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Nicole Hallett

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# The Border's Migration

Nicole Hallett<sup>†</sup>

## ABSTRACT

*The border has never played a larger role in the American psyche than it does today, and yet it has never been less legally significant. Today, a non-citizen's place of residence tells you less about what rights and privileges they enjoy than it ever has in the past. The border has migrated inward, affecting many aspects of non-citizens' lives in the United States. The divergence between the physical and legal border is no accident. Instead, it is a policy response to the perceived loss of control over the physical border. But the physical border remains porous despite these legal changes. People keep migrating even as we continue to draw boundaries within communities, homes, and workplaces far away from the border. This paper explores how U.S. law has evolved to render the border superfluous, even as its symbolic importance has grown, and how it might further evolve in the future.*

## I. INTRODUCTION

If there is anything in the immigration debate on which everyone agrees, it is that the U.S.-Mexico border is a problem.<sup>1</sup> Former President Trump spent most of his four years in office obsessed with the

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<sup>†</sup> Clinical Professor of Law, University of Chicago Law School. I would like to thank the members of *The University of Chicago Legal Forum* and attendees of the *Legal Forum's* Fall 2022 Symposium for their insight and commentary on this essay.

<sup>1</sup> The nature of the problem is, obviously, contested. Republicans and some moderate Democrats see the border as a national security or law and order problem. See J. Baxter Oliphant and Andy Cerda, *Republicans and Democrats Have Different Top Priorities for U.S. Immigration Policy*, PEW RSCH. CTR. (Sept. 8, 2022), <https://www.pewresearch.org/fact-tank/2022/09/08/republicans-and-democrats-have-different-top-priorities-for-u-s-immigration-policy> [https://perma.cc/FUP3-3ENJ]; Nicole Narea, *The Democratic revolt over Biden's border policy*, VOX (April 8, 2022), <https://www.vox.com/policy-and-politics/23016907/democrat-biden-border-title-42-midterms> [https://perma.cc/K5E5-DHJW]. Progressives portray it as a humanitarian problem. See Audie Cornish, *How the Southern U.S. Border has Become a Nearly Constant Humanitarian Crisis*, NAT'L PUB. RADIO (Sept. 24, 2021), <https://www.npr.org/2021/09/24/1040550699/how-the-southern-u-s-border-has-become-a-nearly-constant-humanitarian-crisis> [https://perma.cc/2LLY-XM2D]. Some scholars, like Angélica Cházaro, think the existence of the border—as well as the deportation system and the nation state more broadly—are the problem. See Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040 (2021).

border.<sup>2</sup> “Build the Wall”—always more symbol than policy proposal—became a constant chant at political rallies. Once in office, his administration instituted policy after policy intended to deter illegal migration at the southern border and to prevent migrants who successfully arrived at the border from remaining in the United States.<sup>3</sup> Now, the border is Biden’s problem. Criticism came early in his presidency<sup>4</sup> and is renewed with each subsequent wave of migration.<sup>5</sup> The perceived political cost of the border crisis has led Biden to abandon campaign promises and continue many of Trump’s border policies.<sup>6</sup> Although

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<sup>2</sup> JULIE HIRSCHFELD DAVIS & MICHAEL D. SHEAR, BORDER WARS: INSIDE TRUMP’S ASSAULT ON IMMIGRATION 9 (2019).

<sup>3</sup> See ANDREW IAN SCHOENHOLTZ ET AL., THE END OF ASYLUM 31–86 (2021). For a detailed summary of the Trump Administration’s immigration policies, see *1,030 Trump-era Immigration Policies (and their current status)*, THE IMMIGRATION POLICY TRACKING PROJECT (last updated July 24, 2023), <https://immpolicytracking.org/home> [<https://perma.cc/449E-FPSA>].

<sup>4</sup> David Frum, *Biden Has a Border Problem*, THE ATLANTIC (Mar. 16, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/biden-has-problem-border/618293> [<https://perma.cc/396P-T5QL>]; Ashley Parker et al., *‘No End in Sight’: Inside the Biden Administration’s Failure to Contain the Border Surge*, WASH. POST (Mar. 20, 2021), [https://www.washingtonpost.com/politics/biden-border-surge/2021/03/20/21824e94-8818-11eb-8a8b-5cf82c3dffe4\\_story.html](https://www.washingtonpost.com/politics/biden-border-surge/2021/03/20/21824e94-8818-11eb-8a8b-5cf82c3dffe4_story.html) [<https://perma.cc/5FWZ-KLC4>].

<sup>5</sup> Bret Samuels, *Biden Confronts His Border Problem*, THE HILL (Jan. 7, 2023), <https://thehill.com/homenews/administration/3802882-biden-confronts-his-border-problem> [<https://perma.cc/3ZU7-FB9E>]; Lora Reis, *The Biden Border Crisis Has Gone on Long Enough*, THE HERITAGE FOUNDATION (Nov. 28, 2022), <https://www.heritage.org/immigration/commentary/the-biden-border-crisis-has-gone-long-enough-how-congress-can-help> [<https://perma.cc/Z553-B9HG>]; Mark Krikorian, *Biden’s Border Crisis is About to Get a Lot Worse*, CTR. FOR IMMIGR. STUD. (July 5, 2022), <https://cis.org/Oped/Bidens-border-crisis-about-get-lot-worse> [<https://perma.cc/N7Q3-SXUJ>].

<sup>6</sup> John Burnett, *Biden Pledges To Dismantle Trump’s Sweeping Immigration Changes – But Can He Do That?*, NAT’L PUB. RADIO (Sept. 14, 2020), <https://www.npr.org/2020/09/14/912060869/biden-pledges-to-dismantle-trumps-sweeping-immigration-changes-but-can-he-do-tha> [<https://perma.cc/Z5ML-XR5F>]; Anita Kumar, *Biden Railed Against Trump’s Immigration Policies, Now Defends Them in Courts*, POLITICO (Aug. 10, 2021), <https://www.politico.com/news/2021/08/10/biden-trump-immigration-policies-503108> [<https://perma.cc/P6ZZ-XQ6J>]; Myah Ward, *Immigrant Advocates Feel Abandoned as They Stare at Biden’s First-Term Checklist*, POLITICO (Oct. 20, 2022), <https://www.politico.com/news/2022/10/20/immigrant-advocates-abandoned-biden-00062641> [<https://perma.cc/9VY9-YZYV>]. According to the Immigration Policy Tracking Project, there are over one thousand changes to immigration policy during the Trump administration that Biden has yet to reverse. See *1,030 Trump-era Immigration Policies (and their current status)*, IMMIGRATION POLICY TRACKING PROJECT (last updated July 24, 2023), <https://immpolicytracking.org/home> [<https://perma.cc/449E-FPSA>]. One of the most high-profile examples of the Biden administration’s continuation of Trump’s immigration policies is its defense of Title 42, a Trump-era public health regulation that everyone agrees is no longer justified on the basis of public health. The Biden Administration appealed a federal court’s decision setting aside the regulation in December 2022, see Miriam Jordan, *Government Appeals Border Ruling, but Says It’s Ready to End Expulsions*, N.Y. TIMES (Dec. 7, 2022), <https://www.nytimes.com/2022/12/07/us/biden-title-42-appeal.html> [<https://perma.cc/93U6-BQQQ>], and expanded the policy to apply to additional individuals. Cleve R. Wootson Jr. et al., *Biden Immigration Plan Would Restrict Illegal Border Crossings*, WASH. POST (Jan. 5, 2023), <https://www.washingtonpost.com/politics/2023/01/05/biden-border-security-immigration> [<https://perma.cc/5CH5-B7BD>]. Title 42 ended on May 11, 2023 and was replaced by a new restrictive asylum rule that shares similarities with the Trump asylum bans. See *Biden’s Asylum Ban is a Death Sentence for Refugees*, HUMAN RIGHTS FIRST (May 10, 2023), <https://humanrightsfirst.org/library/bidens-asylum-ban-is->

these policies have worsened the humanitarian crisis at the border,<sup>7</sup> no one has yet figured out how to keep people from migrating.

While the United States has two land borders, as well as maritime boundaries, it is the U.S.-Mexico border that has garnered the most attention in recent decades. When politicians speak about “the border problem,” there is no ambiguity as to which border they mean. As sociologist Douglas Massey has explained:

The border between Mexico and the United States is not just a line on a map. Nor is it merely a neutral demarcation of territory between two friendly neighboring states. Rather, in the American imagination, it has become a symbolic boundary between the United States and a threatening world. It is not just *a* border but *the* border, and its enforcement has become a central means by which politicians signal their concern for citizens' safety and security in a hostile world.<sup>8</sup>

Thus, the U.S.-Mexico border is a physical demarcation as well as a bogeyman, a scapegoat, and an albatross around the neck of whichever official happens to be in charge.

Yet, the focus on the border obscures a larger trend in immigration policy, the seeds of which have existed in U.S. law for more than a hundred years but that have only been fully realized in the last thirty. The border has never played a larger role in the American psyche than it does today, and yet it has never been less legally significant. The physical boundary between the United States and Mexico has remained largely unchanged since the end of the Mexican-American War in 1848,<sup>9</sup> but the border as a legal concept continues to evolve.

A state's power is greatest within its own borders. Territory defines where a state can exercise sovereignty, where it can claim the right to “non-intervention” by foreign states, where it can claim the right to control its borders, and where it can claim the right to re-

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a-death-sentence-for-refugees [https://perma.cc/5G3G-XQFM].

<sup>7</sup> Press Release, Civil Society Organizations Across the Americas Condemn US Government Expansion of Title 42 and Regional Restrictions to Asylum Access; Sound the Alarm on Growing Humanitarian Crisis (Nov. 15, 2022), <https://reliefweb.int/report/united-states-america/civil-society-organizations-across-america-condemn-us-government-expansion-title-42-and-regional-restrictions-asylum-access-sound-alarm-growing-humanitarian-crisis> [https://perma.cc/6JM3-P594]; *Mexico: Asylum Seekers Face Abuses at Southern Border*, HUMAN RIGHTS WATCH (June 6, 2022), <https://www.hrw.org/news/2022/06/06/mexico-asylum-seekers-face-abuses-southern-border> [https://perma.cc/S5G4-L3QL].

<sup>8</sup> Douglas Massey, *The Mexico-U.S. Border in the American Imagination*, 160 PROC. OF THE AM. PHIL. SOC'Y 160 (2016).

<sup>9</sup> Treaty of Guadalupe Hidalgo, Mex.-U.S., Feb. 2, 1848, 9 Stat. 922. For a detailed history of border disputes between the United States and Mexico, see generally OSCAR MARTINEZ, TROUBLESOME BORDER (1988). All outstanding border disputes were resolved in the Boundary Treaty of 1970. See Boundary Treaty of 1970, Mex.-U.S., Nov. 23, 1970.

source extraction.<sup>10</sup> It is also often, by virtue of domestic or international law, relevant to the question of what rights individuals and communities have. A person's rights vis-à-vis that state are also greatest within the state's sovereign territory.

When that person is a non-citizen, different rules apply. The Supreme Court has long recognized that the government lacks jurisdiction over certain categories of non-citizens in the United States, such as foreign diplomats.<sup>11</sup> Moreover, non-citizens' rights have always been circumscribed as compared to U.S. citizens. Most notably, the Supreme Court has repeatedly held that the federal government exercises plenary power over immigration and that non-citizens have no substantive due process right to remain in the country.<sup>12</sup>

However, until recently, the physical location of a non-citizen relative to the border *was* legally significant in a multitude of ways. Beginning in the 1970s and accelerating in the 1990s, that began to change. The border has migrated inward, affecting many aspects of non-citizens' lives in the United States. Today, a non-citizen's place of residence tells you less about what rights and privileges they enjoy than it ever has in the past.

The divergence between the physical and legal border is no accident. Instead, it is a policy response to the perceived loss of control over the physical border. But the physical border remains porous despite these legal changes. People keep migrating even as we continue to draw boundaries within communities, homes, and workplaces far away from the border.

## II. LEGAL FRAMEWORK

Non-citizens have always possessed fewer constitutional rights than citizens. This is particularly true with respect to the right to enter or remain in the United States.<sup>13</sup> However, a non-citizen's location within the United States grants them many constitutional rights, grounded in the text of the Constitution. The word "citizen" does not appear in the Bill of Rights. Instead, the amendments refer to "person" or "the people."<sup>14</sup> As Justice Francis Murphy wrote in *Bridges v. Wixon* in 1945:

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<sup>10</sup> ANNA STILZ, TERRITORIAL SOVEREIGNTY 1 (2019).

<sup>11</sup> *United States v. Wong Kim Ark*, 169 U.S. 649, 658 (1898) (recounting common law history of the jurisdictional status of foreign diplomats in the United States).

<sup>12</sup> *Harisiades v. Shaughnessy*, 342 U.S. 580, 591 (1952); *Fong Yue Ting v. United States*, 149 U.S. 698 (1894).

<sup>13</sup> *Fong Yue Ting*, 149 U.S. at 713; *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

<sup>14</sup> U.S. CONST. amends. I to XII.

The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.<sup>15</sup>

This distinction is geographic, based not on the person's identity but on where they are located. Conversely, the Supreme Court has repeatedly confirmed that "foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution."<sup>16</sup>

For example, non-citizens outside the United States who do not possess permanent residency<sup>17</sup> have no right to procedural due process.<sup>18</sup> Non-citizens in the United States, even if admitted erroneously, do.<sup>19</sup> The Fourth Amendment does not apply to searches and seizures of foreign persons on foreign soil, even when ordered by the U.S. government.<sup>20</sup> Non-citizens inside the United States, even ones present in violation of law, are protected by the Fourth Amendment.<sup>21</sup> The right to petition for a writ of habeas corpus attaches wherever the U.S. exercises de facto sovereignty over territory<sup>22</sup> and does not attach elsewhere.<sup>23</sup> Non-citizens in the United States are protected by the Equal Protection Clause<sup>24</sup> and the First Amendment. Non-citizens abroad are not.<sup>25</sup> In the United States, non-citizens enjoy all the constitutional rights that attach to the criminal process under the Fifth and Sixth

<sup>15</sup> *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring).

<sup>16</sup> *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2086 (2020) (citing *Boumediene v. Bush*, 553 U.S. 723, 770–771 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 558–559 (2004) (Scalia, J., dissenting); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265–275 (1990); *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904)).

<sup>17</sup> *Landon v. Plasencia*, 459 U.S. 21 (1982).

<sup>18</sup> *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) ("It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise"); *Kerry v. Din*, 576 U.S. 86, 103 (2015).

<sup>19</sup> *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (It is not permissible for the government "arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized."); *see also* *Reno v. Flores*, 507 U.S. 292, 306 (1993).

<sup>20</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 263–67 (1990).

<sup>21</sup> *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984).

<sup>22</sup> *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); *Boumediene v. Bush*, 553 U.S. 723, 755 (2008).

<sup>23</sup> *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

<sup>24</sup> *Plyler v. Doe*, 457 U.S. 202 (1982); *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886).

<sup>25</sup> *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2089 (2020) (foreign citizens abroad have no First Amendment rights).

Amendments.<sup>26</sup> Non-citizens outside the country do not.<sup>27</sup> U.S. citizens, by contrast, are protected by the Constitution even when they are not physically present in the country.<sup>28</sup>

What constitutes U.S. sovereign territory is not always cut and dry. For example, in the Insular Cases, the Supreme Court addressed the issue of whether the Constitution applies in unincorporated U.S. territories, deciding that it does not fully apply although people there enjoy some fundamental rights.<sup>29</sup> More recently, the Court has grappled with the question of whether the Constitution applies at the Guantánamo Bay Naval Base, concluding in *Boumediene v. Bush* that Guantánamo detainees had the right to file a petition for habeas corpus.<sup>30</sup> Despite these complexities, until recently the border remained legally significant for non-citizens.

Although Congress has wide latitude to shape the substantive rules of admissions and residency of non-citizens, U.S. immigration law also treated non-citizens in the United States preferentially to non-citizens outside of the United States. As I explain below, for much of the twentieth century the procedural rules governing different categories of non-citizens mirrored the constitutional framework. This is no longer true.

### III. PAST MIGRATION

Beginning in the 1980s and culminating with the Illegal Immigration Reform and Immigrant Responsibility Act in 1996 (“IIRIRA”),<sup>31</sup> Congress began writing the law to remove any advantages non-citizens might have by being physically present in the United States. It could not alter the Supreme Court’s interpretation of the Constitution, but it could change the substantive immigration laws such that

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<sup>26</sup> *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (“[I]t must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth amendments], and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law.”).

<sup>27</sup> *Eisenrager*, 339 U.S. at 782 (1950) (rejecting suggestion that non-citizens tried abroad by military tribunals have Sixth Amendment rights).

<sup>28</sup> See, e.g., *Munaf v. Geren*, 553 U.S. 674, 688 (2008) (right to file writ of habeas corpus); *Reid v. Covert*, 354 U.S. 1 (1957) (right to trial by jury).

<sup>29</sup> See *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904).

<sup>30</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008). The D.C. Circuit later concluded that the due process clause does not apply at Guantanamo, *Al-Hela v. Trump*, 972 F.3d 120, 150 (D.C. Cir. 2020), although the D.C. Circuit has granted en banc review of the decision. *Al-Hela v. Biden*, No. 19-5079, 2021 WL 6753656 (D.C. Cir. Apr. 23, 2021).

<sup>31</sup> The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (1996).

many non-citizens in the United States would be treated as if they were on foreign soil. Today, the Executive Branch is creating further shifts as it takes on the role in immigration policy traditionally played by Congress.<sup>32</sup>

The reason for this shift is not a mystery: illegal immigration,<sup>33</sup> which morphed from a small-scale problem in the 1970s to a massive one by the mid-1980s. The rise in illegal immigration is itself attributable to U.S. immigration policy. The end of the Bracero guest worker program in the 1960s and the restriction of immigration from the Western Hemisphere in the 1965 Immigration and Nationality Act (“INA”) are widely considered to have led directly to the increase in people crossing the border illegally.<sup>34</sup> Whatever the cause, public opinion swung sharply in favor of increased immigration enforcement and border security in the 1990s.<sup>35</sup> Congress responded by increasing militarization of the border.<sup>36</sup> It also systematically set about removing any legal advantage that undocumented immigrants gained by entering the country illegally. Those consequences, Congress hoped, would deter illegal immigration.

We now know that these efforts to stop illegal border crossings failed. Illegal immigration only grew after 1996 and the number of undocumented immigrants in the United States only began to level off after the Great Recession, when jobs became scarce and migrants temporarily stopped coming to find work.<sup>37</sup>

The same dynamics explain the recent changes to border policy, and they have led to the same disappointing results. Last year, there were a record 2.37 million border encounters,<sup>38</sup> a new record.<sup>39</sup> IIRIRA

<sup>32</sup> Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015).

<sup>33</sup> H.R. REP. NO. 104-469(I), at 110–11 (1996).

<sup>34</sup> See, e.g., Douglas S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 POPULATION AND DEV. REV. 1 (2012).

<sup>35</sup> U.S. Representative Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POLY REV. 349, 351–53 (2005).

<sup>36</sup> *Id.* at 351.

<sup>37</sup> Mark Hugo Lopez et al., *Key Facts About the Changing U.S. Unauthorized Immigrant Population*, PEW RSCH. CTR. (Apr. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/04/13/key-facts-about-the-changing-u-s-unauthorized-immigrant-population> [<https://perma.cc/922E-QADN>].

<sup>38</sup> *Southwest Land Border Encounters*, CUSTOMS AND BORDER PROT., <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> [<https://perma.cc/MC52-V43C>].

<sup>39</sup> Experts largely believe that this number is inflated by the continued reliance on Title 42, which returns border crossers to Mexico without providing them an opportunity to claim asylum. See Quinn Owen, *Title 42 Actually Contributes to Increased Migration Numbers, Data Suggests*, ABC NEWS (Dec. 23, 2022), <https://abcnews.go.com/Politics/title-42-contributes-increased-migration-numbers-data-suggests/story?id=95616742> [<https://perma.cc/UY4V-K8DJ>]. Nevertheless, no one disputes that border crossings are at historic levels.



did not end the problem of illegal immigration, and neither have recent interventions. However, they have changed the legal significance of the border.

#### A. Inadmissibility

One of the biggest changes that IIRIRA made was to change what it meant to make an entry into the United States. Prior to April 1, 1997, when IIRIRA went into effect, there were two kinds of immigration proceedings: exclusion proceedings and deportation proceedings. A person who had entered the United States, regardless of whether that entry was lawful or unlawful, was considered to have legally made an “entry” into the United States.<sup>40</sup> Thus, if the government wanted to deport them, it had to initiate deportation proceedings,<sup>41</sup> in which non-citizens were subject to the grounds of deportation.<sup>42</sup> Non-citizens outside the United States were subject to the grounds of exclusion<sup>43</sup> and, if denied entry at the border, were placed into exclusion proceedings.<sup>44</sup>

This gave non-citizens inside the United States several advantages over non-citizens outside the United States. For example, in deportation proceedings, the government bore the burden of proof,<sup>45</sup> whereas the non-citizen bore the burden of proof in exclusion proceedings.<sup>46</sup> Moreover, the grounds of deportation were often narrower than the grounds of exclusion. To take one example, an individual could be found excludable for committing a crime involving moral turpitude even without a conviction,<sup>47</sup> whereas a conviction was required to make a non-citizen deportable.<sup>48</sup>

Another area where this mattered was the public charge grounds of exclusion and deportability. Whereas a non-citizen was excludable if they were “likely at any time to become a public charge,”<sup>49</sup> a non-

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<sup>40</sup> 8 U.S.C. § 1101(a)(13) (1994) (defining “entry” as “any coming of an alien into the United States from a foreign port or place or from an outlying possession, whether voluntary or otherwise”); David M. Grable, *Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 83 CORNELL L. REV. 820, 823 (1998).

<sup>41</sup> 8 U.S.C. § 1252(b) (1994).

<sup>42</sup> 8 U.S.C. § 1251 (1994).

<sup>43</sup> 8 U.S.C. § 1182 (1994).

<sup>44</sup> 8 U.S.C. § 1226(a) (1994).

<sup>45</sup> *Woodby v. Immigr. & Naturalization Serv.*, 385 U.S. 276, 286 n.19 (1966) (“This standard of proof applies to all deportation cases, regardless of the length of time the alien has resided in this country.”).

<sup>46</sup> 8 U.S.C. § 1361 (1994).

<sup>47</sup> 8 U.S.C. § 1182(a)(2)(i).

<sup>48</sup> 8 U.S.C. § 1251(a)(2)(i).

<sup>49</sup> 8 U.S.C. § 1182(a)(4).

citizen subject to the grounds of deportation could only be deported for becoming a public charge for five years after entry, even if that entry was not lawful.<sup>50</sup> In other words, prior to 1996, the law applied more stringent standards to non-citizens outside the country than to non-citizens who were already within our borders, regardless of their legal status.<sup>51</sup>

IIRIRA combined exclusion and deportation proceedings into a single type of proceeding called “removal proceedings.” The grounds of exclusion and deportation became inadmissibility and deportability grounds, respectively. The most crucial difference was the substitution of “entry” with “admission,” which is defined as “the lawful entry of [a noncitizen] into the United States after inspection and authorization by an immigration officer.”<sup>52</sup> A non-citizen’s “entry” into the United States, or the physical crossing into U.S. territory, was no longer relevant to the determination of which removability grounds applied. Instead, it was whether there was an “admission.”<sup>53</sup> Thus, an undocumented immigrant who had never been “inspected and admitted” (anyone who crossed the border illegally) was now subject to the inadmissibility grounds, even though many had lived long periods of time in the United States.<sup>54</sup>

## B. Adjustment of Status

IIRIRA made additional changes to the process by which non-citizens could apply to adjust their status to that of lawful permanent resident in the United States. Prior to 1994, only non-citizens who were inspected and admitted could adjust their status in the United States.<sup>55</sup> Non-citizens who entered without inspection, like other non-citizens outside the United States, had to undergo “consular processing” at a U.S. consulate abroad.<sup>56</sup> If successful, they then received an immigrant visa to enter the United States, upon which they would become a lawful permanent resident. However, undocumented immi-

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<sup>50</sup> 8 U.S.C. § 1251(a)(5).

<sup>51</sup> Non-citizens could still be deported as “excludable at entry” or if they “entered without inspection,” but the government bore the burden of proof. 8 U.S.C. § 1251(a)(1)(A)-(B). Moreover, the previously available form of relief called “suspension of deportation” was granted at extremely high rates.

<sup>52</sup> 8 U.S.C. § 1101(a)(13)(A).

<sup>53</sup> Eunice Lee, *The End of Entry Fiction*, 99 N.C. L. REV. 565, 601 (2021).

<sup>54</sup> 8 U.S.C. § 1227(a) (2008) (applying deportability grounds to “[a]ny alien (including an alien crewman) in and admitted to the United States.”).

<sup>55</sup> 8 U.S.C. § 1255(a) (1994).

<sup>56</sup> *Consular Processing*, U.S. IMMIGR. CITIZENSHIP SERV., <https://www.uscis.gov/green-card/green-card-processes-and-procedures/consular-processing#:~:text=If%20you%20are%20outside%20of,referred%20to%20as%20consular%20processing> [https://perma.cc/52ZJ-J8QN] (last visited July 21, 2023).

grants could often obtain legal status by beginning the process while they were in the United States, followed by a quick trip abroad to complete consular processing.

In 1994, Congress made it even easier for undocumented immigrants to adjust their status through a family-based or employment-based petition by allowing non-citizens who had not been inspected and admitted to pay a fee and adjust their status inside the United States. INA 245(i) became particularly important after IIRIRA was passed in 1996 because of the new 3- and 10-year bars for unlawful presence, which applied only after an undocumented immigrant left the country.<sup>57</sup> Congress let 245(i) expire in 2001, stranding millions of undocumented immigrants in the United States without the ability to either adjust their status or leave and undergo consular processing.<sup>58</sup> The only option was a prolonged years-long separation, the same kind of hardship faced by non-citizens who had never entered the United States.

This change, like the switch from entry to admission, only applied to individuals who crossed the border illegally, the vast majority of whom crossed the U.S.-Mexico border. Non-citizens who overstayed their visa could still adjust their status in the United States, thus avoiding the 3- and 10-year bars.<sup>59</sup> The border moved, but only for some.<sup>60</sup> Moreover, the changes did not actually accomplish the policy goal that Congress had intended. The border moved, but it had the effect of keeping people in the United States rather than keeping them out. An estimated 2.3 million people who are currently in the United States are barred from adjusting their status to lawful permanent resident because of the expiration of 245(i) and the entry bars.<sup>61</sup>

### C. Expedited Removal

IIRIRA also created expedited removal. Prior to 1997, non-citizens apprehended inside the United States were placed into deportation proceedings, regardless of the manner in which they entered the Unit-

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<sup>57</sup> Under 8 U.S.C. § 1182(a)(9)(C), a non-citizen who has spent more than 180 days or more than one year in the country unlawfully and then leaves cannot return for three or ten years, respectively. These bars only apply to non-citizens who have left the country and do not apply to non-citizens unlawfully in the United States who have not left.

<sup>58</sup> *Id.* at § 1255(i)(1)(B)(i) (petition for must be filed prior to April 30, 2001).

<sup>59</sup> *Id.* at § 1255(a).

<sup>60</sup> Jane Lilly López, *Redefining American Families: The Disparate Effects of IIRIRA's Automatic Bars to Reentry and Sponsorship Requirements on Mixed-Citizenship Couples*, 5 J. MIGRATION & HUM. SEC. 238 (2017).

<sup>61</sup> Silva Mathema et al., *Reinstating the LIFE Act and Eliminating Entry Bars Would Allow Millions of Immigrants to Stay with Their Families*, CTR. FOR AM. PROGRESS (May 27, 2021), <https://www.americanprogress.org/article/reinstating-life-act-eliminating-entry-bars-allow-millions-immigrants-stay-families> [https://perma.cc/46TC-T8VT].

ed States. IIRIRA created a new kind of removal, called expedited removal, that by statute could be used to remove a non-citizen located anywhere in the United States who had been in the country for less than two years.<sup>62</sup> In addition, any non-citizen apprehended had to prove “to the satisfaction of an immigration officer” that they had in fact been physically present in the country for at least two years,<sup>63</sup> potentially making long-term residents vulnerable to receiving an expedited removal order if they did not have the requisite proof on their person when they were apprehended.<sup>64</sup>

Calling expedited removal a process is generous. By statute, any immigration officer can issue an expedited removal order “without further hearing or review” unless the individual expresses a credible fear of persecution.<sup>65</sup> Individuals placed in expedited removal are subject to mandatory detention,<sup>66</sup> even though most have no criminal history. Conversely, non-citizens who are placed in normal removal proceedings have the right to a bond hearing unless they are in one of the categories of non-citizens subject to mandatory detention.<sup>67</sup> Two similarly-situated individuals could face very different outcomes depending on whether the government uses expedited removal.

Expedited removal has never been used to the fullest extent allowed by statute, due to concerns about its constitutionality and the difficulty of applying it to individuals who had already been in the United States for some time.<sup>68</sup> After the enactment of IIRIRA, the Immigration and Nationality Service (“INS”) promulgated a regulation that limited its use to individuals who had been in the United States less than fourteen days and who were caught within one hundred miles of the border.<sup>69</sup> In 2019, the Department of Homeland Security (“DHS”) issued a new rule expanding the use of expedited removal to the fullest extent allowed by statute, to anyone in the United States

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<sup>62</sup> *Id.* at § 1225(b)(1)(A)(iii)(II).

<sup>63</sup> *Id.*

<sup>64</sup> Laura W. Murphy & Timothy Edgar, *Comments on “Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act”*, AM. CIV. LIBERTIES UNION (Dec. 13, 2002), <https://www.aclu.org/other/aclu-comments-ins-notice-expand-expedited-removal> [<https://perma.cc/4JZ6-PVXP>].

<sup>65</sup> *Id.* at § 1225(b)(1)(A)(i).

<sup>66</sup> *Id.* at § 1225(b)(1)(B)(iii)(IV) (“Any alien subject to [expedited removal] shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.”); *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (finding that § 1225 does not contain a statutory right to a bond hearing after six months).

<sup>67</sup> 8 U.S.C. § 1226.

<sup>68</sup> *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10312 (Mar. 6, 1997).

<sup>69</sup> *Designating Aliens for Expedited Removal*, 69 Fed. Reg. 48877, 48877-48881 (Aug. 11, 2004).

who entered without inspection and had been in the country less than two years,<sup>70</sup> but it was quickly challenged in the courts. The new regulation was tied up in litigation until DHS rescinded the rule after Biden took office.<sup>71</sup> The Supreme Court has not weighed in on whether this expanded use of expedited removal would be constitutional.<sup>72</sup>

What is clear, however, is that Congress attempted to treat a certain subset of non-citizens inside the United States as if they were physically present at the border seeking admission. For these people, their physical presence in the United States is now irrelevant to the rights they enjoy under U.S. immigration law.

#### D. Non-Refoulement

The 1951 Refugee Convention makes a clear legal distinction between asylum-seekers at or inside a state's border and refugees who remain outside of a country. The principle of "non-refoulement," or "non-return," only applies to people at or inside a state's borders.<sup>73</sup> On the contrary, states have no obligation to accept or consider granting protection to refugees who remain outside its borders.<sup>74</sup> This distinction, which was codified in the Refugee Act of 1980,<sup>75</sup> gives greater protection to some refugees depending on where they are in relation to the border.

While expedited removal changed the procedure for non-citizens caught at or near the border, it did not remove their right to apply for asylum. Under IIRIRA, if a person otherwise eligible to be placed in expedited removal expresses a fear of return or an intent to apply for

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<sup>70</sup> Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (July 23, 2019). Trump announced his intention to expand expedited removal in an Executive Order issued shortly after his inauguration. *See* Exec. Order No. 13,767, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (Jan. 25, 2017).

<sup>71</sup> Rescission of the Notice of July 23, 2019, Designating Aliens for Expedited Removal, 87 Fed. Reg. 16022 (Mar. 21, 2022); *see also* Exec. Order No. 14,010, Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, 86 Fed. Reg. 8267 (Feb. 5, 2021).

<sup>72</sup> As I discuss later in this essay, the Supreme Court *has* sanctioned the use of expedited removal at or near the border in *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020).

<sup>73</sup> U.N. Convention Relating to the Status of Refugees, art. 32(1), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, T.I.A.S. No. 6577 [hereinafter 1951 Refugee Convention] ("No Contracting State shall expel or return ('refouler') a refugee"); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 182 (1993) (interpreting Article 33 of the 1951 Refugee Convention not to have extra-territorial effect).

<sup>74</sup> 1951 Refugee Convention, *supra* note 73, at art. 35(1) (requiring state to "undertake to cooperate with the Office of the United Nations High Commissioner for Refugees," but not requiring any action).

<sup>75</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987).

asylum, they receive a “credible fear” interview.<sup>76</sup> If they pass, then the expedited removal order is vacated, and they are permitted to remain in the United States to pursue an asylum claim.<sup>77</sup>

Though IIRIRA made some limited changes to asylum, such as implementing a one-year deadline for applying,<sup>78</sup> it did not fundamentally change this basic humanitarian protection. Non-citizens within or at the U.S. border were given the chance to apply for asylum.<sup>79</sup> They would not be deported without an opportunity to prove that they were at risk of persecution.

The relative stasis of U.S. asylum law was disrupted during the Trump Administration, which set out to end the right to asylum in the United States.<sup>80</sup> After a few years of trying half-measures to limit the number of people who would be eligible for asylum, the Trump Administration implemented two asylum bans, which barred people from applying for asylum based on the manner in which they had crossed into the United States and the route they had taken to get to the United States. The first asylum ban (Asylum Ban 1.0) prohibited individuals who entered between ports of entry from applying for asylum.<sup>81</sup> The second asylum ban (Asylum Ban 2.0) prohibited individuals who had transited through another country before reaching the United States from applying for asylum.<sup>82</sup> Both intended to reduce the numbers of people eligible for asylum and specifically targeted individuals arriving at the U.S.-Mexico border, which is how the majority of new asylum-seekers were arriving in the United States.

The asylum bans did not violate the principle of non-refoulement because individuals who were barred from applying for asylum could still receive withholding of removal.<sup>83</sup> This temporary status does not provide a path to a green card or citizenship, but it does satisfy the

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<sup>76</sup> 8 U.S.C. § 1225(b)(1)(A)(ii).

<sup>77</sup> *Id.* at § 1225(b)(1)(B)(ii).

<sup>78</sup> 8 U.S.C. § 1158(a)(2)(B); Michele R. Pistone & Phillip Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 2 (2001).

<sup>79</sup> *Id.* at § 1158(a)(1) (“Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum.”).

<sup>80</sup> SCHOENHOLTZ ET AL., *supra* note 3, at 3.

<sup>81</sup> Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations, 83 Fed. Reg. 55934 (Nov. 9, 2019).

<sup>82</sup> Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829 (July 16, 2019).

<sup>83</sup> Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829, 33830 (July 16, 2019) (“The new bar established by this regulation does not modify withholding or deferral of removal proceedings.”); Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55934, 55936 (Nov. 9, 2018) (“Aliens rendered ineligible for asylum by this interim rule and who are referred for an interview in the expedited removal process are still eligible to seek withholding of removal.”).

United States' obligations under Article 33 of the 1951 Refugee Convention because it prevents the government from returning the person to the country where they fear persecution.<sup>84</sup> Withholding of removal did, however, change what was until then a fundamental principle of the U.S. asylum system—that anyone, however they arrived in the United States, could apply.<sup>85</sup>

The Migrant Protection Protocols, also known as “Remain in Mexico,” further scrambled the distinction between asylum-seekers inside and outside the United States.<sup>86</sup> In January 2019, the Trump Administration announced that some migrants arriving at the U.S.-Mexico border would not be allowed to seek asylum. Instead, they would be returned to Mexico to wait for a hearing at which their asylum claim would be adjudicated.<sup>87</sup> The program was initially piloted at several ports of entry, with plans to eventually expand it to apply anywhere along the U.S.-Mexico border.

Then, in March 2020, as the coronavirus pandemic shut down borders around the world, the CDC issued a new regulation under Title 42 of the U.S. Code that allowed immigration officers to return migrants to Mexico without giving them a credible fear interview or allowing them to apply for asylum.<sup>88</sup> Returns under Title 42 did not even comport with the minimal requirements of expedited removal. Instead, Title 42 treated individuals as if they never set foot in the country. Individuals returned to Mexico under Title 42 did not receive a removal order and were not subject to the various deportation bars that attach with the issuance of a removal order.<sup>89</sup>

Although Title 42 started as an emergency health measure, it continued for more than three years through a combination of political

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<sup>84</sup> Compare 1951 Refugee Convention, art. 33 (“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”) with 8 U.S.C. § 1231(b)(3) (“[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”).

<sup>85</sup> 8 U.S.C. § 1158(a)(1).

<sup>86</sup> KIRSTJEN M. NIELSON, U.S. DEP’T OF HOMELAND SEC., POLICY GUIDANCE FOR IMPLEMENTATION OF THE MIGRANT PROTECTION PROTOCOLS (Jan. 25, 2019), [https://www.dhs.gov/sites/default/files/publications/19\\_0129\\_OPA\\_migrant-protection-protocols-policy-guidance.pdf](https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf) [<https://perma.cc/R46R-H3HD>].

<sup>87</sup> *Id.* at 1.

<sup>88</sup> Ctr. for Disease Control and Prevention, Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060, 17060-02 (Mar. 20, 2020).

<sup>89</sup> *A Guide to Title 42 Expulsions at the Border*, AM. IMMIGR. COUNCIL (Oct. 15, 2021), <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border> [<https://perma.cc/R3BC-WNHN>].

inertia<sup>90</sup> and court injunctions.<sup>91</sup> Public health experts agreed that it served no public health purpose.<sup>92</sup> Despite this consensus, Title 42 remained in place, permanently treating some non-citizens who were in the United States as if they are somewhere else entirely. The Biden Administration's new asylum rule, which replaced Title 42 on May 11, 2023, likewise restricts access to asylum for many people at the U.S.-Mexico border. Non-citizens who do not follow a fifteen-step process are not eligible for apply.<sup>93</sup> Most will remain ineligible for asylum.

### E. Parole

The widespread use of parole as an alternative to asylum has created a different migration of the border. The government has broad authority to grant parole “for urgent humanitarian reasons or significant public benefit” to any individual.<sup>94</sup> However, parole is not an “admission,”<sup>95</sup> which means that someone paroled into the United States, while physically present, “[i]n the eyes of the law [stands] at the threshold of this country seeking admission.”<sup>96</sup> They are not “legally within the United States.”<sup>97</sup>

Biden's new asylum rule paired restrictions on the right to seek asylum with a humanitarian parole program that people in a handful of countries can apply for.<sup>98</sup> This humanitarian parole program follows

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<sup>90</sup> Eric Bradner & Alex Rogers, *Swing-state Democrats Turn on Biden over Title 42 Border Decision*, CNN (April 24, 2022), <https://www.cnn.com/2022/04/23/politics/democrats-biden-title-42-immigration-border/index.html> [https://perma.cc/6PZT-XBTT]; Jordan Fabian, *How Title 42 Is Complicating Biden's Border Policy*, WASH. POST (Dec. 28, 2022), [https://www.washingtonpost.com/business/how-title-42-is-complicating-bidens-border-policy/2022/12/27/628331a2-8635-11ed-b5ac-411280b122ef\\_story.html](https://www.washingtonpost.com/business/how-title-42-is-complicating-bidens-border-policy/2022/12/27/628331a2-8635-11ed-b5ac-411280b122ef_story.html) [https://perma.cc/G6BR-ZLQJ].

<sup>91</sup> *Arizona v. Mayorkas*, 143 S. Ct. 478 (2022) (granting stay of lower court setting aside Title 42 regulation); *Louisiana v. Ctr. for Disease Control & Prevention*, No. 6:22-CV-00885, 2022 WL 1604901 (W.D. La. May 20, 2022) (ordering Biden administration to continue Title 42 policy).

<sup>92</sup> *Public Health Experts Issue Recommendations To Protect Public Health and Lives of Asylum Seekers*, COLUMBIA UNIV. MAILMAN SCH. OF PUB. HEALTH (Dec. 21, 2020), <https://www.publichealth.columbia.edu/news/public-health-experts-issue-recommendations-protect-public-health-lives-asylum-seekers#:~:text=Leading%20public%20health%20experts%20wrote,to%20deny%20asylum%20and%20other> [https://perma.cc/XB9V-WTDV].

<sup>93</sup> Dara Lind, *How To Seek Asylum (Under Biden's Asylum Transit Ban)*, *In 15 Not-At-All-Easy Steps*, AM. IMMIGR. COUNCIL (May 11, 2023), <https://immigrationimpact.com/2023/05/11/15-steps-how-to-seek-asylum> [https://perma.cc/N49U-DVB8].

<sup>94</sup> 8 U.S.C. § 1182(d)(5).

<sup>95</sup> *Id.*

<sup>96</sup> *Matter of Aircraft VT-DJK*, 12 I. & N. Dec. 267, 269 (B.I.A. June 22, 1967).

<sup>97</sup> *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958) (internal quotation marks omitted).

<sup>98</sup> *FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions*, THE WHITE HOUSE (Jan. 5, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions> [https://perma.cc/Z8PP-KQMD]; Rebecca Beitch, *Biden rule limits asylum as end of Title 42 nears*, THE HILL (May 10, 2023), <https://thehill.com/homenews/administration/3998011-biden-rules-limit-asylum-as-white-house-grapples-with-end-of-title-42> [https://perma.cc/MW43-RA4V].



on the heels of the widespread use of humanitarian parole to evacuate U.S. allies in Afghanistan<sup>99</sup> and a parole program for people fleeing Ukraine after the Russian invasion.<sup>100</sup> Such parole programs are not new—the government paroled large numbers of Cubans into the United States in the 1960s, for example<sup>101</sup>—but they’ve expanded in recent years.

These large-scale parole programs create a problem. Unless Congress provides a legislative fix, parolees remain legally outside the United States. Historically, Congress periodically passed laws that allowed parolees from certain countries to adjust their status to lawful permanent residents, such as the Cuban Adjustment Act of 1966.<sup>102</sup> But Congress appears unwilling to pass similar laws in response to the recent parole programs. The Afghan Adjustment Act, which had broad bipartisan support, failed to pass in December 2022.<sup>103</sup> Unlike the measures designed to punish illegal immigration, parolees come to the United States with permission, yet they remain excluded. Parole allows the government to offer humanitarian protection while continuing to treat people as if they are outside the United States with no right to enter or remain.

The replacement of asylum with parole carries the risk that rather than integrating refugees into our society and giving them full membership rights, we create a permanent underclass of people who are not legally recognized as being in the United States. The border, which used to signal safety to refugees, will now merely be another hurdle on the way to permanent exclusion.

## F. Employment

The employment of non-citizens in the United States is so highly regulated today that it is easy to forget that it is a relatively new kind of immigration enforcement. For the first half of the twentieth century, federal law did not place limitations on non-citizens’ right to

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<sup>99</sup> Elliot Ackerman, *The Next Afghan-Refugee Crisis Is Right Here in the U.S.*, ATLANTIC (Nov. 28, 2022), <https://www.theatlantic.com/ideas/archive/2022/11/passing-afghan-adjustment-act-house-vote/672267> [<https://perma.cc/XBJ4-2BDS>].

<sup>100</sup> *Uniting for Ukraine*, U.S. CITIZENSHIP AND IMMIGR. SERV. (Apr. 21, 2022), <https://www.uscis.gov/ukraine> [<https://perma.cc/22NK-E7D5>].

<sup>101</sup> Kevin J. Fandl, *Cuban Migration to the United States in A Post-Normalized Relations World*, 26 MINN. J. INT’L L. 81, 95 (2017).

<sup>102</sup> The Cuban Adjustment Act, Pub. L. 89-732, 80 Stat. 1161 (Nov. 2, 1966).

<sup>103</sup> Farnoush Amiri, *Afghan Refugees in US Face Uncertainty as Legislation Stalls*, ASSOCIATED PRESS (Dec. 30, 2022), <https://apnews.com/article/afghanistan-politics-united-states-government-political-refugees-fddb9f66f09f133c6365823df9e28743> [<https://perma.cc/8KEC-JXAY>].

work.<sup>104</sup> In fact, during the *Lochner* era, the Supreme Court held that everyone, including non-citizens, had a constitutional right to work.<sup>105</sup>

The first attempt to limit non-citizen's right to work occurred in the context of the Bracero Program, which brought laborers from Mexico to satisfy U.S. labor needs during World War II. Representing the first time the government put restrictions on non-citizens' right to work, Bracero workers were required to work for a particular employer.<sup>106</sup> Soon after, the government put work restrictions on other categories of non-immigrants, such as students<sup>107</sup> and tourists.<sup>108</sup> The INS continued to chip away at the right of non-citizens to work in the 1960s and 1970s.<sup>109</sup> However, even during this period, the law did not explicitly prohibit undocumented immigrants from working.<sup>110</sup>

By 1980, the INS had promulgated a regulation that made clear that “[e]mployment in the United States is not an inherent right” but, rather, “a matter of administrative discretion.”<sup>111</sup> A few years later, the Immigration Reform and Control Act (“IRCA”) made it a crime to employ a non-citizen without work authorization, bringing the era of the right to work as a non-citizen in the United States firmly to an end.<sup>112</sup> Today, it is not just undocumented immigrants who cannot legally work. Many categories of lawfully-admitted non-immigrants, including many who reside in the United States for many years, cannot legally accept employment.<sup>113</sup>

<sup>104</sup> For a comprehensive history of non-citizens and work, see Geoffrey Heeran, *The Immigrant Right to Work*, 31 GEO. IMMIGR. L.J. 243 (2017).

<sup>105</sup> See *Truax v. Raich*, 239 U.S. 33, 38 (1915) (striking down Arizona's Anti-Alien Labor Act by citing “right to earn a livelihood”); *Yick Wo*, 118 U.S. at 369–74 (right to earn a living discussed in context of Court's equal protection holding).

<sup>106</sup> Heeran, *supra* note 104, at 257.

<sup>107</sup> INS Rule for Nonquota Immigrant Students, 12 Fed. Reg. 5355, 5357 (Aug. 7, 1947).

<sup>108</sup> INS Rule for Aliens Coming to the United States as Visitors, 13 Fed. Reg. 2643, 2644 (Feb. 26, 1948).

<sup>109</sup> Heeran, *supra* note 104, at 261–63.

<sup>110</sup> *Sure-Tan, Inc. v. NLRB*, 467 US 883, 893 (1984) (observing that it is not “a separate criminal offense for an alien to accept employment after entering this country illegally”); *DeCanas v. Bica*, 424 US 351, 360 (1976) (“at best,” federal immigration statutes displayed “peripheral concern with employment of illegal entrants”); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193 (2007) (“For a century before 1986, federal law permitted employers to hire undocumented immigrants.”).

<sup>111</sup> Employment Authorization to Aliens in the United States, 46 Fed. Reg. 25079, 25080 (May 5, 1981).

<sup>112</sup> Immigration Reform and Control Act of 1986, Pub. L. 99–603, 100 Stat. 3445 (Nov. 6, 1986); 8 U.S.C. § 1326(a). Absent a revival of *Lochner*, it seems unlikely that these restrictions on immigrant labor will be successfully challenged.

<sup>113</sup> For example, foreign students cannot work in the United States except in certain limited circumstances such as “severe economic hardship” or optional professional training. See *Working in the United States*, U.S. CITIZENSHIP AND IMMIGR. SERV. (Mar. 31, 2023), <https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/students-and-employment> [<https://perma.cc/8K4C-Y284>]. Likewise, spouses of certain non-immigrant visa holders cannot work

One way to view these restrictions on immigrant labor is through an enforcement lens: this is simply another way that the United States regulates non-citizens in the United States. However, these restrictions also serve as another example of how non-citizens inside the United States have lost a privilege they previously enjoyed based on their presence here. Non-citizens have always migrated to the United States to work. Past immigration restrictions attempted to regulate immigrant labor at the border through admissions rules. Now, many non-citizens in the United States cannot legally work.

Non-citizens without work authorization still work. IRCA has not succeeded in ending the employment of undocumented immigrants.<sup>114</sup> But the exclusion of some categories of non-citizens from legal work has had many downstream effects on non-citizens in the United States. For example, the restriction of social security numbers to non-citizens with work authorization has prevented many non-citizens from obtaining what has become an essential identity number in the United States. Without a social security number, a non-citizen is excluded from many services provided by private companies, such as opening a bank account, signing up for a cell phone plan, or signing a lease.

These restrictions on work have also led to downstream effects on non-citizens' labor rights. For example, in *Hoffman Plastic Compounds Inc. v. NLRB*, the Supreme Court held that undocumented immigrants have no right to backpay when their employer retaliates against them for engaging in protected activity because it would not be lawful for them to have been working under IRCA.<sup>115</sup> Although undocumented immigrants are still technically protected by the National Labor Relations Act,<sup>116</sup> *Hoffman Plastic* ensures that these rights are never vindicated.

Though the Court reasoned that to give undocumented immigrants backpay would “condone[ ] and encourage[ ] future violations,”<sup>117</sup> the Court's decision has, in fact, encouraged violations of non-citizens' labor rights. Even with respect to the rights that undocumented immigrants do enjoy, such as minimum wage and over-

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until their spouse has an approved employer petition. See *Employment Authorization for Certain H-4 Dependent Spouses*, U.S. CITIZENSHIP AND IMMIGR. SERV. (Nov. 12, 2021), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/employment-authorization-for-certain-h-4-dependent-spouses> [<https://perma.cc/5LRT-P74U>].

<sup>114</sup> Wishnie, *supra* note 110, 110 at 195.

<sup>115</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

<sup>116</sup> *Id.* at 152.

<sup>117</sup> *Id.* at 150.

time,<sup>118</sup> the illegality of their employment puts them at risk of exploitation.<sup>119</sup> Although these statutes purport to protect “persons” in the United States, some non-citizens who are here are, for all practical purposes, excluded from protection. In this way, undocumented immigrants share more in common with workers in sweatshops abroad than they do with U.S. workers.

### G. Bureaucracy

The U.S. immigration system has grown into a behemoth as layers upon layers of bureaucracy have been added to enforce and apply the myriad of restrictions on and requirements for non-citizens in the United States. Many of these layers, such as the creation of the work authorization system, were intended to police and punish undocumented immigrants. But once bureaucratic walls go up, they tend to affect everyone. The bureaucracy creates new barriers, not just for undocumented immigrants, but for anyone who must interact with the immigration system.

The immigration bureaucracy creates tools of exclusion that mimic the physical border for individuals already in the United States. Pamela Herd and Donald P. Moynihan have discussed this phenomenon in their book, *Administrative Burden*.<sup>120</sup> They argue that the way laws are administered is political. About the immigration system, they explain:

Burdens are consequential in that they can, quite literally, determine who is and who is not a member of society. Nowhere are the stakes clearer than in the area of immigration. For example, U.S. citizenship applications involve complex paperwork and demanding documentation, application fees, English proficiency, and a naturalization test. Approximately half of individuals eligible for U.S. naturalization do not apply. Some may simply not want to become U.S. citizens, but surveys suggest that administrative burdens—in the form of perceived language, personal, financial, and administrative barriers—are significant factors in their decision.<sup>121</sup>

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<sup>118</sup> *Patel v. Quality Inn S.*, 846 F.2d 700, 702 (11th Cir. 1988); *Flores v. Albertson's, Inc.*, No. CV0100515AHM(SHX), 2002 WL 1163623 (C.D. Cal. 2002); *Liu, et al. v. Donna Karan International, Inc.*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002).

<sup>119</sup> Nicole Hallett, *The Problem of Wage Theft*, 37 YALE L. & POL'Y REV. 93, 125 (2018).

<sup>120</sup> PAMELA HERD & DONALD P. MOYNIHAN, *ADMINISTRATIVE BURDEN* (2019).

<sup>121</sup> *Id.* at 4.

Many of these burdens are created by deliberately underfunding parts of the immigration system that allow non-citizens to progress towards naturalization and full inclusion in society. Congress has generously funded Immigration and Customs Enforcement (“ICE”), the subagency responsible for interior enforcement and removal operations,<sup>122</sup> and Customs and Border Protection (“CBP”), the sub-agency responsible for policing the border.<sup>123</sup> The government has appropriated \$333 billion for ICE and CBP since 2003.<sup>124</sup>

Conversely, United States Citizenship and Immigration Services (“USCIS”), which processes applications and serves as a gatekeeper for non-citizens who want to naturalize or change or adjust their status in the United States, is severely underfunded. Ninety-seven percent of its budget comes from non-citizens in the form of fees.<sup>125</sup> As USCIS’s own Ombudsman has concluded, “USCIS’s near exclusive reliance on a fee-for-service funding model . . . leaves USCIS chronically underfunded and unable to meet customer and stakeholder obligations.”<sup>126</sup>

Even though the current fees are insufficient for USCIS to function effectively, the fees are still prohibitively high for many people. A proposed rule change, for example, would raise the fee for applying for naturalization to \$760.<sup>127</sup> As Herd and Moynihan note, the prohibitive cost of naturalizing likely prevents many eligible non-citizens from applying.<sup>128</sup> Sixty-eight percent of American households cannot afford a \$400 emergency expense, and that number could be higher for immigrant households.<sup>129</sup> The most perverse example is probably the \$410 fee to apply for work authorization.<sup>130</sup> Many people cannot pay

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<sup>122</sup> *About ICE*, U.S. IMMIGR. AND CUSTOMS ENF’T (last updated May 9, 2023), <https://www.ice.gov/about-ice> [<https://perma.cc/D6CS-TTGN>].

<sup>123</sup> *About CBP*, U.S. CUSTOMS AND BORDER PROT. (last updated August 21, 2023), <https://www.cbp.gov/about> [<https://perma.cc/X3U5-PW84>].

<sup>124</sup> *The Cost of Immigration Enforcement and Border Security*, AM. IMMIGR. COUNCIL (Jan. 20, 2021), <https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security#:~:text=Since%20the%20creation%20of%20DHS,in%20locations%20around%20the%20country> [<https://perma.cc/XB8T-ZUQ9>].

<sup>125</sup> Phyllis A. Coven, *The Challenges of the Current USCIS Fee-Setting Structure Recommendation*, OFF. OF CITIZENSHIP AND IMMIGR. SERV. OMBUDSMAN (June 15, 2022), [https://www.dhs.gov/sites/default/files/2022-06/CIS%20OMBUDSMAN\\_2022\\_FEE\\_FOR\\_SERVICE\\_RECOMMENDATION\\_FINAL.pdf](https://www.dhs.gov/sites/default/files/2022-06/CIS%20OMBUDSMAN_2022_FEE_FOR_SERVICE_RECOMMENDATION_FINAL.pdf) [<https://perma.cc/JK38-Q9Z3>].

<sup>126</sup> *Id.* at 19.

<sup>127</sup> U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 88 Fed. Reg. 402, 407 (Jan. 4, 2023).

<sup>128</sup> HERD & MOYNIHAN, *supra* note 120, at 4.

<sup>129</sup> U.S. FEDERAL RESERVE, ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2021, at 3 (2022).

<sup>130</sup> *I-765, Application for Employment Authorization*, U.S. CITIZENSHIP AND IMMIGR. SERV. (May 20, 2023), <https://www.uscis.gov/i-765> [<https://perma.cc/GH2S-KUXY>].

this fee unless they are working unlawfully; a civil immigration violation that could have future immigration consequences.<sup>131</sup>

The fee-based funding scheme also gives rise to the second bureaucratic hurdle that non-citizens face, which is that despite these high fees, the agency is woefully understaffed. Non-citizens filing applications face an almost mind-boggling backlog of unadjudicated applications. There are currently 8.7 million applications pending with USCIS.<sup>132</sup> Sometimes, applications are delayed so long that non-citizens lose their work authorization and risk future immigration consequences if they do not depart from the United States.<sup>133</sup>

In many cases, applications sit for years. It currently takes an average of 17.5 months to renew or replace a lost green card, and 2–3 years to process a new green card application—if you're lucky. The delay in adjudicating U visa applications, a program that provides legal status to victims of serious crimes so that they can cooperate with law enforcement, currently sits at over five years.<sup>134</sup> The USCIS Ombudsman has admitted that these delays have “immediate and often severe” consequences, including “lost jobs and the benefits attached to them (both temporary and permanent), lost societal benefits such as driver’s licenses, lost safety net benefits, and similar losses—to say nothing of the anxiety, stress, and depression they experience.”<sup>135</sup>

Another way that the bureaucracy creates barriers is by requiring increasingly complex applications. Questions are added to applications and never taken off. By some estimates, 85% of the delay in USCIS adjudication is due to the increasing length of applications. These burdensome application requirements are not new. Herd and Moynihan discuss how the U.S. Immigration Act of 1924 required “the provision of police dossier, prison and military records, two copies of a certified birth certificate, and other government records” of all immigrants, including those fleeing Nazi Germany.<sup>136</sup> Many Jews could not obtain

<sup>131</sup> 8 U.S.C. § 1255(c).

<sup>132</sup> Muzaffar Chishti & Kathleen Bush-Joseph, *Biden at the Two-Year Mark: Significant Immigration Actions Eclipsed by Record Border Numbers*, MIGRATION POL’Y INST. (Jan. 26, 2023), <https://www.migrationpolicy.org/article/biden-two-years-immigration-record> [https://perma.cc/8352-S9MY].

<sup>133</sup> Nicole Narea, *Immigrants Could Help the US Labor Shortage — If the Government Would Let Them*, VOX (Feb. 16, 2022), <https://www.vox.com/policy-and-politics/22933223/work-permit-uscis-backlog-immigration-labor-shortage> [https://perma.cc/RT3Q-2GQ4].

<sup>134</sup> Current case processing times can be found at *Check Case Processing Times*, U.S. CITIZENSHIP AND IMMIGR. SERV., <https://egov.uscis.gov/processing-times> [https://perma.cc/DX3Z-T8VR] (last visited July 31, 2023).

<sup>135</sup> ANNUAL REPORT 2022, CITIZENSHIP AND IMMIGR. SERV. OMBUDSMAN, at 2–3 (June 30, 2022), [https://www.dhs.gov/sites/default/files/2022-06/CIS\\_Ombudsman\\_2022\\_Annual\\_Report\\_0.pdf](https://www.dhs.gov/sites/default/files/2022-06/CIS_Ombudsman_2022_Annual_Report_0.pdf) [https://perma.cc/ZQ37-BM8N].

<sup>136</sup> HERD AND MOYNIHAN, *supra* note 120, at 5–6.

these documents and were killed as a result, even as immigration quotas remained unfilled.<sup>137</sup> Today, non-citizens are never truly free of the administrative burdens of being a non-citizen in the United States.

Many of these burdens are not accidental. Take, for example, the Controlled Application Review and Resolution Program, a post-9/11 initiative designed to stall and delay thousands of green card and naturalization applications filed by Muslims in the United States.<sup>138</sup> Or the Trump Administration's plan to require interviews of non-citizens on temporary visas who are applying to adjust their status,<sup>139</sup> a move which experts said would just increase delays in adjudicating the applications.

These programs do not accomplish their intended goals. Instead, they have the effect of creating walls that exclude non-citizens, even those lawfully in the United States.

#### IV. FUTURE MIGRATIONS

There is every indication that the border will continue to lose legal significance. Perhaps the surest sign was the Supreme Court's 2020 decision in *Department of Homeland Security v. Thuraissigiam*.<sup>140</sup> In a challenge to an expedited removal order, the Court held for the first time that a non-citizen inside the United States had no right to due process.<sup>141</sup> Thuraissigiam was apprehended only twenty-five yards from the border, minutes after entering,<sup>142</sup> so it is unclear how far the Court's decision extends. Yet even twenty-five yards represents a paradigm shift. If geography is no longer dispositive, then a whole host of constitutional rights may be at risk.

Other proposals would move the border even further. For example, currently birthright citizenship is a right enjoyed by anyone who is born on U.S. soil. However, a few scholars have argued that the citizenship clause of the Fourteenth Amendment should be interpreted to exclude children of undocumented immigrants.<sup>143</sup> At least one com-

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<sup>137</sup> *Id.* at 6.

<sup>138</sup> Katie Traverso & Jennie Pasquarella, *Practice Advisory: USCIS's Controlled Application Review and Resolution Program*, AM. CIV. LIBERTIES UNION OF S. CAL., at 1 (Jan. 6, 2017), <https://www.lexisnexis.com/community/insights/legal/immigration/b/insidenews/posts/aclu-practice-advisory-uscis-s-controlled-application-review-and-resolution-program-carrp> [https://perma.cc/X39A-8FEZ].

<sup>139</sup> *USCIS to Expand In-Person Interview Requirements for Certain Permanent Residency Applicants*, U.S. CITIZENSHIP AND IMMIGR. SERV. (Aug. 28, 2017), <https://www.uscis.gov/archive/uscis-to-expand-in-person-interview-requirements-for-certain-permanent-residency-applicants> [https://perma.cc/JD4H-ABBL].

<sup>140</sup> *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020).

<sup>141</sup> *Id.* at 1983.

<sup>142</sup> *Id.* at 1982.

<sup>143</sup> PETER H. SCHUCK & ROGERS SMITH, *CITIZENSHIP WITHOUT CONSENT* (1985).

mentator has suggested that this interpretation could be extended to the children of non-citizens in the United States legally on non-immigrant visas.<sup>144</sup> News reports suggest that the Trump Administration considered and then abandoned plans to adopt some version of this interpretation.<sup>145</sup> If it had gone ahead with the plan, the Supreme Court would have been forced to reconsider its 1898 decision, *United States v. Wong Kim Ark*, in which the Court first articulated the broad scope of birthright citizenship.<sup>146</sup> The adoption of such an interpretation would have vast negative consequences on immigrants and society as a whole. It would also, in effect, shift the border in time as well as space to exclude a second generation from receiving the benefits of being in the United States.

Similarly, the debate over who is a “person” for purposes of political apportionment and redistricting is essentially a debate about the legal significance of the border. Non-citizens have been included in the population count for apportionment and redistricting since the founding.<sup>147</sup> The Supreme Court has interpreted the Fourteenth Amendment’s requirement that representation be apportioned based on the “whole number of persons in each State”<sup>148</sup> as *allowing* states to include non-voters, including non-citizens, in its apportionment and redistricting.<sup>149</sup> However, the Court left open the question of whether a state could choose to exclude non-citizens or some subset thereof.<sup>150</sup>

Evidence suggests that some conservative states intend to exclude non-citizens from its apportionment and redistricting if given the chance.<sup>151</sup> The Trump Administration’s attempt to add a citizenship

<sup>144</sup> John Eastman, *Some Questions for Kamala Harris About Eligibility*, NEWSWEEK (Aug. 12, 2020), <https://www.newsweek.com/some-questions-kamala-harris-about-eligibility-opinion-1524483> [<https://perma.cc/GZ9Z-L9EF>].

<sup>145</sup> Paul LeBlanc, *Trump Again Says He’s Looking ‘Seriously’ at Birthright Citizenship Despite 14th Amendment*, CNN (Aug. 22, 2019), <https://www.cnn.com/2019/08/21/politics/trump-birthright-citizenship-14th-amendment/index.html> [<https://perma.cc/2UDW-GYNP>].

<sup>146</sup> *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

<sup>147</sup> *Evenwel v. Abbott*, 578 U.S. 54, 74 (2016) (“As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote.”).

<sup>148</sup> See U.S. CONST., amend. XIV, § 2 (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”).

<sup>149</sup> *Evenwel*, 578 U.S. at 74.

<sup>150</sup> *Id.* (“we need not and do not resolve whether, as Texas now argues, States may draw districts to equalize voter-eligible population rather than total population.”); *id.* at 80 (Thomas, J., concurring) (“Although this Court has required that state legislative districts be apportioned on a population basis, it has yet to tell the States whether they are limited in choosing the relevant population that [they] must equally distribute.”) (internal citations and quotation marks omitted).

<sup>151</sup> Ming Hsu Chen, *The Political (Mis)representation of Immigrants in the Census*, 96 N.Y.U. L. REV. 901, 920 (2021); Justin Levitt, *Citizenship and the Census*, 119 COLUM. L. REV. 1355,



question to the 2020 Census was, in part, about obtaining an accurate count of non-citizens in each state to make it easier for states to exclude them in the 2020 redistricting cycle.<sup>152</sup> After the Supreme Court struck down the addition of the citizenship question,<sup>153</sup> President Trump issued an executive order that would gather the information about citizenship status in other ways.<sup>154</sup> One of the purposes of gathering this information, according to the order, was to allow “States to design State and local legislative districts based on the population of voter-eligible citizens.”<sup>155</sup>

The exclusion of non-citizens in reapportionment and redistricting did not come to pass because Biden won and reversed course, but there is every indication to suggest that the next Republican president will take similar steps.<sup>156</sup> If successful, these efforts would treat non-citizens in the United States as if they did not exist at all, giving them the same rights to political representation as the masses of people on the other side of the border, who may be affected by U.S. policies and actions but have no way of influencing them. Like the attack on birth-right citizenship, these proposals do not merely target undocumented immigrants. In many cases, legal immigrants are also the target. The very idea that non-citizens should be treated as members of our community is at risk. If the Supreme Court continues to erode the constitutional rights of non-citizens, this migration of the border could prove durable and resilient against attempts to reverse it.

## V. CONCLUSION

Why does it matter that the border has lost its legal significance? Why think about this as a border migration at all, rather than through the dominant paradigms of immigration enforcement, illegal immigration, and anti-immigrant animus? One reason is to shift our focus away from the border to the divisions we’ve created within our country. Another reason is to fully explain the extent to which the border now pervades American society, keeping non-citizens out and

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1356 (2019); see Hansi Lo Wang, *Immigration Hard-Liner Files Reveal 40-Year Bid Behind Trump’s Census Obsession*, NPR (Feb. 15, 2021), <https://www.npr.org/2021/02/15/967783477/immigration-hard-liner-files-reveal-40-year-bid-behind-trumps-census-obsession> [https://perma.cc/U654-FMMG].

<sup>152</sup> Levitt, *supra* note 151, at 1388.

<sup>153</sup> *Dep’t of Com. v. New York*, 139 S. Ct. 2551 (2019).

<sup>154</sup> Exec. Order No. 13880, *Collecting Information About Citizenship Status in Connection with the Decennial Census*, 84 Fed. Reg. 33821 (July 11, 2019).

<sup>155</sup> *Id.* at 33822–23.

<sup>156</sup> Amanda Frost, *The Question of Who Counts*, THE ATLANTIC (May 26, 2021), <https://www.theatlantic.com/ideas/archive/2021/05/citizenship-census-redistricting-apportionment/618975> [https://perma.cc/8RP9-EAKP].

denying them their humanity. The U.S. government may never successfully “Build the Wall,” but the wall has already been built. And these legal barriers, as policymakers have discovered, are often more effective than concrete and steel.