First, how many people are actually leaving and what is their immigration status? Because many families have mixed status (some members are here legally, while others are here illegally), the possibility that many of the Latinos leaving have legal status is a substantial one. And what about the movement of undocumented immigrants from non-Latino groups?

Even if we could determine conclusively who is leaving, we do not know where they are going or whether the departures are permanent. The Pew Hispanic Center study suggests that undocumented immigrants

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(as IPC argues), then their departures may be more temporary. Illegal immigration is likely then to increase again when the economy strengthens and jobs are added. If this explanation is correct, then the wisdom of spending extra effort and expense to increase immigration enforcement is questionable.

54. In October 2009, the University of Virginia, James Madison University, and the Police Executive Research Forum will do a comprehensive review of the effects of immigration ordinances enacted in Prince William County, Virginia. Kristen Mack, *Pr. William Crackdown To Cost More Than Planned, First-Year Estimate Rises to $6.4 Million*, WASH. POST, Mar. 2, 2008, at C1.

55. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CENTER, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 1 (2009), http://pewhispanic.org/files/reports/107.pdf.

56. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CENTER, MEXICAN IMMIGRANTS: HOW MANY COME? HOW MANY LEAVE? 1 (2009), http://pewhispanic.org/files/reports/112.pdf.

57. *See supra* notes 44–48 and accompanying text.

are not leaving the United States in increased numbers, so movement may simply be to other jurisdictions within the country.[58] Finally, more importantly, we do not know conclusively why Latinos are leaving certain jurisdictions. Is this demographic trend a reaction to the moving border laws or a result of the economic downturn experienced more severely in different parts of the country?[59]

The position of the Migration Policy Institute (MPI), one of the more neutral voices on this issue, may be the most plausible. Noting the anecdotal evidence of some immigrants leaving jurisdictions with strict immigration legislation, MPI raises similar questions about causality and the identity of the immigrants leaving. "[U]nless implementation of enforcement regimes—both on the federal and state levels—is nationwide," MPI concludes, "state laws and selective enforcement strategies will probably first divert unauthorized immigrants to other destinations within the United States rather than induce return migration."[60]

For purposes of this analysis, the capacity of moving border laws to influence immigration trends is more significant than their actual effect. As explained below, it is through the implementation of the laws that their pragmatic and membership implications become apparent.

B. *Restricting Government Benefits*

The first legal trend in the formation of moving borders, in large part, results from governments restricting their benefits to those who can prove legal immigration status or, in many cases, citizenship.

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58. *See supra* notes 55–56 and accompanying text.

59. Outside of the context of moving border laws, studies of undocumented migration patterns have found high correlations between economic conditions (both in the United States and in the sending country) and the growth of undocumented immigration. That is, worsening economic conditions in the sending country and good job prospects in the United States have been linked to higher rates of undocumented immigration. *See, e.g.*, Belinda I. Reyes, *The Impact of U.S. Immigration Policy on Mexican Unauthorized Immigration*, 2007 U. CHI. LEGAL F. 131, 151 (2007) (examining the individual impact of increased border controls, legalizations, and guest worker programs, Reyes concludes that improving economic opportunities in Mexico is the best approach to controlling illegal immigration from Mexico).

60. DEMETRIOS G. PAPADEMETRIOU & AARON TERRAZAS, MIGRATION POLICY INST., IMMIGRANTS AND THE CURRENT ECONOMIC CRISIS: RESEARCH EVIDENCE, POLICY CHALLENGES, AND IMPLICATIONS 11 (2009), http://www.migrationpolicy.org/pubs/lmi_recessionJan09.pdf. MPI describes itself as "independent, nonpartisan, nonprofit think tank in Washington, DC dedicated to analysis of the movement of people worldwide;" the organization grew out of the International Migration Policy Program at the Carnegie Endowment for International Peace. Migration Policy Institute Homepage, http://www.migrationpolicy.org/about/index.php (last visited Oct. 12, 2009). Current staff members include Doris Meissner (Immigration and Naturalization Service (INS) Commissioner under President Clinton) and James W. Ziglar (INS Commissioner under President George W. Bush). Migration Policy Institute, Staff Homepage, http://www.migrationpolicy.org/about/staff.php (last visited Oct. 12, 2009).

Government benefits, as used here, refers to privileges or programs paid by government funds and implemented by government employees who serve as gatekeepers to the benefits. Government benefits currently subject to moving border laws run the gamut—from need-based aid (such as food stamps),[61] to licenses (including driver's licenses, professional licenses, and business licenses),[62] to non-need-based services (such as substance abuse counseling).[63] Because government benefits deal with basic needs and services, their denial may make the most immediate and severe impact.

Moving border laws have been enacted at both the federal and sub-federal levels, but it has been the federal government that has taken the lead on denying benefits based on immigration status. This federal primacy is not surprising, given that immigration regulation is understood to be an exclusive federal responsibility.[64] Indeed, the U.S. Supreme Court has struck down state laws restricting the ability of legal permanent residents to receive welfare benefits,[65] while upholding federal laws that imposed essentially similar restrictions.[66] The difference, according to the Court in *Graham v. Richardson*, is that states have no authority to regulate the conditions for entry and residence of non-citizens.[67] That authority rests exclusively with the federal government, and in *Mathews v. Diaz*, that plenary authority provided constitutional justification for the federal law that discriminated based on alienage.[68]

The courts, however, have given sub-federal governments more leeway when it comes to their regulation of undocumented immigrants. Because state and local governments have broad police powers, the U.S. Supreme Court has expressed willingness to uphold their laws, even if the laws have some impact on immigration. "[T]he fact that aliens are the subject of a state statute does not render it a regulation of

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61. 8 U.S.C. § 1612(a)(1) (2006).

62. *See, e.g.*, PRINCE WILLIAM COUNTY, VA RES. 07-894 (2007); *see also* Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 215 (2004) (tracing state restrictions on driver's licenses to anti-immigrant sentiment in the 1990s).

63. *See, e.g.*, *infra* notes 88–108 and accompanying text.

64. *See* Ting v. United States, 149 U.S. 698, 699 (1893); Lung v. Freeman, 92 U.S. 275, 280 (1876); Passenger Cases, 48 U.S. (1 How.) 283, 420–21 (1849).

65. Graham v. Richardson, 403 U.S. 365, 376–77 (1971) (striking down state laws that denied welfare benefits to resident aliens or resident aliens who had not resided in the United States for a specified number of years as a violation of the Equal Protection Clause and an encroachment on the federal government's exclusive immigration power).

66. Mathews v. Diaz, 426 U.S. 67, 87 (1976) (holding that Congress' decision to limit Medicare eligibility to permanent resident aliens who had continuously resided in the United States for five years or more was rational).

67. *Id.* at 84–85.

68. *Id.* at 83.

immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[69] Therefore, assuming the sub-federal law does not attempt to regulate entry or the conditions for legal stays, the courts have to determine whether Congress expressed a "clear and manifest purpose" to occupy the field, in which case sub-federal laws, even harmonious ones, would be preempted.[70] Even without field occupation, a sub-federal law may still be preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[71] With the line between permissible exercise of police powers and preempted immigration regulation so blurred, sub-federal laws that make distinctions based on immigration status are often subject to legal challenge.[72]

Because of this legal uncertainty, cities and states often take their cue from the federal government. The most significant federal legislation to form moving borders was the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),[73] which significantly restricts the eligibility of immigrants, even those with legal status, for federal public benefits.[74] Specifically, under PRWORA, only "qualified aliens" are eligible for any "federal public benefit,"[75] and

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69. De Canas v. Bica, 424 U.S. 351, 355 (1976) (upholding a state statute that fined employers who knowingly hired undocumented workers). The statute at issue in *De Canas* would be expressly preempted by the federal employer sanctions program enacted in the Immigration Reform and Control Act of 1986. *See* 8 U.S.C. § 1324a(h)(2) (2006) (stating that federal employer sanctions preempt state and local employer sanctions, other than licensing laws).

70. *De Canas*, 424 U.S. at 357.

71. *Id.* at 363.

72. *See, e.g.*, Ariz. Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036, 1048–49 (D. Ariz. 2008) (rejecting a preemption challenge to the state's employer sanctions law); Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 555 (M.D. Pa. 2007) (striking down the city's ordinances that barred the employment and harboring of undocumented immigrants and required renters to prove legal residence in order to obtain occupancy permits as preempted by federal law); *see also* Plyler v. Doe, 457 U.S. 202, 230 (1982) (striking down a Texas law that restricted the ability of undocumented children to attend public schools as a violation of the Equal Protection Clause).

73. Pub. L. No. 104-193, 110 Stat. 2105, 2260 (1996) (codified at 8 U.S.C. § 1601 (2000)).

74. *Id.*

75. 8 U.S.C. § 1601. "Qualified aliens" include legal permanent residents, asylees and refugees, discretionary parolees, victims of domestic violence who are the spouse or child of a U.S. citizen, and certain grandfathered groups of immigrants. 8 U.S.C. § 1641 (2006). "Federal public benefit" is defined as:

> (A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and

even they face significant restrictions on their eligibility.[76] So undocumented immigrants or applicants for asylum, because of their unqualified status, cannot apply for Medicaid, State Child Health Insurance Program (SCHIP), or any of thirty-one programs identified as providing restricted federal benefits.[77] Furthermore, even legal permanent residents who do have qualified status under PRWORA are categorically ineligible for Supplemental Security Income (SSI) or food stamps.[78] Subsequent legislation restored many of these federal benefits for qualified immigrants who arrived in the United States before August 22, 1996,[79] but otherwise, these benefits continue to be largely limited to citizens.[80] Therefore, with the enactment of PRWORA, legal immigration status (and often, citizenship) has become a prerequisite for an array of federal benefits.

Significantly, PRWORA also gave considerable authority to *states* to make eligibility determinations based on immigration status. This authority extends to both joint federal-state programs and wholly state-funded programs. For specified jointly-funded programs (Temporary Assistance for Needy Families (TANF), Medicaid, and programs funded by federal social services block grants), states are authorized to determine the eligibility of qualified aliens.[81] Practically speaking, this means a state can deny these specified benefits to qualified aliens, as at least one state has chosen to do.[82]

> (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by any agency of the United States or by appropriated funds of the United States.

Id. § 1611(c)(1).

There are limited exceptions for immigrants with refugee or asylee status, who have worked at least forty qualifying quarters without receiving federal means-tested, or who are on active military duty or received an honorable discharge. *Id.* § 1612(a)(2).

76. *Id.*

77. Dep't of Health & Human Servs., Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA); Interpretation of "Federal Public Benefit" Notice, 63 Fed. Reg. 41658, 45658-01 (Aug. 4, 1998), *available at* 1998 WL 435846.

78. 8 U.S.C. § 1612.

79. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997).

80. The eligibility rules are complex and are regularly amended by Congress. For more detailed information, see RUTH ELLEN WASEM, CRS REPORT FOR CONGRESS, NONCITIZEN ELIGIBILITY FOR MAJOR FEDERAL PUBLIC ASSISTANCE PROGRAMS: POLICIES AND LEGISLATION (2004), https://www.policyarchive.org/bitstream/handle/10207/1268/RL31114_20040317.pdf?sequence=1.

81. 8 U.S.C. § 1612(b)(1).

82. For example, Alabama denies TANF to all immigrants. ANN MORSE ET AL., NAT'L CONFERENCE OF STATE LEGISLATURES, AMERICA'S NEWCOMERS: MENDING THE SAFETY NET FOR IMMIGRANTS, http://www.ncsl.org/statefed/execsumm.htm#FedOverview (last visited Oct. 12,

For state-funded benefits like General Assistance programs, states may set their own eligibility determinations, as long as their guidelines are not more restrictive than federal guidelines for similar programs.[83] To make these eligibility determinations, states are explicitly authorized to verify an applicant's immigration status.[84] So, similar to the joint federal-state programs, states are authorized to deny their benefits even to qualified aliens. Finally, though undocumented immigrants are already "unqualified" to receive government benefits, PRWORA further requires states wishing to provide any benefits to these undocumented immigrants to enact a law affirmatively doing so.[85] These provisions, in effect, allow state and local governments to do what the *Graham* Court prohibited: to make distinctions based on alienage in the distribution of local government resources.[86] And the result was to invite the creation of more moving borders, restricting access to state and local government benefits based on immigration status.

Post-PRWORA, many state and local governments have taken up the federal government's invitation and restricted their benefits and programs to those lawfully present.[87] Almost all states require proof of

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2009).

83. 8 U.S.C. § 1622. Because it includes non-immigrants and parolees who have been here less than one year, the group of immigrants eligible for state benefits is slightly larger than those eligible for federal benefits. *Id.* § 1621(a).

Like the federal definition, the restricted "state or local public benefit" is defined broadly as:

> (A) any grant, contract, loan, professional license, or commercial license provided by any agency of a State or local government or by appropriated funds of a State or local government; and
>
> (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by any agency of a State or local government or by appropriated funds of a State or local government.

Id. § 1621(c)(1).

General Assistance programs are operated by states, counties, or other local governments and provide cash and in-kind assistance to needy individuals who are ineligible for or in the process of applying for federal cash assistance programs. *See* L. JEROME GALLAGHER ET AL., THE URB. INST., STATE GENERAL ASSISTANCE PROGRAMS 1998, at 10 (1999), http://www.urban.org/UploadedPDF/ga_main.pdf.

84. 8 U.S.C. § 1625.

85. 8 U.S.C. § 1621(d).

86. *See supra* notes 65–68 and accompanying text.

87. Though PRWORA's language suggests that states are *required* to limit their benefits to qualified aliens, in fact, the provisions relating to state and local public benefits have been interpreted as giving states the *option* to do so. *See* WENDY ZIMMERMAN & KAREN C. TUMLIN, THE URBAN INST., PATCHWORK POLICIES: STATE ASSISTANCE FOR IMMIGRANTS UNDER WELFARE REFORM 39–43 (1999) (explaining that one of the choices states had to make after PRWORA

legal immigration status before issuing a driver's license.[88] As others have noted, restricting driver licenses not only limits a person's lawful access to an important source of transportation. Because a license is the most commonly accepted form of identification, the restrictions also limit a person's ability to participate in a wide range of public and private activities.[89]

Similarly, states have placed immigration-related restrictions on other government benefits, requiring proof of legal immigration status in order to participate in a publicly funded English as a Second Language program (Illinois),[90] to obtain a liquor license (Arkansas),[91] and to obtain other specified benefits.[92] And a handful of states (Arizona, Colorado, Georgia, Missouri, Oklahoma, South Carolina, and Utah) require proof of lawful immigration status before accessing almost any state-funded services and programs.[93] Colorado's House Bill

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was to decide whether to implement new benefits restrictions for undocumented immigrants). It should also be noted that the federal government has not brought any enforcement actions against states under these provisions. *See* 07-03 COLO. ATT'Y GEN. OP. 3 & n.2 (2007), 2007 Colo. AG LEXIS 3, http://www.ago.state.co.us/agopinions/AGO_PDFs/AGO07-3.pdf (observing that the federal government has not promulgated regulations for PRWORA or brought an enforcement action against a state or local government under its provisions).

88. *See* DIV. OF MOTOR VEHICLES, COLO. DEP'T OF REVENUE, IDENTIFICATION REQUIREMENTS 2 n.4, http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1235627232251&ssbinary=true (listing forty-two states and the District of Columbia as jurisdictions that require legal presence before issuing a driver's license or identification card).

89. *See* Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2079 (2008) ("When states and localities deny identity documents, they take a step toward denying identity itself—at least in practical terms."). Activities where a driver's license is often requested as proof of identity run from the essential to the ordinary: boarding an airplane, paying for purchases with a check or credit card, or even obtaining a public library card. Other forms of identification are accepted for these activities (for example, the Transportation Security Administration will accept unexpired photo identification issued by federal, state or tribal governments, as well as unexpired foreign passports, *see* 49 C.F.R. §§ 1540.107(c), 1560.3 (2008)), but these other forms of identification (like passports) are more difficult and expensive to obtain and are less widely recognized than driver's licenses.

90. 110 ILL. COMP. STAT. 805/2-24 (2008).

91. ARK. CODE ANN. § 3-4-210 (2008).

92. For more information on immigration-related legislation enacted by states in 2007, see NAT'L CONFERENCE OF STATE LEGISLATURES IMMIGRANT POLICY PROJECT, 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION (Jan. 31, 2008), *available at* http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf [hereinafter NCSL 2007 LEGISLATION]. For more information on immigration-related legislation enacted by states in 2008, see NAT'L CONFERENCE OF STATE LEGISLATURES IMMIGRANT POLICY PROJECT, STATE LAWS RELATED TO IMMIGRANTS AND IMMIGRATION (July 24, 2008), *available at* http://www.ncsl.org/print/immig/immigreportjuly2008.pdf [hereinafter NCSL 2008 LEGISLATION].

93. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-1803 (2008); COLO. REV. STAT. § 24-76.5-101 (2007); Georgia Security and Immigration Compliance Act, GA. CODE ANN. § 50-36-1 (2008); MO. REV. STAT. § 208.009 (2008); Oklahoma Taxpayer and Citizen Protection Act 2007, OKLA.

1023[94] is typical of these laws: it prohibits state agencies or any political subdivision of the state from providing any federal, state, or local benefit without first verifying the applicant's lawful presence.[95] House Bill 1023[96] defines federal, state, or local benefits broadly, by incorporating PRWORA's definitions, with exceptions for emergency medical care, disaster relief, immunizations, and federally-exempted services, such as soup kitchens.[97]

To receive restricted benefits in Colorado, the applicant must file an affidavit attesting to her legal presence.[98] Then the agency or political subdivision distributing the benefit must verify the legal presence through the federal Systematic Alien Verification for Entitlements (SAVE) Program.[99] An applicant who knowingly files a false affidavit is subject to state criminal penalties, with each receipt of public benefits counted as a separate violation.[100] Agencies are required to provide annual reports regarding SAVE's verification error rates and delays.[101]

At the local government level, towns, cities, and counties have also enacted moving border laws, requiring proof of legal immigration status as a prerequisite to obtaining their government benefits.[102] Because they typically have smaller budgets than states, local governments will have fewer government benefits to restrict.[103] Nonetheless, many local governments have enacted moving border laws, garnering much publicity in the process.[104] Much of the press has focused on the landlord rental laws (requiring landlords to verify the legal immigration status of tenants) or employer sanction laws enacted by some local governments,[105] but the restrictions on government benefits are also noteworthy.

STAT. tit. 25 § 1313 (2008); S.C. CODE ANN. § 8-29-10 (2008); UTAH CODE ANN. § 17-22-9.5 (2008). The laws often contain other immigration regulations, including locally-enforced employer sanctions. *See infra* Part II.C.

94. COLO. REV. STAT. § 24-76.5-103 (2007).

95. *Id.*

96. *Id.* §§ 24-76.5-102 to 24-76.5-103.

97. *Id.*

98. *Id.* § 24-76.5-103(7).

99. *Id.* The SAVE program administers a federal database that contains immigration information for over 100 million records. U.S. Citizenship and Immigration Services, Systematic Alien Verification for Entitlements (SAVE) Program, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=1721c2ec0c7c8110VgnVCM1000004718190aRCRD&vgnextchannel=1721c2ec0c7c8110VgnVCM1000004718190aRCRD (last visited Oct. 12, 2009). Though primarily used by federal and local agencies to determine the immigration status of applicants for public benefits, SAVE also has pilot programs used by employers to verify the eligibility of new employees. *Id.*

100. COLO. REV. STAT. § 24-76.5-103(6).

101. *Id.* § 24-76.5-103(10).

102. *See infra* Part II.C.

103. *See infra* Part II.C.

104. *See infra* Part II.C.

105. *See infra* Part II.C.

Typical of these local efforts is the law enacted by Prince William County, Virginia. In October 2007, the Board of County Supervisors voted to deny county services to undocumented immigrants, part of a broader crackdown that also included increased police enforcement of immigration laws.[106] After the vote, county staff had to determine which specific services the county should restrict based on legal constraints and policy concerns.[107] Based on that analysis, the county restricted access to homeless assistance, substance abuse counseling, and programs to assist the elderly (including in-home care); the county is also engaging in a labor-intensive effort to determine the legal status of individuals who receive county business licenses.[108]

In enacting these moving border laws, all levels of governments have experienced implementation problems. These problems have been particularly acute for state and local governments, as their forays into immigration-related regulation have required them to deal with financial, legal, and community-related challenges. Briefly summarized, state and local governments have had to pay for the additional costs of the new laws, have had to defend their laws from costly and often successful lawsuits, and have had to deal with the undermining of crucial police-community cooperation.[109]

The experiences of Colorado and Prince William County are illustrative of these problems. Colorado's House Bill 1023 was supposed to remove as many as 50,000 undocumented immigrants from the state's public benefit rolls.[110] Yet a year after enactment, state government offices reported spending $2 million to comply with the law but could not identify any savings as a result of that compliance. That is, they could not say how many undocumented immigrants, if any, were being denied state-funded services as a result of the law.[111]

And in Prince William County, the actual costs of implementing its immigration enforcement measures were $26 million over five years—almost twice the original estimate.[112] With cuts in state funding for

106. Mack, *supra* note 12.

107. Mack, *supra* note 12.

108. Mack, *supra* note 12; *see also* PRINCE WILLIAM COUNTY, VA. RES. 07-894 (2007) (listing as Attachment services recommended for restriction based on immigration status).

109. *See* Huyen Pham, *Problems Facing the First Generation of Local Immigration Laws*, 36 HOFSTRA L. REV. 1303, 1310–11 (2008).

110. David Migoya, *New Era on Immigration: Owen Signs Package of Bills, Effect Felt Today. The Governor Hopes Changes Designed to Trim Illegal Recipients from State Welfare and Public Service Will "Stem the Tide of Illegal Immigrants Coming into Colorado,"* DENV. POST, Aug. 1, 2006, at A1, *available at* http://www.denverpost.com/search/ci_4119484.

111. Couch, *supra* note 12. Colorado has experienced a host of other implementation problems, including bureaucratic problems, lack of funding, and legislative inaction. *See* Pham, *supra* note 109, at 1303–04.

112. Mack, *supra* note 54.

county police services and a shrinking tax base (caused by foreclosures and overall declining property values),[113] the county was forced to make hard fiscal decisions.[114] Eventually, the Board of County Supervisors voted to scale back its immigration measures, directing police to reduce the scope of their enforcement (checking the immigration status of criminal suspects only after they have been arrested, as opposed to checking the status of all criminal suspects, no matter how minor the alleged crime), voting not to install video cameras in police cars, and cutting $1.2 million in immigration-related costs for police, protective services and foster care for children of deported immigrants.[115] Still, the county had to raise property tax bills by 5% to pay for these immigration measures and the rest of its budget.[116]

Despite these challenges, the trend to restrict government benefits is expanding as immigration issues continue to garner national interest and as more cities and states become involved in the immigration debate.[117] The result is to form moving borders around essential government benefits, where proof of legal immigration status is required for entry and access.

C. *Restricting Private Benefits*

Moving borders are also formed by a second legal trend—laws that restrict access to privately funded benefits, like employment, housing, and transportation. The laws, passed by all levels of government, operate by requiring employers, landlords, and other private actors to verify an applicant's legal immigration status before distributing a private benefit like employment or housing. This private enforcement of immigration laws is a swiftly growing and significant trend. Its significance is two-fold: it expands the reach of immigration enforcement to private transactions not funded or directly controlled by the government and it enlists private parties to serve as the mechanism for enforcement.

Like restrictions on government benefits, laws restricting private benefits have been enacted at all levels of government, with the federal government taking the lead. In 1986, Congress enacted the Immigration Reform and Control Act (IRCA) to address illegal immigration, with

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113. Kristen Mack, *28% Higher Property Tax Rate Eyed in Pr. William: Funds Could Help Cover Shortfall, Public Safety*, WASH. POST, Feb. 27, 2008, at B1.

114. *Id.*

115. Kristen Mack, *Pr. William Softens Policy on Immigration Status Checks: Police Officers Can Question Crime Suspects About Their Residency Only After They Are Arrested*, WASH. POST, Apr. 30, 2008, at B1.

116. *Id.*; *see also* Mack, *supra* note 113; Mack, *supra* note 12.

117. *See infra* Part II.D.

employer sanctions as its centerpiece.[118] For the first time, IRCA made it illegal under federal law to hire an unauthorized worker.[119] By making it more difficult for undocumented immigrants to find work, Congress believed that employer sanctions would reduce the incentives for illegal immigration.[120] The sanctions impose two requirements on employers: one substantive (prohibiting the "knowing" hire of unauthorized workers) and one administrative (requiring employers to verify the work eligibility of all employees by checking for certain documents).[121] An employer who violates the law faces fines;[122] an employer who "engages in a pattern or practice" of substantive violations may also face criminal penalties.[123]

Despite congressional aspirations, federal employer sanctions have been roundly criticized as both ineffective in deterring illegal immigration and detrimental in increasing exploitation of workers. Critics point out that the sanctions are rarely enforced, and when they are, the structure of the sanctions makes it difficult to prosecute employers for substantive violations.[124] Throw in widely available

118. The other components of the legislation included legalization for many undocumented immigrants already here and heightened border security to prevent future illegal crossings. *See* Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.).

119. *Id.* § 101, 100 Stat. 3359, 3360 (codified as amended in 8 U.S.C. § 1324a (1988)). Previously, under the "Texas Proviso" (so called because it was added after lobbying by southwestern farmers and other agricultural interests), the employment of an unauthorized worker did not constitute "harboring" and thus was not subject to sanction under federal law. Immigration and Nationality Act §274(a), 8 U.S.C. § 1324(a) (1976). At the time of IRCA's enactment, eleven states and one city had employer sanctions laws, but these laws were rarely enforced. *See* Carl E. Schwarz, *Employer Sanctions Laws, Worker Identification Systems, and Undocumented Aliens: The State Experience and Federal Proposals*, 19 STAN. J. INT'L L. 371, 383 (1983).

120. "Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens, and this, in turn, will deter aliens from entering illegally or violating their status in search of employment." H.R. REP. NO. 99-682(I), at 46 (1986), *reprinted in* 1996 U.S.C.C.A.N. 5649, 1986 WL 31950.

121. Immigration and Nationality Act § 274A(a)(1)(B), 8 U.S.C. § 1324a(a)(1)(B) (2006).

122. For substantive violations, employers can be fined $250 to $2000 per unauthorized worker hired ($2,000 to $10,000 per hire for repeat violations); for administrative violations, employers face fines of $100 to $1,000 for each employee with inadequate paperwork. Immigration and Nationality Act § 274A(e)(4)(A)(i)-(iii), 8 U.S.C. § 1324a(e)(4)(A)(i)-(iii) (2006); Immigration and Nationality Act § 274A(e)(5), 8 U.S.C. § 1324a(e)(5).

123. The criminal penalties include a $3,000 fine per unauthorized hire, six months imprisonment, or both. Immigration and Nationality Act § 274A(f)(1), 8 U.S.C. § 1324a(f)(1).

124. Complying with the administrative requirements (that is, making a good faith effort to check for required documents) provides employers with an affirmative defense against charges of substantive violations and makes prosecutions more difficult. *See* Immigration and Nationality Act § 274A(a)(3), 8 U.S.C. § 1324a(a)(3); 8 C.F.R. § 274a.4 (2009). Under the good faith affirmative defense, a good faith verification counts as compliance, "notwithstanding a technical or procedural failure to meet such requirement if there was a good faith effort to comply." 8 U.S.C. § 1324a(b)(6). An example of a technical or procedural failure that has been

counterfeit documents, and the result on the enforcement side is that the sanctions have very little deterrence effect, creating incentives for employers to hire unauthorized workers without fear of legal liability.[125]

On the worker protection side, employer sanctions are blamed for increasing exploitation of workers, both documented and undocumented. Critics argue that employers, who are largely insulated from prosecution under IRCA but suspect that their employees are undocumented, exercise tremendous power over their employees.[126] Moreover, because the sanctions incentivize the hiring of undocumented workers who are vulnerable to exploitation, the wages and working conditions of all workers suffer.[127]

Sensing inadequacy in the federal laws, a growing number of sub-federal governments have enacted their own employer sanctions. Some of these laws threaten employers with targeted penalties—the loss of a business license, a government contract or grant, or a tax deduction—if they knowingly hire unauthorized workers. For example, the Illegal Immigration Relief Act (IIRA) Ordinance enacted in Hazleton, Pennsylvania, requires an employer who hires unauthorized workers to fire those workers within three business days after receiving notice from the city or risk suspension of its business license.[128] Other sub-federal employer sanctions (like federal sanctions) are more general in scope, threatening employers with fines for violations. For example, Colorado fines employers who, with reckless disregard, fail to submit requested documentation of their employees' legal status or submit false documentation.[129]

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excused is the failure to include a date on section 2 of the I-9 form (where the employer attests that she has reviewed the required forms and that they appear genuine). Order Granting in Part and Denying in Part Respondent's Motion for Leave to Amend Answer at 10, WSC Plumbing, Inc., OCAHO No. 99A00054, 2000 WL 33113962 (Dep't of Just. Sept. 7, 2000).

125. The General Accountability Office warned in 2006 that "ongoing weaknesses [in the document verification process] have undermined [the sanctions'] effectiveness" and that employers who circumvent the sanctions face little chance of prosecution." U.S. GOV'T, ACCOUNTABILITY OFFICE, REP. NO. GAO-06-895T, IMMIGRATION ENFORCEMENT, WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 21 (2006).

126. Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103 (2009).

127. *See* Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 211–13 (2007) (arguing that employer sanctions have undermined labor and employment rights for undocumented workers and consequently, worsened working conditions for other workers as well).

128. HAZLETON, PA., ORDINANCES 2006-18 (2006). IIRA was subsequently amended by Ordinance 2007-6, but none of those minor amendments are relevant here. *Id.* The IIRA Ordinance, as well as the city's Tenant Registration Ordinance (requiring apartment residents to prove legal immigration status before obtaining a required occupancy permit) were both struck down as unconstitutional on preemption and due process grounds. *See* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 538 (M.D. Pa. 2007).

129. H.R. 1017, 65th Leg., 1st Spec. Sess. (Colo. 2006), *codified at* COLO. REV. STAT. § 8-

Private enforcement laws have expanded beyond the employment area. In the housing area, some local governments have passed ordinances that penalize landlords who, knowingly or with reckless disregard, rent to undocumented immigrant tenants.[130] In the transportation area, a federal law imposes substantial criminal penalties on anybody who, in "knowing or in reckless disregard" of a person's illegal immigration status, transports that person within the United States.[131] This criminal statute motivated Greyhound to train its employees to detect and avoid selling tickets to undocumented, would-be immigrants.[132] Other proposed laws, if enacted, would have expanded private enforcement into the medical care and charity areas.[133]

2-122(2)-(4) (2006). The constitutionality of sub-federal employment sanction laws, particularly the more general laws, are questionable because federal employer sanctions expressly preempt all state and local sanctions laws, with a limited exception for licensing and other similar laws. *See* Immigration and Nationality Act § 274A(h)(2), 8 U.S.C. § 1324a(h)(2) (2006) ("The provisions of this section [employer sanctions] preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.").

130. *See* CHEROKEE COUNTY, GA., ORDINANCES 2006-003 (2006) (imposing penalties on landlords who rent to undocumented immigrants, "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of the law"); HAZLETON, PA., ORDINANCES 2006-13 (2006), *available at* http://www.smalltowndefenders.com/090806/2006-13%20_Landlord%20Tenant%20Ordinance.pdf (penalizing landlords who knowingly rent to undocumented immigrants).

131. The statute imposes penalties on "[a]ny person who, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law." 8 U.S.C. § 1324(a)(1)(A)(ii) (2006).

132. Leslie Berestein & Norma de la Vega, *Bus Company Policy Irks Latino Groups, Ticket Sellers Told to Deny Service to Apparent Illegals*, SAN DIEGO UNION-TRIB., Sept. 23, 2005, at A1. Greyhound's guidelines warned employees not to sell tickets "to anyone you know or believe to be an illegal alien" and instructed them to, among other things, look for large groups traveling together, with little or no luggage, led by one person (likely the smuggler), and moving in single file. *Id.* After protests by the Mexican American Legal Defense and Educational Fund, Greyhound modified its guidelines to remove all references to Spanish words and to give equal space to explaining the company's policy against racial profiling. *Id.*

133. *See, e.g.*, H.R. Res. 3722, 108th Cong. (2004) (including a federal bill that would have required hospitals seeking federal reimbursement to determine the immigration status of all patients before providing care). The bill was soundly defeated, 331 to 88. Mark Sherman, *Patient Status Kept Out of ERs; The Government Had Wanted To Use the Immigration Question To Assess Funding Eligibility*, HOUSTON CHRON., Oct. 10, 2004, at A21; *see also* H.R. 2937, 2007 Gen. Assem., Reg. Sess. (Va. 2007) (including state bill that would have prevented charities from using state or local government funding to provide services to undocumented immigrants). The bill was referred to the Senate Committee on Rehabilitation and Social Services, where it was passed by indefinitely. Virginia General Assembly Legislative Information System, H.R. 2937, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=071&typ=bil&val=hb2937 (last visited Oct. 12, 2009).

Though they differ in their details, these private enforcement laws share a common structure: to make lawful immigration status a prerequisite to obtaining private benefits essential to everyday living. The efficacy of enlisting private parties to enforce immigration laws is suspect however, particularly given that private parties lack immigration law training and therefore are likely to make legal mistakes and resort to racial profiling.[134] Nevertheless, these laws continue to be popular and will continue to erect moving borders between applicants and necessary private benefits.

D. *Restricting at the Sub-Federal Level*

The third legal trend contributing to the formation of moving borders is the dramatic increase of state and local government involvement in immigration enforcement. And this trend is implicit in the description of the previous trends, but the recent upsurge in sub-federal enforcement deserves special analysis. Though immigration regulation has been long understood to be an exclusive federal responsibility,[135] now other levels of government—states, counties, and cities—are enacting laws affecting the immigrants within their jurisdictions. For example, from January 2007 through June 2008, state legislatures enacted 415 bills and resolutions related to immigration;[136] of those, 125 were moving border laws, requiring proof of legal immigration status to access benefits as varied as inmate educational programs,[137] government-funded health insurance for children,[138] and a funeral director license.[139] As these examples illustrate, the increased involvement of sub-federal governments have substantially increased the reach of moving border laws into everyday transactions largely regulated by state and local governments. This trend will likely continue as sub-federal governments continue to outpace the federal government in both the quantity and variety of moving border laws enacted.

As noted earlier, the legal landscape for sub-federal involvement in immigration enforcement is murky.[140] The federal government's authority to exercise immigration powers—and to exercise it exclusively—is clear. In upholding the infamous Chinese exclusion laws, the Supreme Court characterized the federal government's

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134. *See infra* Part IV.B; *see also* Pham, *supra* note 3, at 800–26 (evaluating the effectiveness of private enforcement laws).

135. *See supra* note 64.

136. *See* NCSL 2007 LEGISLATION, *supra* note 92; NCSL 2008 LEGISLATION, *supra* note 92.

137. H.R. 86, 2008 Gen. Sess. (Utah 2008) (bill enrolled), *available at* http://le.utah.gov/~2008/bills/hbillenr/hb0086.pdf.

138. KAN. STAT. ANN. § 38-2001 (2008).

139. MO. REV. STAT. § 333.041 (2008).

140. *See supra* notes 64–72 and accompanying text.

authority to exclude foreigners as "part of those sovereign powers delegated by the Constitution."[141] Because its exercise can affect foreign policy, the immigration power belongs exclusively to the federal government and is "incapable of transfer to any other parties."[142] The Court reiterated that position in subsequent cases as well.[143]

What's not as clear is where the federal government's immigration power ends and a sub-federal government's police power begins. Sub-federal laws that affect immigrants living within the sub-federal jurisdictions are not necessarily preempted by federal immigration laws.[144] Adding to the complexity of the preemption analysis is the federal government's encouragement of sub-federal involvement, both in the realms of government welfare benefits[145] and federal immigration law enforcement.[146] The legality of some moving border laws has been challenged in court, and this unfolding legal story will undoubtedly affect the role of sub-federal involvement in immigration law enforcement.[147]

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141. Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) (upholding the Chinese exclusion laws that prohibited Chinese laborers from entering the United States, even in those cases where the laborers had left the country with official government permission to return).

142. *Id.*

143. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); Truax v. Raich, 239 U.S. 33, 42 (1915) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government."); Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, ... In the United States this power is vested in the national government.").

144. *See supra* notes 69–71 and accompanying text.

145. *See supra* notes 73–89 and accompanying text.

146. After the 9/11 attacks, Attorney General John Ashcroft invited local and state police to enforce both civil and criminal immigration laws, as part of anti-terrorism efforts. Attorney General John Ashcroft, Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), *available at* http://www.usdoj.gov/archive/ag/speeches/2002/060502ag preparedremarks.htm. This invitation was a reversal of the Department of Justice's previous position on this issue and a departure from previous legal precedent. For more on the federal government's efforts to involve sub-federal governments in immigration law enforcement, see Pham, *supra* note 14.

147. *See supra* note 72 and accompanying text. For scholarly analysis of the constitutionality of sub-federal involvement in immigration law enforcement, see generally, for example, Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008) (noting that because the Constitution allows immigration authority to be shared by different levels of government, the constitutionality of sub-federal involvement in immigration law enforcement should be assessed through traditional federalism analysis, not preemption analysis); Pham, *supra* note 14 (arguing that because of its voluntary nature and the discretion it grants to local and state authorities, sub-federal enforcement of immigration laws

Why this increased state and local interest? Demographic changes show that undocumented immigrants are settling in areas of the country that have not historically received large numbers of immigrants. Consider that in 1990, about 88% of undocumented immigrants lived in only six states (California, Florida, New Jersey, Illinois, and Texas).[148] By 2004, even though the undocumented population continued to grow, only 61% settled in those six states.[149] The rest settled in states like Arizona, Colorado, Georgia, and North Carolina, states that have not traditionally been immigrant-receiving areas but that experienced significant growth in their undocumented populations from 2000 to 2004.[150]

This diffusion of undocumented immigrants into different parts of the country has transformed immigration from being solely a national concern to one with local implications, affecting smaller communities and non-border areas. Because 81% of undocumented immigrants are from Mexico or other countries in Latin America, this demographic change can dramatically affect the racial and ethnic make-up of communities.[151] Thus, the dramatic increase in sub-federal moving border laws can be seen as a manifestation of localized immigration anxiety, as cities and states enact moving border laws out of concern that immigration is changing their communities.[152]

III. WHY MOVING BORDERS ARE FORMED: A PRAGMATIC ANALYSIS

Part II explored how moving borders are formed through the convergence of three legal trends and, specifically, how they are formed through the denial of public and private benefits. Part III asks why these moving borders are formed in the first place. Why are governments rushing to enact these laws, laws that are often expensive to implement and questionable in their efficacy? As explained in Part II, the laws are

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unconstitutionally creates non-uniform immigration laws); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (arguing that because the immigration power is an exclusively federal one, state welfare laws discriminating on the basis of alienage should be subject to heightened scrutiny).

148. JEFFREY S. PASSEL, PEW HISPANIC CENTER, ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION 3 (2005), http://pewhispanic.org/files/reports/44.pdf.

149. *Id.*

150. *Id.* at 3, 6.

151. 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. *Id.* at 2.

152. *See, e.g.*, Patrick McGee, *2 Cities Saw Big Rise in Hispanic Enrollments*, FT. WORTH STAR-TELEGRAM, Mar. 9, 2008, at A20 (describing how Farmers Branch and Irving, Texas, which implemented tough immigration measures, have experienced some of the state's sharpest growth in Hispanic student enrollment in their public schools in recent years).

being enacted by all levels of government—federal, state, and local—and encompass many different subject areas, so understanding why these laws are enacted presents a challenge. Yet, looking at statements made by the enacting government officials and other legislative history, certain themes emerge. As explored further below, those themes include the desire to reinforce the physical borders, to preserve fiscal resources for those lawfully present, and to communicate symbolic messages, including hostility toward immigrants and groups perceived to be immigrants.

A. *Reinforcing Physical Borders*

Perhaps the most commonly expressed reason for enacting moving border laws is the desire to reinforce physical borders. Given the country's well-documented problems in enforcing our physical borders,[153] moving border laws are popular because they are seen as providing backup support. That moving border laws are seen as an immigration enforcement tool is evident in their preambles. For example, Oklahoma's moving border legislation declares that Oklahoma has a "compelling public interest . . . to discourage illegal immigration" by requiring state agencies to cooperate with federal immigration enforcement.[154] Practices like issuing identification cards without verifying immigration status, the state concludes, "impede and obstruct the enforcement of federal immigration law [and] undermine the security of our borders."[155]

As an immigration enforcement tool, moving border laws are unique in that they don't require or, in most cases, even result in the deportation of undocumented immigrants. Rather, the deportations that occur, if any, are supposed to be voluntary, as undocumented immigrants decide to leave rather than endure life in this country without access to essential benefits. Those who manage to evade immigration controls at the physical border (or enter legally but overstay) still face moving borders laws that, by denying essential benefits, make living in the United States very difficult. The overt goal is to make these immigrants leave (and to discourage others contemplating illegal entry from doing so). In other words, advocates of these laws believe that the laws will cause undocumented immigrants to "self-deport."[156] The position of

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153. *See, e.g.*, Randal C. Archibold & Julia Preston, *Despite Growing Opposition, Homeland Security Stands By Its Fence*, N.Y. TIMES, May 21, 2008, at A18; Richard Marosi, *Razor Wire Added at Mexican Border; Officials Say the 5-mile Stretch Will Protect Agents. Critics Contend it's Inhumane and a Terrible Symbol*, L.A. TIMES, May 17, 2008, at A1.

154. Oklahoma Taxpayer and Citizen Protection Act 2007 § 2, § 4, OKLA. STAT. tit. 21 § 1550.42 (2008).

155. *Id.*

156. For more on the self-deportation argument, see *supra* notes 23 and 35 and

Louis Barletta, mayor of Hazleton, Pennsylvania, is representative. In pushing for some of the first locally-enacted moving border laws, Barletta's goal is to "get rid of the illegal people. It's this simple: *They must leave.*"[157]

As noted earlier, the efficacy of moving border laws in reducing illegal immigration is unclear.[158] What is clear, however, is that the goal of border reinforcement continues to be a driving force behind the continued expansion of moving border laws.

B. *Preserving Resources*

Even if moving border laws are not effective immigration enforcement tools, they are still politically popular because they seek to preserve important (and often scarce) benefits for those lawfully present. At the same time, the laws also deny benefits to immigrants (largely undocumented but also sometimes documented), which is also a politically popular position. The desire to preserve resources is particularly compelling when the restricted benefits are publicly funded because few taxpayers are willing to pay for benefits for immigrants (particularly undocumented immigrants) who are seen as undeserving of public assistance.

In enacting PRWORA, legislation that restricted eligibility for many federal need-based programs largely to citizens, Congress was clearly motivated by this preservation rationale. National immigration policy, Congress concluded, requires that "aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations."[159] To ensure this self-sufficiency, the government has a compelling interest in cutting immigrant eligibility for public benefits.[160] And this preservation rationale appears more bluntly in comments made by Representative Frank Riggs: "[T]he message that we are sending here, and we are clearly stating to our fellow citizens, [is] that we really are going to put the rights and needs of American citizens first."[161]

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accompanying text.

157. Michael Powell & Michelle Garcia, *Pa. City Puts Illegal Immigrants on Notice, 'They Must Leave' Mayor Hazleton Says After Signing Tough New Law*, WASH. POST, Aug. 22, 2006, at A3.

158. *See supra* notes 45–60 and accompanying text.

159. Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 § 400, 8 U.S.C. § 1601(2)(A) (2006).

160. *Id.* § 1601(5).

161. 141 Cong. Rec. H3412 (1995); *see also* T. Alexander Aleinikoff, *The Tightening Circle of Membership*, 22 HASTINGS CONST. L.Q. 915, 920 (1995) (concluding that PRWORA's exclusion of legal immigrants from federal entitlement programs was motivated by a narrowing conception of membership that excluded even lawfully present immigrants).

Should benefits be limited based on immigration or citizenship status? As noted earlier, the legal question is only partially settled. The federal government is constitutionally authorized to make these distinctions, but the authority of state and local governments to do so is less clear.[162] Even if governments have legal authority to make these distinctions, should they do so, as a policy matter? Much has been written about the wisdom and indeed, the morality of treating people differently based on citizenship status.[163] For present purposes, it is important to note that in trying to preserve resources, moving border laws may actually prevent those lawfully present from receiving the benefits to which they are entitled.

For many Americans, particularly the poor and the homeless, obtaining an original or certified birth certificate or other proof of legal immigration status can be a very difficult task because of the costs and time delays. Indeed, after the federal Deficit Reduction Act of 2005[164] took effect (requiring documentation of citizenship to apply for or renew Medicaid coverage), states reported significant declines in Medicaid enrollment, which they attributed, in whole or significant part, to the documentation requirements.[165] Data from these states indicate that it was primarily American citizens, not undocumented immigrants, who were denied coverage because of the documentation requirements.[166] Similar problems have been experienced by states as they move to require documentation of citizenship for their own welfare programs.[167]

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162. A sub-federal law affecting immigrants is constitutionally valid if it is an exercise of that sub-federal government's police power (versus a preempted immigration regulation) or is done at the invitation of the federal government. *See supra* notes 64–72 and accompanying text.

163. *See, e.g.*, ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 36 (Yale U. Press 1975) (arguing that the Constitution, and not citizenship status, determines how the government treats those within its jurisdiction).

164. Pub. L. No. 109-171, § 1, 120 Stat. 4, 4 (2006) (codified as amended in scattered sections of 2, 7, 12, 16, 20, 26, 28, 29, 42, 46, 47 U.S.C.).

165. *See* DONNA COHEN ROSS, CTR. ON BUDGET & POLICY PRIORITIES, NEW MEDICAID CITIZENSHIP DOCUMENTATION REQUIREMENT IS TAKING A TOLL 1 (2007), http://www.cbpp.org/files/2-2-07health.pdf; JENNIFER RYAN, NATIONAL HEALTH POLICY FORUM, CITIZENT DOCUMENTATION IN MEDICAID AND CHIP, May 26, 2009, http://www.nhpf.org/library/the-basics/Basics_CitizenshipMedicaidCHIP_05-26-09.pdf. Previously, applicants were allowed to make written declarations of citizenship, under penalty of perjury; now under the DRA, however, applicants have to provide an original or certified copy of a birth certificate, naturalization certificate, passport, or other specified document proving citizenship. Deficit Reduction Act of 2005.§ 6306, 42 U.S.C. §1396b (2006); *see also* 42 C.F.R. § 436.407 (2008).

166. *See* ROSS, *supra* note 165, at 1; Ryan, *supra* note 165, at 3–4.

167. Kathy Barks Hoffman, *Welfare Clients Asked to Prove Citizenship, Some States Now Require Documents*, BOSTON GLOBE, July 6, 2008, at A10, *available at* http://www.boston.com/news/nation/articles/2008/07/06/welfare_clients_asked_to_prove_citizenship/.

Despite these problems, the preservation rationale continues to be politically popular for readily apparent reasons. Preserving benefits for those legally present in the country is an inherently appealing argument for taxpaying voters. In this political climate, denying benefits to immigrants, undocumented and documented, is also popular because they are seen as undeserving of the benefits. And those U.S. citizens likely to be harmed—the poor and the homeless—have limited political capital to influence the legislative debate. Thus, the preservation rationale will likely continue to play an important role in the political debate over moving border laws.

C. *Expressing Symbolic Messages*

A third reason that governments (particularly state and local governments) enact moving border laws is to express symbolic messages: discontent with the lack of enforcement by the federal government; concern about the perceived resulting damage to the rule of law; and in many cases, bias against immigrants and those who look like immigrants. The symbolic function of moving border laws is separate from any practical impact the laws may have. That is, the opportunity to express a symbolic message may motivate governments to enact moving border laws, regardless of the laws' impact on border reinforcement, resource preservation, or other policy goals.

In enacting federal employer sanctions, Congress clearly had the symbolic message in mind. Before IRCA became law, it was illegal for undocumented immigrants to come into the country or for documented immigrants to overstay their visas; yet employers who hired these immigrants faced no legal sanction under federal law.[168] Apart from the anticipated policy effect of the sanctions, Congress wanted to establish that hiring undocumented workers was indeed an illegal act. Drafters of key IRCA provisions were very much concerned with establishing this legal principle, "regardless of whether it was financially, technically, or politically possible to enforce it rigorously in the short run."[169]

For state and local governments, symbolic messages are particularly important because they face legal and practical constraints on their ability to influence immigration policy.[170] When federal immigration

168. Pre-IRCA, federal law specified that employment of undocumented immigrants was not "harboring" and was thus not subject to penalties under federal law. *See supra* note 119.

169. MICHAEL FIX & PAUL T. HILL, ENFORCING EMPLOYER SANCTIONS: CHALLENGES AND STRATEGIES 39 (1990) (reporting on interviews with members of Congress).

170. The legal constraints concern questions about the authority of sub-federal governments to enact legislation affecting immigrants or immigration. *See supra* notes 64–72 and accompanying text. As compared with the federal government, sub-federal governments, as a practical matter, are constrained by smaller budgets and an inability to enact immigration legislation that would have national (versus local) impact. *Id.*

laws are not vigorously enforced, sub-federal governments deal with the consequences, both positive and negative. Though analysts disagree about whether undocumented immigrants have a net positive or negative fiscal impact, most agree that sub-federal governments pay a disproportionate share of the costs of undocumented immigration.[171] Some sub-federal governments have enacted moving border laws to express frustration with federal enforcement policies.[172] In enacting these laws, sub-federal governments often express a related message: that lax federal enforcement encourages illegal immigration, which undermines the rule of law.[173]

Finally, the discriminatory messages expressed by many moving border laws cannot be ignored. The laws themselves do not single out any particular ethnic or racial group; indeed many of the laws include a provision requiring implementation on a non-discriminatory basis.[174] Yet the contexts in which the laws are passed often imply a broader anxiety about immigrants generally, not just those here illegally. Often, these laws are passed together with English-only ordinances.[175] Because

171. *See, e.g.*, CAROL KEETON STRAYHORN, TEX. OFF. OF THE COMPTROLLER, UNDOCUMENTED IMMIGRANTS IN TEXAS: A FINANCIAL ANALYSIS OF THE IMPACT TO THE STATE ECONOMY AND BUDGET 1 (2006), http://www.window.state.tx.us/specialrpt/undocumented/undocumented.pdf (concluding that in Texas in 2005, undocumented immigrants produced $1.58 billion in state revenues, exceeding the $1.16 billion they received in state services; also noting that local governments were burdened with paying $1.44 billion in health care and law enforcement costs that were not reimbursed by the state); FED'N FOR AM. IMMIGR. REFORM, THE COST OF ILLEGAL IMMIGRATION TO TEXANS 1 (2005), http://www.fairus.org/site/DocServer/texas_costs.pdf?docID=301; *see also* Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 609–40 (2008) (arguing that because state and local governments play a crucial role in integrating immigrants into the body politic, they should be given a voice in the design and implantation of immigration controls).

172. For example, in requiring companies with county contracts to verify the lawful immigration status of their workers, Suffolk County, New York, clearly wanted to send a message to the federal government: "[S]ince there has been a lack of enforcement of a twenty (20) year old federal law [employer sanctions] . . . , Suffolk County has an opportunity to lead by example in an effort to prod the federal government to undertake such enforcement action." SUFFOLK COUNTY, N.Y., LOCAL LAW NO. 52-2006 (2006).

173. Oklahoma, in passing its omnibus House Bill 1804 that created numerous moving borders, made a finding that "illegal immigration is causing economic hardship and lawlessness in this state." H.R. 1804, 51st Leg., 1st Sess. § 2 (Okla. 2007), *available at* http://64.233.167.104/search?q=cache:dvFJSZC5udAJ:webserver1.lsb.state.ok.us/2007-08HB/HB1804_int.rtf+oklahoma+house+bill+1804&hl=en&ct=clnk&cd=2&gl=us. For an insightful analysis of the rule of law debate within the immigration context, see Motomura, *supra* note 89, at 2085–87.

174. In its provisions requiring agencies to verify the legal immigration status of applicants for state or local benefits, Oklahoma requires that the verification "shall be enforced without regard to race, religion, gender, ethnicity, or national origin." Oklahoma Taxpayer and Citizen Protection Act 2007, OKLA. STAT. ANN. tit. 56 § 71(B) (West 2008).

175. At the same time that it enacted its Illegal Immigrant Relief Act, Hazleton, Pennsylvania also passed an ordinance making English the city's official language. HAZLETON,

language disputes implicate more than language preferences, the coupling of moving border laws with these language ordinances suggests conflict with immigrants, foreigners, and foreign culture.[176] Additionally, moving border laws are often enacted in communities experiencing rapid growth in their Latino populations.[177] And then there are blatantly discriminatory comments like those made by Mayor Jeffrey Whitteaker of Valley Park, Missouri, in explaining why he pushed to pass the city's housing law: "My main issue is overcrowding. You got one guy and his wife that settle down here, have a couple of kids, and before long you have Cousin Puerto Rico and Taco Whatever moving in."[178] Indeed, some have suggested that the real purpose of moving border laws, particularly those passed at the sub-federal level, is to "express[] . . . hostility . . . [toward] Latino immigrants[, to say they] are not part of 'our' community."[179]

Because immigration is an issue that engenders great passion and controversy, the symbolic messages behind moving border laws should not be ignored. Apart from any pragmatic effect the laws may have, they will continue to be politically popular because they convey symbolically important messages. The intended audiences for these messages include the federal government and even immigrants themselves. Particularly for state and local governments that face legal and practical constraints on their abilities to influence the immigration debate, the symbolic impact of moving border laws is especially appealing.

IV. WHAT MOVING BORDERS MEAN: A MEMBERSHIP ANALYSIS

The pragmatic analysis of moving border laws helps us understand why these laws are being enacted, but to truly understand their

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PA., ORDINANCE 2006–19 (2006), *available at* http://www.smalltowndefenders.com/090806/2006-19%20_Official%20English.pdf.

176. A person's linguistic ability or preference is not controlled by his or her immigration status, so disputes about which language(s) should be used necessarily implicate more than just immigration issues. *See* Keith Aoki et al., *(In)visible Cities: Three Local Government Models and Immigration Regulation*, 10 OR. REV. INT'L L. 453, 518–19 (2008) (describing English-only groups "not only as pro-English language, but also as anti-Latino").

177. *See, e.g.*, McGee, *supra* note 152 (describing how Farmers Branch and Irving, Texas, which recently implemented tough immigration measures, have experienced some of the state's sharpest growth in Hispanic student enrollment in their public schools).

178. Kristen Hinman, *Valley Park to Mexican Immigrants: "Adios, Illegals!" A Small-Town Mayor's Plan Creates One Big Controversy*, ST. LOUIS RIVERFRONT TIMES, Feb. 28, 2007, *available at* http://www.riverfronttimes.com/2007-02-28/news/valley-park-to-mexican-immigrants-adios-illegals/.

179. Motomura, *supra* note 89, at 2076; *see also* Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 54–56 (arguing that Mexicans and Mexican-Americans have been and will continue to be the targets for sub-federal immigration laws).

significance, we must also understand how they reflect changes in our notions of national membership. What do the moving border laws reflect about us and how we think about each other? What does it mean for us as a nation when we require proof of legal immigration status before conducting everyday transactions? What are the implications for those who are consistently excluded by moving border laws?

Addressing these questions requires us to have a common understanding of the term "membership." One way to conceptualize membership is as a dichotomy defined by citizenship status, with citizens as members and non-citizens as strangers.[180] Another conceptualization is to think of membership as a continuum, with rights obtained by persons through time.[181] For our purposes, I define membership as the national project of defining our identity, differentiating between those who have the right to be in our national community and those who do not. This right to belong can be based on formal status (like citizenship), but it can also be based on other factors like longevity of stay or contribution to the community.[182] I conceptualize membership as a series of concentric circles, with economic, social, and political rights increasing as we move closer to the center (see Figure 1 below).

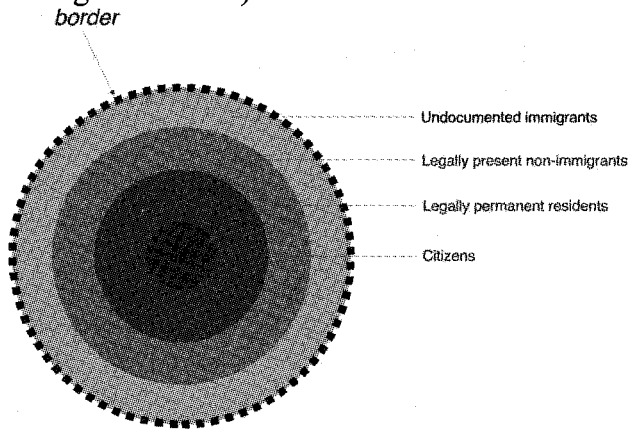

Figure 1: National Membership Before Moving Border Laws

180. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 31–63 (1983) (articulating and defending a distinction between citizens who belong to the national membership and non-citizens who do not).

181. *See* PETER SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP 28 (1998) (arguing that membership runs along a continuum, with degrees of membership distinguishing citizens, legal residents, and undocumented immigrants).

182. For another definition of membership focused on themes of identity and belonging, see Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 131, 133 (defining membership as a nation's "cultural or sociological identity").

At the outer edges of membership are undocumented immigrants who, before the advent of moving border laws, had limited but real membership rights.[183] The next circle consists of legally present non-immigrants who, depending on their visa status, have the right to temporarily work in the country,[184] enroll in college,[185] or conduct business transactions.[186] As recognized guests, they are given more rights than undocumented immigrants. Moving inward, there are legal permanent residents (LPR), or green card holders, who can stay permanently in the United States. Because they have future access to citizenship, they can engage in many of the same social and economic transactions as citizens.[187] At the center of the membership circle are citizens who, as a theoretical construct, exercise full economic, social, and political rights.[188] Encircling all of this is the border, which represents the outside boundary of membership.

How is membership manifested or measured? This Article considers the issue primarily from a legal perspective, looking for laws that expressly grant rights or prohibit activities (or the absence of such laws, which is also significant). From this perspective, we see that moving border laws have changed the composition of our national membership. By making legal immigration status the threshold consideration in defining membership, moving border laws have pushed undocumented immigrants outside the circle of national membership. But in doing so, the laws have had the ironic and unintended effect of devaluing that same legal status, especially citizenship status. As explained more fully below, the enforcement of moving border laws is particularly vulnerable to racial and national origin discrimination. For Latinos and others assumed to be immigrants, moving border laws create permanent borders of discrimination, regardless of their actual immigration status.

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183. *See infra* notes 190–95 and accompanying text.

184. *See* Immigration and Nationality Act § 101(a)(15)(H), 8 U.S.C. § 1101(a)(15)(H) (2006) (discussing visas for temporary workers).

185. *See id.* §§ 101(a)(15)(F), 101(a)(15)(J), 8 U.S.C. §§ 1101(a)(15)(F), 1101(a)(15)(J) (discussing visas for students and exchange visitors).

186. *See id.* § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B) (discussing visas for tourists and business visitors).

187. LPRs can stay in the United States as long as they do not engage in deportable activity. *See generally id.* § 237, 8 U.S.C. § 1227 (2006) (listing categories of deportable aliens). As noted previously, LPRs are not eligible for many government programs offering need-based aid. *See supra* notes 73–85 and accompanying text. For naturalization requirements, see generally 1 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 18.05 (3d ed., rev. 2009); *see also* HIROSHI MOTOMURA, AMERICANS IN WAITING, THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 9 (2006) (arguing that for much of its history, the United States treated lawful immigrants as "Americans in waiting" and immigration as a transition to citizenship).

188. Citizenship, however, is not a guarantee of full rights. *See generally infra* Part IV.B.

A. *Legal Immigration Status as the Dividing Line*

The biggest membership change wrought by moving border laws is that legal immigration status is now, more starkly than ever, the dividing line between those who belong in our national community and those who do not. As a result of the laws, legal immigration status must be checked before engaging in everyday transactions. Legal immigration status has become the threshold consideration in defining membership, resulting in the ouster of undocumented immigrants from our national community.

Some may question whether undocumented immigrants have ever been members of the national community. After all, undocumented immigrants are, by definition, in the United States illegally. From a membership perspective then, they do not have the community's permission to be here.[189] But consider that before the advent of moving border laws (which we can roughly pinpoint as starting in 1986 with federal employer sanctions), undocumented immigrants could engage in a number of economic and social transactions, despite their unauthorized status.[190] Most significantly, undocumented immigrants could work without penalty and could enforce workplace rights under the National Labor Relations Act[191] and the Fair Labor Standards Act.[192] Also, under most states' laws, undocumented immigrants had the right to own real property, to own and convey personal property without restriction, to serve as trustees for fiduciary trusts, and to participate in some state benefit programs.[193] And in the absence of express prohibitions, undocumented immigrants could also rent homes, obtain driver's licenses, and obtain professional licenses. Using our definition of membership, we see that "[i]n certain formal and practical spheres, the undocumented [immigrant] function[ed] as an acknowledged member of the national community."[194] The sense that undocumented immigrants belonged made it politically plausible to

189. The perspective that undocumented immigrants deserve no rights of membership has been described as the "outlaw" perspective. *See* Laura Oren, Comment, *The Legal Status of Undocumented Aliens: In Search of a Consistent Theory*, 16 HOUS. L. REV. 667, 668–69 (1979).

190. Undocumented immigrants also had important constitutional rights to due process in the criminal and deportation contexts. Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 972–77, 980. Though not the focus of this Article, it is significant to note that the constitutional protections afforded all immigrants during deportation proceedings have been weakened. *See* Demore v. Kim, 538 U.S. 510, 530–31 (2003) (upholding a law that mandates detention for non-citizens who have been convicted of a wide-range of crimes, pending their removal hearings, without any opportunity for individualized inquiry into dangerousness or flight risk).

191. 29 U.S.C. §§ 151–59 (2006).

192. *Id.* §§ 201–19 (2006); Bosniak, *supra* note 190, at 979, 982.

193. *Id.* at 978–82.

194. Bosniak, *supra* note 190, at 978.

legalize almost 2.7 million undocumented immigrants in 1986 through the different IRCA legalization programs.[195]

Since that time, however, there has been a steady chipping away at membership rights for undocumented immigrants.[196] The most obvious change, of course, is that IRCA outlawed the employment of unauthorized workers, imposing penalties on both workers and employers.[197] As noted earlier, state and local governments have also passed their own employer sanction laws, further weakening the ability of undocumented immigrants to work.[198] Though undocumented workers continue to be protected under federal labor law, the ability to enforce those protections was weakened with the U.S. Supreme Court's 2002 decision in *Hoffman Plastic Compounds, Inc. v. NLRB*.[199] In that case, the Court held that an undocumented worker who was illegally fired for engaging in union organizing was not entitled to any back pay because of his illegal status.[200] In so holding, the *Hoffman* Court took away one of the most potent remedies that workers have to enforce their rights, raising concerns that the rights of undocumented workers will be undermined in other areas.[201]

Outside the realm of employment, moving border laws have eroded other important rights as well. As explained in more detail earlier, undocumented immigrants today have limited or no access to driver's

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195. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 606 (4th ed. 2005) (enumerating how many undocumented immigrants were legalized under IRCA). The IRCA had a three-prong strategy for reducing illegal immigration: employer sanctions, legalization, and enhanced border enforcement. *See supra* note 118.

196. The rapid formation of moving borders and their extension into so many different areas is consistent with the concurrent trend to criminalize immigration laws. *See generally* Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, 74 INTERPRETER RELEASES 1317 (1997) (discussing the increasing criminalization of immigration law). Starting in the mid-1980s, coinciding roughly with the enactment of IRCA, we saw the increased prosecution of immigration violations as federal crimes, resulting in increased incarceration of non-citizens for what had historically been treated as civil violations. *Id.* at 1318. We also saw the rapid expansion of criminal offenses that subject non-citizens to deportation. *Id.* at 1322. Both the "criminalization of immigration law" and the advent of moving border laws reflect increasingly negative views about undocumented immigrants, as outsiders not deserving of any membership rights. *Id.* For more on the criminalization of immigration phenomena, see Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669 (1997); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003).

197. *See supra* notes 118–27 and accompanying text.

198. *See supra* notes 128–29 and accompanying text.

199. 535 U.S. 137 (2002).

200. *Id.* at 140.

201. Nat'l Immigration Law Ctr., *Supreme Court Bars Undocumented Worker from Receiving Back Pay Remedy for Unlawful Firing*, IMMIGRANTS' RIGHTS UPDATE, Apr. 2, 2002, at 1, 10, *available at* http://www.nilc.org/pubs/iru/2002/iru2-02.pdf.

licenses, professional licenses, and most federal need-based aid.[202] And though undocumented immigrants can still own real property under most states' laws,[203] they are not authorized to rent housing in certain jurisdictions.[204] At least four states have enacted laws prohibiting undocumented immigrants from receiving unemployment benefits,[205] and another state now requires that trustees for charitable trusts be either citizens or legal permanent residents.[206]

This is not to claim that pre-IRCA, undocumented immigrants lived in an idyllic world where they had full membership rights in the national community. There were important practical and even legal limitations on the ability of undocumented immigrants to exercise the limited membership rights they were granted. For example, though they were protected by fair labor laws to a greater degree than exists now, the fear of deportation likely prevented undocumented immigrants from reporting workplace violations.[207] And though they had limited rights to receive state and federal benefits, doing so could have led to a finding that they were "likely to become a public charge," and prevent them from regularizing their status or seeking other relief from deportation.[208]

Yet because of their economic contribution (in the form of labor), undocumented immigrants were tolerated and even accepted in ways that are no longer possible. With the advent of moving border laws, immigration status has become, more starkly than ever, the dividing line in defining membership status in our national community. Those unable to prove lawful immigration status are excluded in many ways that affect daily life. Without legal access to jobs, transportation, and other necessities, their presence in the national community becomes much more tenuous. From a membership perspective, moving border laws have pushed undocumented immigrants, once at the periphery, firmly outside of the membership circle (see Figure 2 below).

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202. *See supra* Parts II.B, C.

203. 3 C.J.S. *Aliens* §§ 139–60 (2008).

204. *See supra* note 105 and accompanying text.

205. Those states are Colorado, Minnesota, Mississippi, and Utah. NCSL 2007 LEGISLATION, *supra* note 92, at 7–10.

206. H.R. 605, 2008 Reg. Sess. (La. 2008).

207. Bosniak, *supra* note 190, at 986–87.

208. *Id.* at 986 (citations omitted); *see also* Immigration and Nationality Act § 212(a)(15), 8 U.S.C. § 1182(a)(15) (1982); National Center for Immigrants' Rights, *How the Receipt of Public Benefits Can Endanger an Alien's Immigration Status*, 21 CLEARINGHOUSE REV. 126, 127–29 (1987).

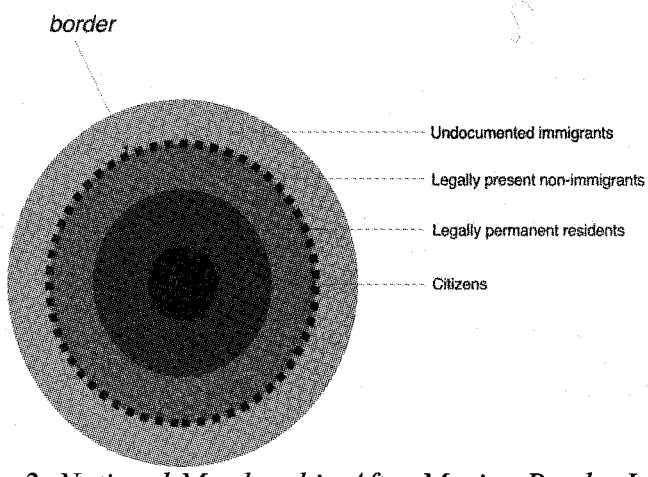

Figure 2: National Membership After Moving Border Laws

As a theoretical construct to understand this membership change, it is helpful to consider the question that Professor Linda Bosniak asks in much of her writing: "What is the proper jurisdiction of the border?"[209] Should the border (and the immigration concerns it represents) be allowed to reach into the interior and affect the way we treat people in the public and private spheres? In other words, should we treat people differently inside the country based on their alienage? One possible answer is that alienage makes no difference. Because of our strong commitment to equal personhood for everyone who lives in our territory, we want to keep concerns about alienage separated from our interior policies.[210] An alternative answer is that alienage makes a big difference, and the importance of immigration policy justifies converging our border and interior policies. This convergence, in effect, allows the immigration power to reach into the interior and treat people differently in their economic, social, and other transactions based on their alien status.[211]

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209. *See, e.g.*, LINDA S. BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 37–76 (2006) (characterizing alienage as an "intrinsically hybrid legal category" that is subject to the domains of both immigration regulation and a personhood-based analysis of rights); Linda Bosniak, *The Undocumented Immigrant: Contending Policy Approaches*, *in* DEBATING IMMIGRATION 85, 87 (Carol M. Swain ed., 2007) (analyzing "how the regulatory domains of immigration and alienage stand in relation to one another").

210. Bosniak, *supra* note 27, at 1095–1101 (analyzing *Wong Wing v. United States*, and other cases recognizing a constitutionally protected sphere for aliens that is beyond the reach of immigration regulation).

211. Bosniak, *supra* note 27, at 1101–15 (analyzing *Mathews v. Diaz*, and other cases where courts allowed alienage discrimination as an incident or extension of the government's immigration power).

What moving borders demonstrate is the triumph of the convergence model and the expansion of the border (and its related immigration concerns) into the interior. Where once the border was more static and served to protect membership (so that some sort of membership status came with territorial presence inside the border), now the border, in its expanded and moving state, is a tool to enforce our membership concerns.[212] Ultimately, the impact of this change is to make legal immigration status the baseline characteristic for inclusion in our national membership, the dividing line between those who belong and those who do not.

B. *The Permanent Borders of Discrimination*

But in elevating legal immigration status, moving border laws have had the ironic and unintended effect of devaluing that same legal status, and even citizenship status. For Latinos and others who are most often identified as immigrants, the popularity of moving border laws means that they will be subject to racial and national origin profiling and thus be surrounded by permanent borders of discrimination. Enforcing immigration laws necessarily involves a lot of discretion, making it crucial to know who makes enforcement decisions. In the context of moving border laws, the enforcers are private parties and government officials who are not trained in the complexities of immigration law. Without that training, those who are responsible for enforcing the laws are likely to resort to discrimination—that is, only requiring those who look or sound foreign to prove legal immigration status or just outright denying benefits based on race or national origin. This discrimination has important membership implications, as those subject to the discrimination will never be accepted as full members of the national community although they may have legal status or even formal citizenship.

To understand how this discrimination occurs, we must understand the nature of immigration law enforcement. One view is that immigration law enforcement is self-executing; the meaning of illegal presence is clearly set out in the Immigration and Nationality Act, and those charged with enforcement are simply acting on evidence of illegality.[213] But Professor Hiroshi Motomura argues convincingly that immigration law enforcement is highly discretionary and contingent.[214] First, the meaning of unlawful presence is not clear in all cases because the law authorizes some who enter or stay illegally to regularize their status through employment or family relationships.[215] Moreover, those

212. I thank Keith Hirokawa for this insight.

213. Motomura, *supra* note 89, at 2060–65.

214. Motomura, *supra* note 89, at 2060–65.

215. Motomura, *supra* note 89, at 2047–48. A person who enters illegally may also

who are placed in removal proceedings may be granted discretionary relief that allows them to stay legally.[216] Even more relevant for our purposes, not all who are here unlawfully will actually be removed, so discretionary decisions have to be made, for example, about whether to focus resources on workplace or border enforcement and how to balance enforcement needs against concerns about inappropriate racial or ethnic profiling.[217]

With so much discretion involved in immigration law enforcement, Professor Motomura suggests that it becomes even more important to know the identity of those making enforcement decisions.[218] For moving border laws, the enforcers are private parties like landlords and employers or government employees like those who work in motor vehicle departments. The commonality these enforcers share is that their main responsibilities (e.g., renting homes, operating businesses, or distributing driver's licenses) do not implicate immigration law enforcement. As such, they are unlikely to have any meaningful immigration law training.

Why is this training important? To enforce moving border laws effectively, the person charged with enforcement must be able to determine whether the applicant has legal immigration status and would thus be eligible for the restricted benefit. Yet making this determination can be complex because there are many different categories of legal immigrants and non-immigrants, with different rules as to the scope of permissible activities. For example, a student can travel to the United States on an F-1 visa, which allows her to travel, rent an apartment, and engage in other economic activity, as long as she maintains her student status. However, she is not allowed to work off-campus unless she can demonstrate severe economic hardship and obtains an employment authorization document from Customs and Immigration Services (CIS).[219] Without immigration law training, would a landlord or an employee at the Department of Motor Vehicles be able to make these distinctions? Would they even recognize a student visa?

Without immigration law training, how do enforcers of moving border laws determine immigration status? Drawing upon our experience with federal employer sanctions, the likely answer is that they will discriminate against applicants who look or sound foreign (including racial groups like Latinos and Asians, who most often are identified as immigrants) or who were not born in the United States. In

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regularize her status if she successfully applies for asylum. *See generally* Immigration and Nationality Act § 208, 8 U.S.C. § 1158 (2006) (discussing asylum procedures).

216. Motomura, *supra* note 89, at 2048.

217. Motomura, *supra* note 89, at 2064.

218. Motomura, *supra* note 89, at 2064.

219. 8 C.F.R. § 214.2(f)(9) (2008).

1989, shortly after the sanctions took effect, the then-General Accounting Office (GAO) surveyed employers to determine how their hiring practices had been affected by the sanctions law.[220] Astoundingly, the GAO found that 10% of employers (461,000) engaged in illegal national origin discrimination based on an applicant's foreign accent or appearance and that another 9% (430,000) engaged in illegal citizenship discrimination as a result of the sanctions.[221]

Specifically as to national origin discrimination, GAO found that 6.6% of surveyed employers stopped hiring applicants with foreign accents or appearances; 8.6% only examined the documents of current employees who looked or sounded foreign; and 9.8% required applicants with foreign appearances or accents to produce documents *before* making a job offer.[222] Regarding citizenship discrimination, GAO found that as a result of the sanctions, 14.7% of employers stopped hiring foreign-born applicants and 13% stopped hiring applicants with temporary work eligibility.[223] GAO did not have data on whether authorized workers were affected by this discrimination, but because the surveyed employers hired an estimated 2.9 million workers in 1998, GAO assumed that many authorized workers were, in fact, affected.[224] Thus, GAO concluded that employers engaged in a "serious pattern of discrimination" as a result of the sanctions.[225]

Why are employers discriminating? Though GAO could not address directly the reasons for this discrimination, it found correlations in its data that suggested at least some of the discrimination would be attributed to employers' confusion about or misunderstanding of the sanctions' requirements. Employers whose answers showed they discriminated were more likely to report that they did not understand the law, as compared with employers who did not discriminate. Similarly, employers who discriminated were more likely than employers who did not discriminate to want a better verification system.[226]

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220. To ensure that the reported discriminatory practices were linked to IRCA, the survey phrased its questions: "Which of the following actions, if any, was taken at this location as a result of your firm's understanding of the 1986 immigration law?" GAO 1990 DISCRIMINATION REPORT, *supra* note 29, at 120. Also, a box at the beginning of the questions set out this instruction: "IMPORTANT: CHECK 'YES' ONLY IF ACTION TAKEN WAS A RESULT OF THE 1986 IMMIGRATION LAW." *Id.*

221. *Id.* at 38.

222. *Id.* at 117, 120.

223. *Id.* at 120. A temporary resident alien would be an example of an applicant with temporary work eligibility. *Id.*

224. *Id.* at 6.

225. *Id.* at 5.

226. *Id.* at 62–63.

Our experience with federal employer sanctions provides valuable lessons on the discrimination costs of moving border laws.[227] When enforcers not trained in immigration law are expected to make immigration determinations, they are going to rely on appearance, accents, and foreign birthplace as proxies for immigration status. We saw with federal employer sanctions that employers engaged in illegal profiling, at least in part because they were confused or misunderstood the sanctions' requirements. This confusion occurred even though the federal government produced a standardized verification form, the I-9, for employers to use and spent tremendous amounts of time and money to educate employers about their obligations under the law.[228] In the larger context of moving border laws, we would expect that confusion to multiply, as the number of laws and their varying requirements multiply. Moreover, with many laws enacted at the state and local level, we also lack the benefits of a centralized federal system and federal resources to educate about verification obligations.

Besides confusion about legal requirements, enforcers also engage in profiling for more nefarious reasons: to avoid legal liability for making erroneous determinations or to discriminate against immigrants generally or against specific groups like Latinos based on plain, old-fashioned animus. Both motivations are given fuel in today's political climate, where anti-illegal immigrant sentiments run high and immigration enforcement is politically popular.[229] Enforcers who fear legal liability may reason, not illogically, that the safest course of action is to withhold restricted benefits from those who could be undocumented—that is, from those who look or sound foreign. And

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227. Other studies and surveys also support a finding of IRCA-related discrimination. *See e.g.*, HARRY CROSS ET AL., URBAN INST., EMPLOYER HIRING PRACTICES: DIFFERENTIAL TREATMENT OF HISPANIC AND ANGLO JOB SEEKERS 2–3 (1990) (finding that in 1989 hiring audits, foreign-looking or sounding Hispanics received worse treatment than their Anglo counterparts, treatment that the researchers attributed to discrimination); Cynthia Bansak & Steven Raphael, *Immigration Reform and the Earnings of Latino Workers: Do Employer Sanctions Cause Discrimination?*, 54 INDUS. & LAB. REL. REV. 275, 275–76 (2001) (finding that Latino workers in non-agricultural sectors received lower wages post-IRCA, which supports a finding of discrimination—on the theory that workers suspected of being unauthorized work for lower wages to compensate for the employers' risk in hiring them).

228. In the GAO survey, 15.1% of employers thought that the I-9 verification form was unclear or very unclear; 12% of employers were unclear or very unclear about the types of documents that were acceptable as proof of work authorization. GAO 1990 DISCRIMINATION REPORT, *supra* note 29, at 119.

229. In its survey of major public opinion polls, the Pew Hispanic Center found that a significant majority of Americans (57% to 63%, depending on the poll) believes that illegal immigration is a very serious problem; moreover, a sizeable minority (18%) believes that undocumented immigrants should be deported. PEW HISPANIC SURVEY, THE STATE OF AMERICAN POLITICAL OPINION ON IMMIGRATION IN SPRING 2006, A REVIEW OF MAJOR SURVEYS 4–5, 7–10 (2006).

those enforcers already biased against a certain group may use the moving border laws as cover for denying benefits to members of that group. Because none of the moving border laws, except for federal employer sanctions,[230] provide a remedy to applicants who experience illegal discrimination, enforcers can be fairly confident that they will not be held accountable for their discrimination.

Though the reasons for the discrimination may vary, the effect on Americans, particularly Latinos, who are consistently singled out for discrimination, is clear. As with federal employer sanctions, those who have a foreign accent or appearance or who were born in another country can expect to be asked to show documents when others are not, be asked to show more documents, or be denied restricted benefits altogether. And because there are so many moving border laws, enacted by all levels of government, we can expect that large numbers of people with legal status will experience this discrimination. Those singled out for this discrimination will feel the impact through everyday transactions, as they apply for jobs, housing, and other essential benefits. For them, moving border laws will become permanent borders of discrimination.

The impact of this discrimination on individual lives greatly offends our notions of equality and justice, but from a membership perspective, the result is particularly disturbing. As illustrated by Figure 3 below, those who are surrounded by permanent borders of discrimination are effectively pushed outside of our membership circle, even if they have legal status as legally present non-immigrants, permanent legal residents, or citizens.

230. Section 274B makes it illegal to discriminate against someone in hiring or firing based on national origin or citizenship status. Immigration and Nationality Act § 274B, 8 U.S.C. § 1324b (2006). However, restrictions on claims brought under this law—including the requirement that intentional discrimination by employers be proven—have made this law difficult to use. *See generally* LEGOMSKY, *supra* note 195, at 1227–29.

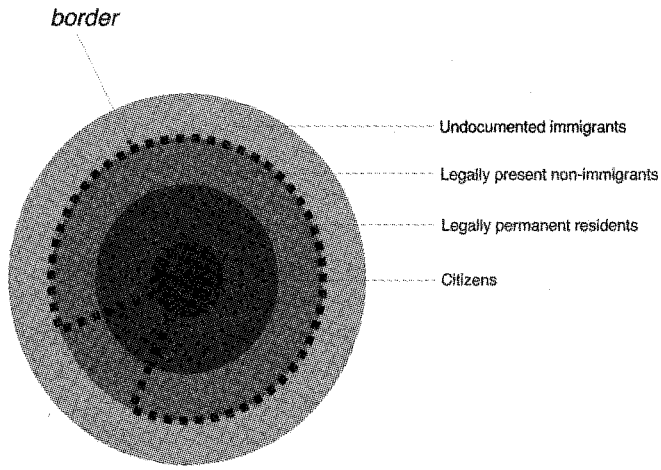

Figure 3: The Permanent Borders of Discrimination

The discrimination experienced by citizens and permanent residents, who have the legal capacity to become citizens, undercuts a bedrock principle of the American narrative: that citizenship means gaining full and equal membership in our national community. According to this narrative, non-citizens come to this country, take up residence, and eventually obtain full membership rights, represented in the grant of citizenship status.[231] Politically, they are to make the transition "from alien to citizen, from stranger to rights-holder, from foreigner to governor," and socially, they are to integrate or assimilate over time, moving from "out-group to in-group."[232]

But by erecting permanent borders, moving border laws seriously undermine the accuracy and the relevance of this narrative.[233] For citizens who are encircled by discriminatory borders, the connection between citizenship and membership rights seems ephemeral, at best. How can they be full members of our national community when they are singled out for discrimination in everyday transactions? How can they belong if they are constantly suspected of being the illegal stranger? Under the worst case scenario, they will wrongly be denied

231. T. Alexander Aleinikoff & Ruben G. Rumbaut, *Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?*, 13 GEO. IMMIGR. L.J. 1, 1 (1998) (arguing that concerns about assimilation are influencing the underlying model of membership); *see also* Motomura, *supra* note 89, at 2028–79.

232. Aleinikoff & Rumbaut, *supra* note 231, at 1.

233. For other critiques of this narrative, see, for example, Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005) (examining laws that stripped U.S. citizen women of their citizenship once they married non-citizen men, Volpp argues that beliefs about how Asian men and women behave restricted their ability to obtain citizenship).

essential benefits, either because they have problems documenting their legal immigration status[234] or because they are never given the opportunity to prove their status before being denied benefits (for example, employers who have a blanket but unstated policy of not hiring employees born outside of the United States). Under the best case scenario, Latinos and others assumed to be immigrants will be subject to onerous questions and documentation requirements that others who "look American" are not.

While the result in individual cases is important, the true significance from a membership perspective is not in the accuracy of the discrimination but in the discrimination itself. That certain applicants are singled out for discrimination based on factors that they cannot control (such as appearance, accent, or birthplace) suggests that these applicants may never be able to make the transition from "foreigner to governor," from "out-group to in-group" in any meaningful way. Their perceived foreignness marks them as outsiders, and this outsider status continues, even if they should naturalize and gain formal citizenship status. And because the discrimination focuses on physical features, subsequent generations, though citizens by birth, are also marginalized as outsiders because they carry a "figurative border" on their bodies.[235] The permanent borders provide compelling evidence that for many Americans, a substantial divide exists between the formal status of citizenship and the substantive exercise of citizenship's rights and privileges, a divide that should disturb us all.[236]

234. *See supra* notes 165–67 (discussing how the poor are often denied government benefits because they have problems documenting their legal immigration status).

235. Professors Chang and Aoki explored this theme in the context of globalization—while the flow of information and capital across borders has increased, the flow of certain types of people has constricted. Chang & Aoki, *supra* note 31, at 1414. For Asian Americans and Latinos, who are seen as outsiders in a White-Black nation, "[f]oreign-ness is inscribed upon our bodies in such a way that [we] carry a figurative border with us." *Id.*

236. For more on the difference between formal and substantive citizenship, see IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 78 (2006) (examining the historical role that law has played in constructing white identity through its construction of the nonwhite identity and linking this nonwhite construction to continuing obstacles to full membership); Ediberto Román, *Members and Outsiders: An Examination of the Models of United States Citizenship as Well as Questions Concerning European Union Citizenship*, 9 U. MIAMI INT'L & COMP. L. REV. 81, 88 (2000) (arguing that Americans, based on race and other subjugating factors, experience different forms of citizenship, with different levels of participation and inclusion).

V. CONCLUSION

As this Article is written, moving border laws continue to proliferate. The legal trends that converged to create these laws—laws to preserve government resources for those legally present, laws to require private enforcement of immigration laws, and laws providing for continued growth in sub-federal immigration enforcement—continue to thrive, creating borders that move and shift around us. Now, more than ever, proof of legal immigration status has become essential to life in our country, not just to enter the country at the physical border but to bypass the moving borders that have been erected around jobs, housing, and other essential benefits.

The moving borders paradigm represents a fundamental shift in our thinking, both about immigration law enforcement and our notions of community membership. As explored in this Article, moving border laws are enacted primarily as an enforcement tool, with the goal of reinforcing our physical borders and reducing illegal immigration through self-deportation. But the laws are also popular because they are perceived to preserve resources for those lawfully present and because they communicate symbolic messages of discontent and discrimination.

More subtly, moving border laws reflect a shift in how we think about our national membership. Now, legal immigration status has become the threshold characteristic in defining our national community, pushing undocumented immigrants from the periphery they once occupied to outside the circle of membership. But the effects of moving border laws are not limited to just the undocumented. Those who look or sound foreign can expect to be singled out for discriminatory treatment, even if they have citizenship status. From a membership perspective, this discrimination does great damage to the cherished narrative that gaining citizenship means gaining full membership rights. Thus, the permanent borders of discrimination that result from moving border laws provide compelling evidence against the adoption of these laws.