

THE SHIFTING BORDER OF IMMIGRATION REGULATION†

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INTRODUCTION	809
I. LAW’S ADMISSION GATES: THE CHANGING MEANING OF “ENTRY”	815
II. THE SHRINKING AND EXPANDING BORDER: THE CASE OF EXPEDITED REMOVAL.....	816
III. MOVING BEYOND THE NATION’S TERRITORY: BIOMETRIC REGULATION AND PRE-INSPECTION	819
IV. “SMARTENING” BORDERS THROUGH BILATERAL AND MULTILATERAL COOPERATION	822
V. REGULATING CITIZENS: “EXTERNAL” CONTROL MEASURES TURN INWARDS.....	827
VI. INTERDICTING “UNWANTED” MIGRANTS: CANADA’S OVERSEAS IMMIGRATION OFFICERS AND RELIANCE ON THIRD-PARTY ACTORS.....	829
VII. ERASING TERRITORY: AUSTRALIA’S EXCISION POLICY.....	832
CONCLUDING REMARKS.....	834

“The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.”¹

INTRODUCTION

As Justice Breyer observes in *Zadvydas*, the drawing of borders—between member and non-member, insider and outsider, the interior and the exterior—lies at the heart of immigration law.² These distinctions

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1. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

2. Recent years have seen a rich vintage of scholarly analyses of these distinctions. Among the most influential discussions, see T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* (2002); RAINER BAUBOCK, *TRANSNATIONAL CITIZENSHIP: MEMBERSHIP AND RIGHTS IN INTERNATIONAL MIGRATION* (1994); SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* (2004); LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006); HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY*

bear dramatic consequences for the scope of rights, protections, and opportunities that noncitizens hold. They also partake in shaping (and reshaping) the nation's membership boundaries as well as its territorial, jurisdictional, and geographical frontiers. The interaction between the government's power to restrict access and the conceptualization of where the U.S. border begins and ends is the topic of my inquiry here. Some facts are clear enough: U.S. immigration law has long held that an alien who is stopped at the border enjoys far less protection than a person who is already within this country.³ Core constitutional rights, most notably due process, apply to all persons residing in the United States, "whatever [their] status under immigration laws"—as the Supreme Court asserted in *Plyler*.⁴ Yet such rights remain unavailable to would-be immigrants so long as they remain outside the geographical borders of the United States.⁵ The notion that legal circumstances affecting non-members substantively change after they "pass through our gates" is well entrenched in immigration law, as the canonical case law from *Shaughnessy* to *Zadvydas* attests.⁶ But where precisely do the territorial and jurisdictional borders of the United States lie for immigration regulation purposes? My concern here is not where the boundaries of membership *should* lie, but rather, more concretely, where they *do* lie, in U.S. immigration law and practice.

A novice to the field of immigration might expect the legal boundaries of inclusion and exclusion to correlate with the "cartographic" borders of U.S. territory. The reality, however, is far more complicated. The firm borderlines drawn in the world atlas do not necessarily coincide with those adhered to, indeed created through, immigration law and policy. Instead, we increasingly witness a border that is in flux: at once more open and more closed than in the past. More important still for the purpose of our discussion, the *location* of the border is shifting—at times penetrating into the interior, in other circumstances extending beyond the edge of the territory. And in other contexts, these borders are reappearing, ever more robustly, as a physically refortified barrier, offering a sharp demarcation line between the U.S. and its neighbors to the South and the North.

OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004); PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP (1998).

3. See *Kaplan v. Tod*, 267 U.S. 228 (1925).

4. *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

5. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990).

6. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

While American immigration law is still largely informed by the doctrine of plenary power, which holds that “[a]dmission to the United States is a privilege granted by the sovereign” (as the Supreme Court asserted in *Knauff* more than fifty years ago),⁷ what has dramatically changed in recent years is the location of “our gates,” which no longer stand at the country’s territorial edges. Instead, the border itself has become a moving barrier, a legal construct that is not tightly fixed to territorial benchmarks.⁸ This *shifting border of immigration regulation*, as we might call it, is selectively utilized by national immigration regulators to regain control over their crucial realm of responsibility, to determine who to permit to enter, who to remove, and who to keep at bay.

The crux of my argument is that the state’s ability to flexibly redraw the border for immigration regulation purposes is a key component in the new policy-toolbox developed by the U.S. (and other leading immigrant-destination countries) to reassert control over their so-called “broken” borders in the age of increased international mobility and security risks.⁹ In contrast with the predictions of post-nationalists and others who have told us that the retreat of the regulatory state and the breaking down of borders is imminent, the domestic and comparative examples discussed here demonstrate how border controls are being “retooled and redesigned” by nation-states to better respond to changing needs and challenges in the current age of globalization.¹⁰

This redesign has been accomplished by enforcing the sovereign prerogative to deny or permit access in a whole new way: by redrawing (indeed, redefining) the once fixed and static territorial border, transforming it into something more malleable and movable, which can be placed and replaced—by the words of law—in whatever location that best suits the goal of restricting access. By employing sophisticated legal maneuvers that establish this new multi-faceted border, the regulatory

7. United States *ex. rel.* *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

8. See LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS (Mary L. Dudziak & Leti Volpp eds., 2006).

9. See, e.g., CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE (Wayne Cornelius et. al. eds., 1994).

10. My work here is in line with a set of critical reflections on the theme of “losing control.” See, e.g., Virginie Guiraudon & Galia Lahav, *A Reappraisal of the State Sovereignty Debate: The Case of Migration Control*, 33 COMP. POL. STUD. 163 (2000) [hereinafter Guiraudon and Lahav, *A Reappraisal of the State Sovereignty Debate*]; Christian Joppke, *Immigration Challenges the Nation-State*, in CHALLENGE TO THE NATION-STATE: IMMIGRATION IN WESTERN EUROPE AND THE UNITED STATES 5 (Christian Jopke ed., 1998). A politically astute tale of symbolically regaining control is offered by Peter Andreas, *The Escalation of U.S. Immigration Control in the Post-NAFTA Era*, 113 POL. SCI. Q. 591 (Winter 1998–1999).

state is enhancing and expanding—rather than waning and losing (as many theorists have suggested) its immigration-enforcement authority to act against “unwanted intruders.”

To comprehend the novelty of the shifting border of immigration regulation, we must contrast it with contending views: the classic, clearly demarcated territorial border that serves as the front-line for setting barriers to admission; and the contrasting, globalist vision of a world in which extant borders are traversed with the greatest of ease, to the extent that they become all but meaningless, serving merely as archaic relics of a bygone era. It is convenient to refer to these competing approaches as the “static” vs. “disappearing” conceptions of the border. I will briefly discuss each in turn.

The classic Westphalian ideal of statehood places the border as a permanent and *static* barrier that stands at the frontier of a country’s territory. This formidable border serves a crucial role in delimiting (externally) and binding (internally) a nation’s territory, jurisdiction, and peoplehood, correlating with a notion of fixed “legal spatiality.”¹¹ For many years, this concept permeated immigration law and policy. Accordingly, it is at the border that agents of the state are permitted to exercise the utmost control over access, including the decision “to turn back from our gates any alien or class of aliens.”¹² Yet this resolves only part of the puzzle. The question that occupies us here is where precisely the border itself is to be found for immigration regulation purposes. It is here that the classic notion of the firmly planted territorial border simply does not correlate with the actual reality we find on the ground.

Neither, however, does the fashionable claim that borders are “disappearing” provide a satisfactory explanation to the phenomenon of the shifting border.¹³ In recent years, theorists of post-nationalism, transnationalism, and open-border admission policies have painted a picture of a new world order in which borders are blurred, global commerce and

11. See Kal Raustiala, *The Geography of Justice*, 73 *FORDHAM L. REV.* 2501, 2503 (2005); see also John H. Herz, *Rise and Demise of the Territorial State*, 9 *WORLD POL.* 473, 480–481 (1957).

12. *United States ex rel. Knauff v. Shaughnessy*, 228 U.S. 537, 550 (1950) (Jackson J., dissenting).

13. See DAVID HELD, *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMY, AND CULTURE* (1999); *INTERNATIONALIZATION AND DOMESTIC POLITICS* (Robert Keohane & Helen Milner, eds., 1996); KENICHI OHMAE, *THE BORDERLESS WORLD: POWER AND STRATEGY IN THE INTERLINKED ECONOMY* (1990); SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996) [hereinafter SASSEN, *LOSING CONTROL?*]; see also Neil Brenner, *Beyond State-Centrism? Space, Territoriality, and Geographical Scale in Globalization Studies*, 28 *THEORY & SOC’Y* 39 (1999); Edward S. Cohen, *Globalization and the Boundaries of the State: A Framework for Analyzing the Changing Practice of Sovereignty*, 14 *GOVERNANCE* 81 (2001).

human mobility is on the rise, and international human rights instruments gain sway.¹⁴ As a corollary, those theorists have claimed that the old territorial border can no longer carry the weight of restricting access of non-citizens seeking to enter.¹⁵ Such developments, so goes the standard argument, eventually lead to a decline in the power of states to exercise exclusive authority over spatially bounded territories and their respective inhabitants.¹⁶ On this account, immigrants are seen as the vanguards in testing “the new world order”—their authorized (or more so, *unauthorized*) movement across borders symbolizes the impossibility of enforcing strict immigration controls over access in an increasingly interdependent world.¹⁷

While these arguments may appear persuasive on paper, in practice, immigration law’s shifting borders have not necessarily correlated with the demise of regulatory authority over defining whom to include and whom to exclude.¹⁸ If anything, an opposite trend can be identified: the relaxing of the linkage between territory and authority has given greater latitude for national legislatures and regulatory agencies to develop new enforcement policies that manipulate the border—bleeding it into the interior or extending it beyond the territory’s exterior—whenever such maneuvers are beneficial to deter access by irregular migrants deemed inadmissible or deportable.¹⁹

Charting the logic of this new cartography (or legal reconstruction) of the U.S. border in the context of immigration regulation is my task here. I discuss seven vivid illustrations of the emerging “malleable border” concept. First, I show how Section 212 of the Immigration and Nationality Act (INA) created the distinction between “entry” and “admission” for restricting access to unauthorized migrants, even if they have already physically crossed the border into the territory of

14. See SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* (2006); YASEMIN NUHOGLU SOYSAL, *LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE* (1994); see also *RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY* (Daniele Archiugi et. al. eds., 1998); Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOB. LEGAL STUD.* 447 (2000).

15. See SASSEN, *LOSING CONTROL?*, *supra* note .

16. See Guiraudon and Lahav, *A Reappraisal of the State Sovereignty Debate*, *supra* note 10.

17. See SASSEN, *LOSING CONTROL?*, *supra* note 14.

18. See SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* 6 (2004).

19. Irregular migrants are those traveling without the proper documentation required for lawfully crossing international borders by land, air, or sea. With the exception of asylum seekers, irregular migrants are deemed “inadmissible” or “deportable” from the United States. The latter are terms of art in immigration law, as defined in 8 U.S.C. § 1182 (2006) and 8 U.S.C. § 1227 (2006), respectively.

the United States. I further illustrate the shifting border of immigration regulation through the procedure of expedited removal, which is designated to take place “at the border”; however, we will see that this has been implemented not only in the interior but also extended beyond the external perimeter of the U.S. borderline. A third example I explore here is the advances in the collection of biometric information from non-citizens in the context of pre-inspection procedures, which increasingly takes place outside the territory of the U.S. or its land, air, and sea ports-of-entry. To that end, American immigration officials stationed abroad are empowered to exercise their full legal authority under the INA over those who are yet to board a plane or ship heading towards the United States, effectively pushing the “shifting” border farther away from the territory and into new terrains of technological regulation and information collection.

The Fourth Part investigates how “smart border” agreements partake in redrawing the border of immigration regulation at the continental level, creating a “buffer zone” around high-demand countries. I then underscore the potentially detrimental impact of these recent developments not only on the situation of non-citizens, but on that of citizens as well. Next, I turn to explore similar developments in comparable immigrant-receiving countries: Canada and Australia. In Part six, I show how Canada is adopting aggressive measures of overseas “interdiction” of air travelers in order to avoid admission of unwanted migrants to its territory, much in the same vein as America’s pre-inspection measures. I also discuss the growing reliance on private actors (such as airline carriers) in conducting the task of weeding out legitimate travelers from those deemed high-risk. A seventh and final illustration of the malleable border concept focuses on Australia’s far-reaching excision policy, which “erases off” certain parts of its territory from the map, creating an “excision zone” where Australia’s standard immigration law provisions do not apply—with dramatic consequences for limiting the rights and protections of unauthorized entrants.

I conclude by offering a few remarks on the future of the U.S. border, which appears to be resurrected as a physical barrier at certain charged ports-of-entry, especially along the U.S.-Mexico borderline. By locating the shifting border as an alternative to the established theoretical poles of “static” versus “disappearing” boundaries, I show that neither of these visions captures the dynamics of the new regulatory regime of the shifting border. I place at center stage what too-often remains at the margins: documenting and explaining the manifold, indeed conceptually

far-reaching, “re-invention” of the border by regulatory agencies entrusted with the state apparatus of migration and border control.²⁰

I. LAW’S ADMISSION GATES: THE CHANGING MEANING OF “ENTRY”

The very act of crossing the border into U.S. territory is no longer treated as legally relevant for changing one’s status from “an alien who has never entered” into one who “has effected an entry,” to use the classic terminology of immigration law. Since the introduction of Section 212(a)(6)(A) of the Immigration and Nationality Act (INA) as part of the 1996 immigration reforms, which codified into law some of the most fundamental changes to U.S. immigration policy in recent memory, those who physically enter the country are no longer considered to have passed through “our gates.”²¹ While it may sound like an oxymoron, the hocus-pocus of detaching fact from law can occur in the realm of immigration regulation by setting apart the physical act of entry from the legal notion of admission. The INA creates this legal construct by distinguishing between *physical entry* into the country (which does not count for immigration purposes) and *lawful admission* at a recognized port-of-entry (which makes one’s presence in the country permissible, and therefore visible, in the eyes of the regulatory state).²² In this way, entry into the territory—the material act of crossing the geographical border and physically being present within the jurisdiction of the United States, does *not* equate with gaining immigration-related procedural protections that would apply to those who have been admitted.

This change in the meaning of “entry” can occur given the shifting conception of the border: “an alien present in the United States without being admitted,” to recite the somewhat cryptic language of the statute, is treated as if the non-citizen (who is already present on the territory) never really crossed the border into the country.²³ This “as if” fiction

20. Since 2003, federal regulation, administration, and enforcement of immigration law and border control lies with the Department of Homeland Security (DHS), which was created in the post 9/11 era as part of the largest makeover of the federal government’s institutional structure since World War II. 6 U.S.C. § 111 (2006).

21. 8 U.S.C. § 1182 (a)(6)(A).

22. 8 U.S.C. § 1101(a)(13)(A) reads as follows: “The term ‘admission’ and ‘admitted’ mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” On the pre-1996 situation of excludable aliens, see *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir.), cert. denied, 116 S. Ct. 479 (1995).

23. 8 U.S.C. § 1182(a)(6)(A)(i). These individuals will have certain constitutional protections while in the country. This distinction between “alienage law” and “immigration law”

bears serious consequences for aliens “present in the United States without being admitted.” For instance, they are subject to inadmissibility rather than deportation grounds (the former are more strict than the latter)²⁴ and their unlawful admission becomes a bar precluding regularization of status or the application of waivers in removal processes.²⁵ The final element in relinquishing their prospect of lawful admission to the United States in the future is that the INA makes the very act of crossing without inspection (the otherwise non-recognized presence of the non-citizen on the territory) into the “main substantive charge used to remove them.”²⁶

In creating the legal distinction between “entry” and “admission,” the INA effectively treats individuals present in the country without authorization as if they had been stopped at the border—where aliens have traditionally enjoyed fewer protections under U.S. immigration law than non-citizens who have actually made it into the interior. But this legal maneuver can only occur by “redrawing the traditional exclusion-deportation line” under a shifting conception of the border, which is no longer tied to the territorial perimeter.²⁷ Instead, the exclusion-deportation line has become *de-territorialized*: the key factor for the legal analysis is not whether the person has passed through the territory’s frontiers (where the border traditionally resided). Rather the only question that matters for immigration regulation purposes is whether the person has crossed at any time or place through *law’s gates of admission*, which, as the INA proclaims without hesitation, are not territorially fixed but rather “designated by the Attorney General.”²⁸

II. THE SHRINKING AND EXPANDING BORDER: THE CASE OF EXPEDITED REMOVAL

Consider another legal technique of de-coupling territory from authority in the effort to curb “unwanted” admission. With the ushering in of the Illegal Immigration Reform and Immigrant Responsibility Act

is perhaps best articulated in the writings of Linda Bosniak. *See, e.g.,* BOSNIAK, THE CITIZEN AND THE ALIEN *supra* note 2.

24. 8 U.S.C. § 1182(a)(6)(A)(i) and 8 U.S.C. § 1227.

25. See the waivers from removal specified in 8 U.S.C. § 1227(a)(1)(H), which are easier to establish than those appearing in 8 U.S.C. § 1182(i).

26. See IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 428 (Thomas Alexander Aleinikoff et. al. eds., 5th ed. 2003) [hereinafter IMMIGRATION AND CITIZENSHIP]. There is also a 10-year bar to re-admission.

27. *Id.*

28. See 8 U.S.C. § 1182(a)(6)(A)(i).

(IIRIRA) of 1996, Congress created a new procedure called “expedited removal.”²⁹ This removal procedure “sharply redefined—downward—what process is due an individual who arrives at [the] border and is deemed not to have proper documents to enter.”³⁰ Expedited removal grants the immigration officer at the border the ultimate power to issue a removal order against aliens arriving in the United States or seeking admission to its territory, if they have no travel documents or possess potentially fraudulent ones.³¹ An expedited removal order is both formal and conclusive. As the INA explicitly states, “the officer shall order the alien removed from the United States without further hearing or review”³² This weighty decision to exclude is typically made by low-level immigration officers following a short interview with the arriving individual that takes place at the port of entry.³³ Vesting such immense powers in the hands of front-line officers—the “gate-keepers” of the nation, whose expedited removal decisions are largely shielded from administrative and judicial review—appears at first blush to reconstitute the familiar cartographic borderline as the ultimate locus for protecting the country against unwelcomed intruders. But, then again, where precisely does this border lie?

When Congress introduced the procedure of expedited removal, it authorized the Attorney General (now the Secretary of the Department of Homeland Security [DHS]) “to apply the procedure to persons who entered illegally and who had not been physically present in the United States for more than two years.”³⁴ In other words, expedited removal—a procedure typically exercised at the “edge” of territory—could apply with equal force to individuals who have already been present within the country for a period of up to two years.

Based on this authorization, the DHS issued a set of regulations (in 2002, 2004, and 2006) that permit immigration officials to expeditiously

29. 8 U.S.C. § 1225(c). As initially implemented, expedited removal was only applied to arriving aliens at the nation’s ports of entry.

30. See Stephen M. Knight, *Defining Due Process Down: Expedited Removal in the United States*, 19 REFUGE 41, 41 (2000).

31. 8 U.S.C. § 1182(7)(A)(i).

32. 8 U.S.C. § 1225(b)(1)(a)(i). The only exception to this rule is that an arriving non-citizen who indicates an intention to apply for asylum and establishes “credible fear” of persecution is detained and referred to an asylum officer who must determine whether the individual will be permitted access to the U.S. asylum system. If the individual makes the case for credible fear, he or she will then be placed in a standard removal process, which offers greater procedural protection and permits the individual to make the claim for asylum. See 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. §§ 208.30(d), 235.3(c) (2006).

33. It further bears the additional penalty of making the person inadmissible for five years. See 8 USC § 182(a)(9)(A)(i) (2006).

34. RICHARD A. BOSWELL, *ESSENTIALS OF IMMIGRATION LAW* 37 (2006).

return undocumented migrants found within 100 miles of the border up to fourteen days after their actual crossing, through the exercise of expedited removal. This authorization means that non-citizens apprehended *inland* are treated, for immigration regulation purposes, as though they had been caught *at the U.S. border*, effectively blurring the line between the perimeter and the interior. This redrawing of the border has significant legal effects, including the elimination of various procedural protections from the removal process. The most glaring impact of expedited removal is that it precludes access to administrative and judicial review of the immigration officer's decision, taking away established legal safeguards that would have been available in standard interior removal processes.³⁵ It also imposes a lower onus on the government in establishing the grounds for removal when compared to a full-blown (and judicially reviewable) removal hearing.³⁶

Beyond these technicalities of positive law, what is important for our discussion is the recognition that one's presence within the territory of the United States is no longer a guard against expedited removal by officers of the executive branch, who are free to make swift and irrevocable deportation decisions, on the same terms as if the person was detected at the border. This cannot occur without reliance on the shifting border of immigration regulation, which permits these decisions to be made without granting the affected individual access to the courts, although the outcome carries the most telling personal consequences. These decisions bear directly, as the authors of a leading casebook in immigration law put it, "on just where home will be, and on which relatives and friends will share in life's triumphs and defeats."³⁷ In this example, the border has been detached from its traditional location at the perimeter of the country's edges—it has now "moved" 100 miles into the interior, by relying on the legal fiction of removing unwanted migrants "at the border" when they are already firmly within its perimeter.³⁸ As officials at the Department of Homeland Security appear to see it, the legislative mandate to protect the integrity of the territorial border is no longer tied to a

35. See Press Release, Department of Homeland Security, Department of Homeland Security Streamlines Removal Process Along Entire U.S. Border (Jan. 30, 2006), available at http://www.dhs.gov/xnews/releases/press_release_0845.shtm [hereinafter Streamlining Removal Process].

36. 8 U.S.C. § 1225(b)(1) & (2). The implementation of expedited removal along the entire U.S.-Mexico, U.S.-Canada, and all U.S. coastal areas has followed a more limited application along the "ports-of-entry at all nine U.S. Customs and Border Protection (BCE) Border Patrol Sectors on the Southwest border." *Id.*; see also Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004).

37. See IMMIGRATION AND CITIZENSHIP, *supra* note 26, at 750.

38. Designating Aliens for Expedited Removal, 69 Fed. Reg. at 48,877.

specific geographical location. While expedited removal currently bleeds 100 miles into the territory, the DHS has recently declared that its *border-enforcement* measures may well expand “*nationwide*.”³⁹

The shifting border of immigration regulation is not restricted to inland application. It may also stretch in the other direction—outward, beyond the territory as well—for instance, when expedited removal procedures are applied to persons interdicted in international or United States waters.⁴⁰ This outward stretch has a similar effect of beefing up the reach of immigration-enforcement efforts. In both shrinking and expanding the reach of the border, the regulatory state is attempting to regain control over access to its territory and restrict the procedural protections that attach to crossing “our gates.” This goal is expressed loudly by the authorized agents of the federal government, such as the Secretary of the DHS, who, in announcing these new measures, asserted that: “we made a commitment [today] to implement new tactics throughout the U.S. in order to gain control of our borders.”⁴¹

III. MOVING BEYOND THE NATION’S TERRITORY: BIOMETRIC REGULATION AND PRE-INSPECTION

To provide another illustration of the unprecedented reach of the shifting border in the post-9/11 era, consider the collection of biometric information by U.S. immigration officials from authorized visitors entering the United States (approximately 175 million people annually).⁴² This mega-operation, entitled US-VISIT, demands that individuals holding visas or those coming from visa-waiver countries present themselves to an immigration officer at a port-of-entry, where their two index fingers and digital photo will be taken and stored in a massive government

39. See Press Release, Department of Homeland Security, Fact Sheet: Secure Border Initiative (Nov. 2, 2005), available at http://www.dhs.gov/xnews/releases/press_release_0794.shtm.

40. Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68924 (Nov. 13, 2002) (quoting 8 C.F.R. § 1.1(q) (2002)).

41. See Streamlining Removal Process, *supra* note 35.

42. See DEPARTMENT OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, 2005 YEARBOOK OF IMMIGRATION STATISTICS 63, tbl. 25 (2005) [hereinafter 2005 YEARBOOK OF IMMIGRATION STATISTICS]. Of these non-immigrant entries, the vast majority (142 million, or 82%) were short-time visitors for business or pleasure from Canada and non-resident aliens crossing from Mexico with an authorized Border Crossing Card (BCC or “laser visa”). The remaining 33 million completed the I-94 arrival/departure form at a port of entry. Of those entrants, 29 million were admitted on a short-term B1/B2 visa for business or pleasure. *Id.*

database used to match and authenticate their travel documents.⁴³ In issuing the regulations governing the US-VISIT program (“notice of requirement for biometric collection from certain nonimmigrant aliens” in the technocratic language of the Federal Registrar),⁴⁴ the DHS has taken the occasion not only to specify who must submit to it (“nonimmigrant aliens”)⁴⁵ and when (“upon arrival”),⁴⁶ but also *where* such inspection may take place.⁴⁷ The latter component is of most significance to us: arrival in the United States, as defined by federal regulations, can take place at designated air, land, and sea ports-of-entry.⁴⁸ This is not surprising; it is at these ports-of-entry that immigration officials are typically stationed. But what is surprising is that the collection of biometric information by U.S. immigration officials can take place outside the United States—in foreign territories—sometimes located tens, hundreds, or even thousands of miles away from the country’s actual territorial borders, in places such as Ireland’s Dublin or Shannon international airports, Canada’s Toronto and Montreal international airports, or Bermuda and Bahamas’ international airports.⁴⁹ None of these spaces can plausibly be construed to lie within U.S. territory, yet American immigration officials conduct their business there as a matter of course.

The presence of U.S. immigration officials abroad for the US-VISIT program is part of a larger strategy of “pre-inspection,” which permits these agents to determine whom to include and whom to exclude “upon arrival,” despite the fact that the people they interview have yet to board a flight to the United States. What is more, these immigration officials’

43. See Department of Homeland Security, U.S.-VISIT: How It Works, *available at* http://www.dhs.gov/xtrvlsec/programs/editorial_0525.shtm (last visited Apr. 12, 2007) [hereinafter *Keeping America’s Doors Open*]. The Acting Director of U.S.-VISIT recently stated that DHS wants to move to a ten-print system in order to “make identifications even more reliable,” noting that “[w]e’re now at 80 million-plus individuals in the system.” See Adam Liptak, *Adding to Security but Multiplying the Fears*, N.Y. TIMES, Feb. 26, 2007, at A14.

44. Notice to Nonimmigrant Aliens Subject to be Enrolled in the United States Visitor and Immigrant Status Indicator Technology System, 69 Fed. Reg. 482 (Jan. 5, 2004).

45. *Id.* The notice applies to non-immigrant entrants from around the world, with limited exceptions.

46. *Id.*

47. As of March, 12, 2007, US-VISIT entry inspections were in place at 116 airports, 15 seaports, and 154 land ports. See the list specifying air and seaports designated for US-VISIT inspection, Department of Homeland Security, US-VISIT: Current Ports of Entry, *available at* http://www.dhs.gov/xtrvlsec/programs/editorial_0685.shtm (last visited Apr. 12, 2007).

48. According to U.S. Customs and Border Patrol, there are 327 such ports of entry in the United States and 15 preclearance points in Canada and the Caribbean. U.S. Customs and Border Patrol, Ports of Entry, <http://www.cbp.gov/xp/cgov/toolbox/ports> (last visited May 13, 2007).

49. See *Keeping America’s Doors Open*, *supra* note 43.

decisions bear the full weight and authority of the INA. In other words, those deemed inadmissible will not be permitted to board any plane or ship heading to America. They are prohibited from even embarking on their international journey towards the promised land of immigration.⁵⁰ This drastic measure of “de-territorialization” requires significant conceptual change in the perception of the border. U.S. immigration officers normally make such determinations “at the border”—but here the territory of the U.S. is no longer anywhere in sight: the border has instead been removed to non-U.S. soil.

Such techniques of pre-inspection to weed out unauthorized travelers may well prove to be the wave of the future; they arguably are an immigration regulator’s dream tool to deter unwanted admission. As the International Organization for Migration (IOM) noted in a recent report, “[m]any states which have the ability to do so find that intercepting migrants before they reach their territories is one of the most effective measures to enforce their domestic immigration laws and policies.”⁵¹ This insight has not been lost by the architects of the shifting border. The INA now authorizes U.S. immigration officers to examine and inspect at the point of origin the passengers and crew of “any aircraft, vessel, or train proceeding directly, without stopping, from a port or place in foreign territory to a port-of-entry in the United States”⁵² As noted above, decisions made by U.S. immigration officials at these non-U.S. locations are *final* determinations of admissibility.⁵³ This radical “relocation” of the border—placing it in a foreign territory’s jurisdiction—is made possible through a combination of international cooperation (by the countries on whose territory U.S. agents are permitted to conduct the pre-inspection) and domestic authorization. The latter is found in the dry, bureaucratic words of American immigration law, which hold that inspection made “at the port or place in the foreign territory . . . shall have the same effect under the Act as though made at the destined port-of-entry in the United States.”⁵⁴

Such de-coupling of legal authority from the geographic boundaries of the nation-state represents an extreme variant of the technique of “de-territorializing” the border for immigration regulation purposes. It is

50. This raises serious concern about migration inflows moving to unregulated channels. See Andrew Brouwer & Judith Kumin, *Interception and Asylum: When Migration Control and Human Rights Collide*, 21 REFUGE 6 (2003).

51. HUMAN RIGHTS WATCH ET AL., NGO BACKGROUND PAPER ON THE REFUGEE AND MIGRATION INTERFACE (2001), available at http://www.hrw.org/campaigns/refugees/ngo-document/ngo_refugee.pdf.

52. 8 C.F.R. § 235.5(b) (2006).

53. *Id.*

54. *Id.*

increasingly popular among well-off countries trying to take anticipatory or preventive action by extending their influence far away from their own geographical boundaries in order to curb territorial entry by irregular migrants. The United States is not alone in adopting these “re-capture” techniques. For instance, Canada and Australia—which, like the United States, are among the world’s leading immigrant-receiving countries—share related concerns about deterring unauthorized admission. And they too have responded by adopting striking techniques of “shifting” the border of immigration regulation, with variations corresponding to their distinct geopolitical characteristics and jurisprudential precedents that create corresponding immigration-control challenges.⁵⁵

IV. “SMARTENING” BORDERS THROUGH BILATERAL AND MULTILATERAL COOPERATION

Before we move to consider these comparative examples, let me provide one final illustration of another legal method for shifting the border away from the territorial frontiers: creating a semi-hemispheric “ring” of border control, in this context, around the United States and Canada.⁵⁶ The evidence of increased immigration- and customs-control cooperation in North America is not often discussed, but its reach is overwhelming. It is best represented by the creation of the “smart border” in 2002 (a year after the 9/11 terrorist attacks) between the United States and Canada, which was later partly extended to Mexico as well. The smart border, as its constitutive thirty-point Action Plan declares, is designed to “enhance the security of our shared border while facilitating the legitimate flow of people and goods.”⁵⁷ It relies on four pillars: the secure flow of people, the secure flow of goods, secure infrastructure, and information sharing and coordination in the enforcement of these objectives. The smart border has been “upgraded,” through regulatory action, to cover new areas of cooperation, such as bio-security and the

55. See *infra* Parts VI and VII (discussing concerns and immigration measures taken by the Canadian and Australian governments).

56. See, Ambassador Michael Kergin, Canadian Embassy, Remarks to the Houston World Affairs Council (Mar. 21, 2001), available at <http://geo.international.gc.ca/world/site/includes/print.asp?lang=en&print=1&url=%2Fcan-am%2Fwashington%2Fambassador%2F010321-en.asp>; North American Aerospace Defense Command, About Us, available at http://www.norad.mil/about_us.htm (last visited Mar. 3, 2007). Note that North America is here defined as referring primarily to the U.S. and Canada, to the exclusion of Mexico.

57. Press Release, White House, U.S.-Canada Smart Border/30 Point Action Plan Update (Dec. 6, 2002), available at <http://www.whitehouse.gov/news/releases/2002/12/20021206-1.html> [hereinafter U.S.-Canada Smart Border Agreement].

application of biometric-identification technology to cross-border movement, leading to, as one scholar puts it, “a kind of bureaucratic integration regarding the flow of people . . . that was unthinkable, and certainly politically untenable, just a few years ago.”⁵⁸

This has been translated in practice to various joint measures to create new inspection technologies of people and goods that increasingly extend beyond the ports-of-entry, just in line with the general trend identified here of the “shifting” border.⁵⁹ The smart-border agreement calls for developing common standards for biometric information and increased visa-policy coordination. It also permits extensive sharing of information on high-risk travelers destined to either country using jointly developed, risk-scoring immigration “lookouts” lists that are managed in concert on a 24/7 basis through the U.S. National Targeting Center (NTC) and Canada’s National Risk Assessment Centre (NRAC). In addition, the smart-border agreement laid the foundation for entering into a “safe-third country” agreement that “allows both countries to manage the flow of individuals seeking to access their respective asylum systems” by effectively pushing these claimants back to the first point of entry into North America.⁶⁰ This not only creates a buffer zone around each country, but also shifts the enforcement mechanism towards a new *locus* for the exercise of legal authority: the *continental* perimeter.⁶¹

58. Greg J. Anderson, *North American Economic Integration and the Challenges Wrought by 9/11*, 3 J. HOMELAND SECURITY & EMERGENCY MGMT. 3, 9 (2006), available at <http://www.bepress.com/jhsem/vol3/iss2/2>.

59. The erection of smart-borders in an age of potential mega-national security crises is largely driven by self-interest of sovereign entities, but it requires a greater deal of cooperation among them in order to be successful. Despite their significance, few of these developments ever reach the spotlight of popular media, nor are they to be found in the inflated political rhetoric that often surrounds U.S. immigration law and policy moves in the post 9/11 era.

60. See Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, U.S.-Can., Dec. 5, 2002, available at <http://www.cic.gc.ca/english/policy/safe-third.html> [hereinafter Safe Third Country Agreement]. In this way, both countries manage to uphold their obligation to *non-refoulement*, while gaining greater strategic depth. For critical commentary, see Audrey Macklin, *Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement*, 36 COLUM. HUM. RTS. L. REV. 365 (2005).

61. This border “shifting” strategy was initially devised in Europe (through the Dublin Convention) in response to specific geopolitical pressures, allowing the European Union to push away its refugee-admission border to “gate-keeper” states in order to protect its “core.” But this strategy has since proliferated beyond Europe. A decade later, we find a similar policy implemented in North America, with the entry into force of the US-Canada Safe Third Country agreement in 2004. See Safe Third Country Agreement, *supra* note 60. Such cooperation enhances, as the Director of U.S. Citizenship and Immigration Services publicly noted, “the two nations’ ability to manage, in an orderly fashion, asylum claims brought by persons crossing our common border.” Press Release, U.S. Citizenship and Immigration Services, United

And I have not yet said a word about joint cargo pre-inspections and pre-screening of goods arriving from overseas, and the setting up of databases of “trusted” frequent travelers, truck drivers, and shipping companies that are permitted to use electronic and related identifiers that facilitate swift crossing at land, sea, and air “ports of entry”—although the inspection itself often takes place far away from the territorial border. Indeed, the smart-border agreement explicitly states the goal “developing approaches to move customs and immigration activities *away* from the [actual] border to improve security and relieve congestion where possible.”⁶² In pushing the borders of immigration (and customs) regulation outward—as close as possible to the point of origin—the national territory becomes the last line of defense instead of the main one, as it was in the past. Collectively, these measures provide strategic depth, allowing the trading partners in NAFTA’s heavy-traffic economy to better regulate their “hemispheric” perimeter—from afar—with the guiding aim of distinguishing authorized, low-risk, and pre-cleared travelers from high-risk cross-border movement of “irregular migrants.”⁶³

What is astonishing here is not only that governments are taking drastic steps to “promote the creation and development of systems that allow for rapid and reliable identity checks to be carried out”—most likely by *other* countries’ immigration officials, but also that the degree of international cooperation among national law-enforcement agencies that is required in order to make this system of verification realistically workable.⁶⁴ This development is perhaps most vividly reflected in the Enhanced Border Security and Visa Entry Reform Act of 2002 (also known as the Border Security Act), in which the United States initially required the citizens of other countries to present machine-readable passports with digital photos imprinted in them in order to gain admis-

States and Canada to Implement Safe Third Country Agreement on Asylum (Dec. 29, 2004), available at <http://www.uscis.gov/files/pressrelease/Safe-12-29-94.pdf>.

62. U.S.-Canada Smart Border Agreement, *supra* note 57, at point #15.

63. These trends have only further deepened with the introduction of the Security and Prosperity Partnership of North America (SPP), which was jointly announced by the U.S., Canada, and Mexico in 2005. The SPP creates a template for regulatory harmonization of the countries’ border management, security, trade, and bioprotection measures. See White House, Security and Prosperity Partnership of North America Security Agenda (Mar. 23, 2005), available at <http://www.whitehouse.gov/news/releases/2005/03/200503233.html>. For further details, see <http://www.spp.gov>; see also Jason Ackleson & Justin Kastner, *The Security and Prosperity Partnership of North America*, 36 AM. REV. CAN. STU. 207 (2006).

64. Council of Europe, Committee of Ministers, Recommendation Rec(2005)7 of the Committee of Ministers to Member States Concerning Identity and Travel Documents and the Fight Against Terrorism (Mar. 30, 2005), available at https://coe.int/+e/legal_affairs/legal_cooperation/fight_against_terrorism/2.opled_text3/Rec2005.7E.pdf. See Enhanced Border Security and Visa entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (2002).

sion to the United States as non-immigrant visitors.⁶⁵ As of 2006, these travel-document requirements were made even stiffer. To gain visa-free admission, any new passport issued by an eligible visa-waiver country must (as DHS recently clarified) be an “e-passport,” which includes “an integrated computer chip capable of storing biographic information from the date page, as well as other biometric information, such as the required digital photograph of the holder.”⁶⁶ In addition to the smart-chip requirements, DHS is taking steps “to strengthen document integrity by requiring the visa-waiver countries to commit to several measures concerning lost and stolen passports.”⁶⁷ The latter include the requirement of reporting lost and stolen passports to INTERPOL (the world’s largest international police organization, with 186 member countries) and to DHS’ Fraudulent Document Analysis Unit.

The U.S.-led push towards “smartening” borders and tightening governmental regulation of travel documents is further strengthened by changes occurring on the other side of the Atlantic, where the European Union is aggressively building its virtual “external borders.”⁶⁸ In 2004, this policy mandate led to the creation of a European-wide agency for the “management of operational cooperation at the external borders of the member states,” known as FRONTEX.⁶⁹ Working diligently to fulfill its control and surveillance mandate, FRONTEX has “adopted biometrics as a means to enhance interoperability between states, notably in the field of identity verification, and the return of illegal migrants”⁷⁰ This “interoperability,” as the collection, retrieval and sharing of sensitive personal information encoded in passports and other identity cards is referred to in the professional jargon of immigration regulators, has further accelerated with the development—as the 2005 EU Council of Ministers recommends—of “effective systems of registration of modification [of

65. See Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (2002).

66. Department of Homeland Security (DHS), Visa Waiver Program: Passport Requirements Timeline, *available at* http://www.dhs.gov/xtrvlsec/programs/content_multi_image_0021.shtm#1 (last visited Dec. 11, 2006).

67. Press Release, Department of Homeland Security, DHS to Require Digital Photos in Passports for Visa Waiver Travelers (Jun. 16, 2005), *available at* http://www.dhs.gov/xnews/releases/press_release_0691.shtm.

68. See *THE WALL AROUND THE WEST: STATE BORDERS AND IMMIGRATION CONTROLS IN NORTH AMERICA AND EUROPE* (Peter Andreas & Timothy Snyder eds., 2000).

69. The European Council (EC), Council Regulation No. 2007/2004 (Oct. 21, 2004), *available at* <http://register.consilium.eu.int/pdf/en/04/st10/st10827.en.04.pdf>. FRONTEX is assigned with the task of providing “[c]oordination of operational cooperation between Member States in the field of management of external borders.” See FRONTEX Tasks, *available at* http://www.frontex.europa.eu/origin_and_tasks/tasks/.

70. Rebekah Thomas, *Biometrics, International Migration and Human Rights*, 7 *EUR. J. MIGRATION & L.* 377, 385 (2005).

personal information] resulting from events occurring abroad.”⁷¹ On this account, domestic law enforcement agencies have to carry out tasks involving the identity documents issued by a government other than their own. For instance, if a French passport is stolen in the United States, it will be the responsibility of American law-enforcement agencies to inform their French counterparts of this event, as part of the global identification system, which, according to its advocates, has the potential to “cut wait times, reduce government fees for travelers, fight illegal immigration and . . . better defend nations from terrorists.”⁷²

This big-brother-like approach to regulating cross-border mobility will only become more pronounced if the next phase of “smart border” implementation takes place, that stage will see the use of radio frequency identification (RFID) technology to record the entry and exit of individuals across national or regional borders simply by reading the information coded in the smart chip of their biometric travel documents. A number of U.S. land borders are already testing the RFID technology as part of a DHS pilot project.⁷³ The United Kingdom is currently implementing its version of the electronic or “virtual border” scheme, which is designed “to use advance passenger information provided by airlines, to screen, record and even refuse entry to individuals *before they even leave their country of origin*.”⁷⁴ This would represent the ultimate merge of policy and technology in shifting the border of immigration regulation as far away as possible from the territory of the admitting state.

Add to this the EU-US Agreement on Passenger Name Records of 2004, which was designed to comply with U.S. demands to require air carriers to transfer to American authorities the passenger-name-records (PNR) information about those on board U.S.-bound flights for the purpose of assessing the risk of these international travelers *before* they reach this country’s actual, physical shores.⁷⁵ This development is also important because it represents a casebook example of some of the more profound and potentially far-reaching implications of the shifting border

71. Council of Europe, *supra* note 64; *see also* Thomas, *supra* note 70.

72. *See* Jonathan Marino, *Head of Visitor Tracking System Wants Global ID System*, GOVEXEC.COM, Apr. 25, 2006, http://www.govexec.com/story_page.cfm?articleid=33925&dcn=e_gvet.

73. Press Release, Department of Homeland Security, Testing of Radio Frequency Identification (RFID) Technology at Land Borders Questions and Answers (Aug. 8, 2005), *available at* http://www.dhs.gov/xnews/releases/press_release_0714.shtm.

74. Thomas, *supra* note 70, at 379.

75. Agreement on the Processing and Transfer of PNR Data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, U.S.-E.C., May 28, 2004, Temp. State Dep’t No. 04-107, 2004 WL 1809735.

of immigration regulation: a system initially designed to detect high-risk foreigners becomes a pretext for mass surveillance directed at the American people. To wit, it was recently revealed that DHS has used the PNR data collected through the EU-US agreement not only to regulate the movement of non-citizens, but also to create a massive “Automated Targeting System” (ATS) that generates a risk assessment score for *each* traveler—including millions of U.S. citizens.⁷⁶

V. REGULATING CITIZENS: “EXTERNAL” CONTROL MEASURES TURN INWARDS

These new measures significantly re-draw the line of inclusion and exclusion, blurring once firm distinctions between protected citizens and less-welcomed aliens.⁷⁷ Indeed, we increasingly witness how border control requirements initially designed to apply only to members of other nations (i.e. those seeking admission into “our gates”), fast travel to challenge long-accepted norms concerning U.S. citizens as well. The recent implementation of new U.S. e-passport regulations, which I now turn to discuss, illustrates this last point. These recent policy changes represent “the most significant changes in border control in years, as federal officials try to bring the process of checking identification into the digital age.”⁷⁸ No less important for the purposes of our discussion, these new measures are *inward* looking: affecting not aliens, but Americans.

Beginning in 2007, all U.S. citizens applying for a passport will receive a document that looks like the traditional type, but in fact includes an embedded “smart” chip that stores a digital photo of the passport carrier and other personal information. The adoption of the American version of the biometric “e-passport” (previously demanded only of non-citizens seeking to gain admission into our gates) has followed little if any public deliberation concerning the various civil liberties and privacy

76. See DEP’T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE AUTOMATED TARGETING SYSTEM (2006), available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbp_ats.pdf.

77. This “redrawing” of the line of inclusion/exclusion is further complicated by the creation of “gradations” of the citizenship privileges offered to different members of the polity itself, as reflected, for example, in the recent court sagas of *Hamdi* and *Padilla*. See *Rumsfeld v. Padilla*, 541 U.S. 426 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). For commentary, see Ediberto Román, *The Citizenship Dialectic*, 20 GEO. IMMIGR. L.J. 557 (2006); Juliet Stumpt, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. DAVIS L. REV. 79 (2004).

78. Roger Yu, *Travel to Canada, Mexico is about to Change with New Passport Rules: “Smart” Chip Added to Increase Security*, USA TODAY, Jan. 2, 2007 at 8A.

concerns that the new passport may cause.⁷⁹ What we do find in spate are governmental agencies' declarations, confidently proclaiming that the "new generation of the U.S. passport [which] includes biometric technology . . . will take security and travel facilitation to a new level."⁸⁰ On this account, "the introduction of biometric or 'e-passports' will further enhance global security." This new level of security will be achieved, it is argued, by the addition of "a small contactless integrated circuit (computer chip) embedded in the [passport's] back cover, . . . enabl[ing] biometric comparison, through the use of facial recognition technology at international borders."⁸¹ Notice here the subtle bleeding of *international* borders into *domestic* regulations affecting the situation of citizens, not aliens. Rolling out this "new generation" of border control measures is anything but business-as-usual. Instead, it represents a significant expansion in the government's powers to engage in massive collection, storage and retrieval of biometric information, which extends beyond the standard gaze of regulating noncitizens: namely, policing the mobility of *full members* as well. Just a number of years ago these developments would have seemed more fitting for a science-fiction novelist's mal-utopia than describing our increasingly regulated everyday reality. We are thus witnessing here the unfolding of yet another kind of shifting border: the increased post 9/11 regulation of the non-citizen has become a precursor for adopting unprecedented immigration control measures affecting the quintessential member: the American citizen.⁸²

The Electronic Passport logo (shown below) is the international symbol for an electronic passport. It signifies that the passport contains an integrated circuit or chip on which data about the passport and passport bearer is stored. The logo will be displayed at border inspection

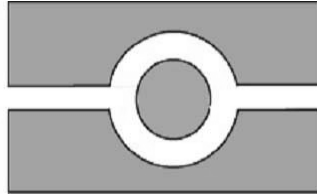
79. Although there has been little public debate over these issues, specialized non-governmental organizations, such as Privacy International, have provided detailed information concerning the severity of civil liberties and privacy concerns associated with the introduction of biometric passports. See PRIVACY INT'L, BACKGROUND ON BIOMETRIC PASSPORTS (2004), <http://www.privacyinternational.org/article.shtml?cmd%5B347%5D=x-347-61327>.

80. Press Release, U.S. Dep't of State, Department of State Begins Issuing Electronic Passports to the Public (Aug. 14, 2006), available at <http://www.state.gov/t/pa/prs/ps/2006/70433.htm>.

81. U.S. Dep't of State, The U.S. Electronic Passport, http://travel.state.gov/passport/eppt/eppt_2498.html# (last visited Apr. 12, 2007).

82. This is a main theme advanced by constitutional and immigration law scholars in related contexts of blurring the lines between the citizen and non-citizen. See, e.g., T. Alexander Aleinikoff, *The Tightening Circle of Membership*, 22 HASTINGS CON. L.Q. 915 (1995); Linda Bosniak, *Opposing Prop. 187: Undocumented Migrants and the National Imagination*, 29 CONN. L. REV. 555 (1996); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

lanes at all airports and transit ports equipped with special data readers for Electronic Passports.⁸³



VI. INTERDICTING “UNWANTED” MIGRANTS: CANADA’S OVERSEAS IMMIGRATION OFFICERS AND RELIANCE ON THIRD-PARTY ACTORS

America’s “shifting” border is part of a larger transformation, which is complemented by the regulatory actions undertaken by other leading immigrant-receiving countries. Consider Canada, its neighbor to the North, for example. It is well known that Canada shares a massive land border with the United States (often referred to as “the world’s longest undefended border”), but is otherwise surrounded by large bodies of water and ice. Given its geopolitical location, Canada is reached primarily by air travel, which lends itself to immigration-regulatory techniques that rely on overseas interdiction: the act of prohibiting and intercepting unauthorized migrants from arriving at the border, and stopping them on their way to the desired destination country. This way, Canada can avoid triggering the constitutional provisions that were established to apply to protect the rights of non-citizens landing on Canadian territory.⁸⁴

As part of a comprehensive study on immigration-triggered detention and removal, Canada’s Senate Standing Committee on Citizenship and Immigration concluded in 1998 “that the interdiction abroad of people who are inadmissible to Canada is the most efficient manner of reducing the need for costly, lengthy removal processes.”⁸⁵ The following year, in 1999, Canada began to aggressively implement the technique of interdiction abroad, effectively relocating its immigration regulation activities further away from its “real” physical frontiers. This has been

83. U.S. Dep’t of State, U.S. Electronic Passport: Frequently Asked Questions, *available at* http://travel.state.gov/passport/eppt/eppt_2788.html# (last visited Mar. 3, 2007).

84. *See Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 (Can.).

85. *See SENATE REPORT OF THE STANDING COMMITTEE ON CITIZENSHIP AND IMMIGRATION, IMMIGRATION DETENTION AND REMOVAL*, at recommendation 18 (1998), *available at* <http://cmte.parl.gc.ca/Content/HOC/committee/361/citi/reports/rp1031513/citirp01/09-rec-e.htm>.

done by stationing Canadian immigration officials in major foreign-transit hubs located primarily in Europe and Asia, granting them authority to “work with other government departments, international partners, local immigration and law enforcement agencies and airlines”⁸⁶ in order to determine if incoming travelers have the proper documentation for admission.⁸⁷ If they cannot provide such documents (a passport, valid visa, or an internationally recognized *laissez-passes*), these would-be entrants are turned away before they embark on a flight to Canada. While this may appear like a mere technicality, it is anything but. Being turned away before reaching Canadian territory is crucially important for defining the scope of constitutional protections to which these non-citizens are entitled. For if the very same individuals were to land on Canadian soil, by virtue of the landmark 1985 Canadian Supreme Court decision in *Singh*, they would have been entitled to a full oral hearing to determine the merits of their claim to stay, even if they were carrying improper documents.⁸⁸ No similar rights apply to them if they are interdicted prior to admission. Here again we see an example of immigration-enforcement measures that occur outside the national territory in an attempt to deter, indeed “combat global irregular migration” (as official government documents put it) by stopping people en route to Canada—that is, by prohibiting their ability to reach the desired destination in the first place.⁸⁹

Canada, as well as the United States, also relies heavily on third-party actors, in particular airline carriers, as “enforcers” of their respective immigration regulation and border control provisions. As many seasoned travelers will know, it is usually airline personnel who take pains to verify that the required documents and visas are in place prior to permitting embarkation on international flights. They do so, at least in part, because their companies face steep financial penalties by the receiving countries if they bring into their territories improperly documented persons.⁹⁰ For instance, Canadian immigration law permits

86. See Canada Border Services Agency, Fact Sheet: Immigration Intelligence—Irregular Migration, <http://www.cbsa-asfc.gc.ca/media/facts-faits/030-eng.html>.

87. See CITIZENSHIP AND IMMIGRATION CAN., REVIEW OF THE IMMIGRATION CONTROL OFFICER NETWORK—FINAL REPORT, available at <http://www.cic.gc.ca/english/research/audit/ico/01summary-e.html>. Formally, the role of these immigration officials is merely advisory, in order to avoid legal challenges by those denied entry. See Brouwer and Kumin, *Interception and Asylum*, *supra* note 50, at 10.

88. *Singh*, 1 S.C.R. 177.

89. CITIZENSHIP AND IMMIGRATION CANADA, GOVERNMENT RESPONSE TO THE REPORT OF THE STANDING COMMITTEE ON CITIZENSHIP AND IMMIGRATION, at recommendation 21 (2002), available at <http://www.cic.gc.ca/english/pub/competing.html>.

90. See Immigration and Refugee Protection Act (IRPA), S.C. 2001, ch. 27 (Can.).

the federal government to seek reimbursement from airline carriers for “costs of detention, return, and, in some cases, medical care” associated with irregular migrants that came aboard their flights.⁹¹ The Canadian policy of overseas interdiction has focused on *expanding* the reach of the shifting border far beyond its territory. The results of erecting these legal-walls abroad have been dramatic: the government recently reported that the work of these officers resulted in an interdiction rate of 72% in 2003. This means that of all attempted unauthorized entries by air, the vast majority were stopped *before* they reached Canada.⁹² Following Canada’s lead, the United States introduced a similar program, called the Immigration Security Initiative (ISI), which places ISI officers overseas in order to decrease the number of people arriving in the United States with improper or false travel documents. The United Kingdom and Australia have also developed comparable mechanisms of immigration regulation and control abroad, which work in close cooperation with the American and Canadian overseas immigration officers, creating a collaborative “network” to interdict improperly documented travelers before those travelers reach their respective territorial boundaries.⁹³ No less significant for our discussion, these overseas immigration officers operate under the recommended guidelines developed by the International Air Transport Association (IATA), which is a *non-state* organization that represents the global airline industry. The role of organizations like IATA reveal not only the shifting *location* of the border but also the increased collaboration among private *and* public actors in regulating the

91. See Brouwer, *supra* note 50, at 10. In the same vein, the 1990 Schengen Implementation Agreement obliges all members of the European Union to implement carrier sanctions. This mandate was further enhanced in 2001, by a European Council Directive that aims to harmonize these financial sanctions as a powerful regulatory tool, used here by member-states in concert, to diminish the prospects of arrival to their shores of unauthorized migrants. See Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. See Text of the 1990 Convention Applying the Schengen Agreement, 30 Int’l Material 84 (1991). See also Guiraudon and Lahav, *A Reappraisal of the State Sovereignty Debate*, *supra* note 10.

92. The problem with this data is that no one knows for certain how many people have actually entered Canada without permission or authorization. See STATUS OF WOMEN CAN., GENDERING CANADA’S IMMIGRATION LAWS, available at http://www.swc-cfc.gc.ca/pubs/pubspr/0662435621/200607_0662435621_13_e.html. In 2002, Citizenship and Immigration Canada (CIC) reported that more than 40,000 people attempting to travel to Canada without proper documentation were interdicted abroad. See Citizenship and Immigration Canada, Fact Sheet: September 11, 2001: A Year Later, available at http://circ.jmellon.com/docs/html/fact_sheet_september_11_2001_a_year_later.html.

93. See CITIZENSHIP AND IMMIGRATION CAN., COMPARABLE ICO NETWORK MODELS, REVIEW OF THE IMMIGRATION CONTROL OFFICE NETWORK—FINAL REPORT app. A, available at <http://www.cic.gc.ca/english/research/audit/ico/500appendix-e.html>.

malleable, de-territorialized “edges” of well-off polities seeking to prevent admission of persons they deem unwanted.⁹⁴

VII. ERASING TERRITORY: AUSTRALIA’S EXCISION POLICY

But perhaps no country has taken the idea of the “shifting borders of immigration controls” as far as Australia has with its self-imposed “excision” policy. This policy, created through the Migration Amendment (Excision from Migration Zone) Act of 2001, and expanded in 2005, involves the legal removal of the applicability of Australia’s standard immigration and asylum laws from certain parts of its territory that are more vulnerable to unauthorized access from the surrounding seas. This federal legislation, explained Australia’s Immigration Minister, “will excise certain Australian territories . . . for purposes related to unauthorized arrivals.”⁹⁵ Such formal “contraction” of certain parts of a country’s own territory for immigration regulation purposes is unprecedented. Yet the logic behind it should sound familiar by now: this shifting-border policy was designed specifically to “[allow] for the detention and removal of unauthorized arrivals in the excision zone.”⁹⁶ This logic is reminiscent of the inward “bleeding” of the U.S. border into the interior (the 100-mile in-land zone) in order to conduct expedited removal proceedings as if they were carried out at the actual frontiers of the United States.

Australia, even more explicitly than the United States, has, through the words of law, *relocated* the border, creating—as the government readily admits—a distinction between the country’s “migration zone” and “Australia” as we know it on the map.⁹⁷ This legal maneuver has authorized Australia’s immigration officials to remove asylum seekers that have reached the country’s “excised” territories, as if they never reached

94. See U.N. High Comm’r for Refugees [UNHCR], Standing Committee, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, 10, U.N. Doc. EC/50/SC/CPR.17 (June 9, 2000).

95. See Press Release, Minister for Immigration and Multicultural Affairs, Joint Statement with Minister for Justice and Customs: Government Strengthens Border Integrity, MPS 161/2001 (Sept. 17, 2001), http://www.minister.immi.gov.au/media_release/ruddock_media_01/r01161.htm.

96. See AUSTRALIAN GOV’T, DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AFFAIRS, FACT SHEET 71: BORDER MEASURES TO STRENGTHEN BORDER CONTROL: MIGRATION AMENDMENT (2001) [hereinafter Fact Sheet 71] (Excision from Migration Zone) (Consequential Provisions Act).

97. See AUSTRALIAN GOV’T, DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AFFAIRS, FACT SHEET 81: AUSTRALIA’S EXCISED OFFSHORE PLACES (Jan. 30, 2007), <http://www.immi.gov.au/media/fact-sheets/81excised.htm>.

Australia, although they physically landed on its shores.⁹⁸ It further eliminates the possibility of judicial review “in relation to the entry, status, detention and transfer of a person arriving unlawfully,” much like the post-1996 legislative changes in the United States.⁹⁹

The Australian example of excision, where a country effectively erases certain parts of its territorial space, as it were perforating itself geographically, may appear to undermine “the very elements of national sovereignty that immigration controls seek to bulwark.”¹⁰⁰ But in practice excision represents the ultimate attempt to regain control over cross-border movement in the age of globalization, by exercising, wherever the regulatory state’s immigration officials see fit, its authority to determine whom to include and whom to exclude—by redefining and shifting the very spatial reach of a nation’s territorial and jurisdictional boundaries: moving the border of immigration regulation in response to perceived threats by unauthorized migrants and high-risk travelers.

More limited versions of “excision” are also found in several high-traffic airports located in European capitals, which have declared certain parts of these airports, physically located in their national territories, as “transit zones” where the standard protections of domestic and international law do not apply. This means that if a person is caught after disembarking a flight but before reaching the first official EU border control checkpoint, that person has not “landed” for immigration regulation purposes. These transit zones are treated as legal black holes,

98. Such asylum seekers are removed to neighboring third-countries, such as Nauru and Papua New Guinea, with which Australia has entered into contract for the reception of unauthorized arrivals who have reached its “excised” places, claiming refugee status. See U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS, COUNTRY REPORT AUSTRALIA, (2002), available at http://refugees.org/countryreports.aspx?__VIEWSTATE=dDwxMTA1OTA4MTYwOztSPENvdW50cnlERDpHb0J1dHRvbjs%2BPrImhOOqDI29eBMz8b04PTi8xjW2&cid=313&subm=19&ssm=29&map=&_ctl0%3ASearchInput=+KEYWORD+SEARCH&CountryDD%3ALocationList=. This practice of “transfer of responsibilities” is permissible under the 1951 Refugee Convention, though it is normally “envisaged as between [s]tates with comparable protection systems.” See U.N. High Comm’r for Refugees, *Submission to the Senate Legal and Constitutional Legislation Committee Inquiry into the Provisions of the Migration Amendment (Designated Unauthorized Arrivals) Bill 4* (May 2006), available at <http://www.unhcr.org.au/pdfs/designatedunauthorisedarrivalsbill.pdf>.

99. See Fact Sheet 71, *supra* note 96. In the United States, the Supreme Court permitted limited review of post-removal detention (in *Zadvydas*) and habeas corpus petitions (in *St. Cyr*). See *Zadvydas v. Davis*, 533 U.S. 678 (2001); *INS v. St. Cyr*, 533 U.S. 289 (2001). For commentary on the significance of these cases, see T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L. J. 365 (2002); Nancy Morawetz, *INS v. St. Cyr: The Campaign to Preserve Court Review and Stop Retroactive Application of Deportation Laws*, in IMMIGRATION STORIES 280 (David A. Martin & Peter H. Schuck eds., 2005).

100. See Robert A. Davidson, *Spaces of Immigration “Prevention”: Interdiction and the Nonplace*, 33 DIACRITICS 3, 6 (2003).

operating in a limbo space, “in which officials ‘are not obliged to provide asylum seekers or foreign individuals with some or all of the protections available to those officially on state territory.’”¹⁰¹ The creation of these legal “grey zones” is not entirely new; the U.S. navy base in Guantanamo Bay, before it became (in)famous for serving as the detention place for hundreds of foreign nationals suspected of terrorism links, has been used as a repository for asylum seekers (particularly from Haiti) whose shattered boats were intercepted before they reached the U.S. territorial waters to prevent those onboard from claiming refuge at “our gates.”¹⁰² Again, we witness the craftsmanship of flexing the muscles of legal definitions and categories to interdict unwanted immigrants before they arrive at the border; this undermines their legal standing, removing a range of procedural protections otherwise due to them in admission and removal proceedings in Australia, Canada, or European countries, in a manner similar to that of the United States.

CONCLUDING REMARKS

While different polities are likely to continue to experiment with different legal techniques that best suit their particular needs, the large-scale trajectory remains crystal clear: immigration-regulatory agencies are breaking new ground in their attempt to *regain* control over the cross-border movement of people in an age of increased economic interdependence and growing concerns about national security and terrorism. They do so through policy initiatives that stretch the boundaries of “the border,” turning it into a flexible, malleable legal construct often re-

101. *Id.* at 9 (citing Francis Kpatinde, *Welcome to Limbo*, REFUGEES MAGAZINE iss. 100 (1995), available at <http://www.unhcr.org/publ/PUBL/3b54400b4.html>) Similar concerns arise in the context of the practice of “extraordinary renditions,” whereby, according to recent reports, aircrafts operated by the CIA flew through and stopped over in Europe, carrying suspected terrorists and other detainees. These terrorist suspects were then “rendered” for interrogation to countries that were cited by the U.S. State Department for human-rights violations, including torture. The extrajudicial nature of rendition has been severely criticized by human rights activists, European governments, and the European Parliament. See MARY CRANE, COUNCIL ON FOREIGN RELATIONS, U.S. TREATMENT OF TERROR SUSPECTS AND U.S.-E.U. RELATIONS (2005), available at <http://www.cfr.org/publication/9350/>; see also *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); EUROPEAN PARLIAMENT, REPORT ON THE ALLEGED USE OF EUROPEAN COUNTRIES BY THE CIA FOR TRANSPORT AND ILLEGAL DETENTION OF PRISONERS (2006).

102. For a brief exposition of the governmental practice of detention without trial of Haitian refugees at Guantanamo in the 1990s, and the legal challenges that followed, see Harold Hongju Koh, *Captured by Guantanamo*, OPEN DEMOCRACY, Sept. 26, 2005, available at <http://www.opendemocracy.net>. On today’s use of Guantanamo Bay, see *Rasul v. Bush*, 542 U.S. 466 (2004); Military Commissions Act of 2006, 10 U.S.C. § 949 (2006).

moved from the traditionally fixed, static location of cartographically marked and internationally recognized borderlines. These developments, which de-couple authority from territory and rights from aliens, allow the apparatus of the state to extend its influence and regulatory mandate, marking an interesting contrast to earlier predictions about the “demise” of the nation-state and the breakdown of borders.

The basic function of immigration regulation may not have changed drastically (it still involves control over admission into a bounded membership community) but what has changed dramatically in today’s world is *where*, and *how*, enforcement takes place, departing radically from the territorial-centered conception of the *static* border, carved under the Westphalian image. And not only is the *location* of the border shifting: another major transition on the ground is the creation of high-tech barriers and pre-clearance screening processes, which require increased bilateral and multilateral cooperation among countries in their joint effort to restrict access to those arriving from unstable and poorer polities.¹⁰³ As scores of recent domestic and international reports indicate, the latter are undertaking ever-more desperate and dangerous routes in their attempt to pass through “our gates,” seeking the relative security and prosperity taken for granted by those already safely within them.¹⁰⁴ It is primarily in response to these inflows of unlawful entrants that the U.S. is now embarking on an apparently contradictory trend to the “shifting” border: namely, re-asserting the *physical* dimension of the static, territorial border through a proposed “reinforced fence” to be erected along a 700-mile stretch across the U.S.-Mexico divide line. If we were to isolate this development, we might (too swiftly) conclude that America

103. For instance, the United States and Canada share information on intelligence and specific data concerning individuals seeking visa admission at their respective diplomatic and consular posts overseas. Both countries now screen passengers at check-in points at *overseas* airports to provide recommendations to airline carriers on whether to permit boarding to North American destinations for potentially high-risk travelers. The border here is not only de-territorialized, but also gradually extended to a *hemispheric* perimeter, making baby-steps towards a semi-coordinated immigration and customs regime that is implemented far-away the United States and Canada’s actual territorial borderlines. And we have not yet said a word about joint cargo pre-inspection and pre-screening of goods arriving from overseas, pushing the border of immigration and customs regulation “outward,” as close as possible to the cargo’s point of origin, gaining strategic depth in the process. The erection of these “smart borders” in age of mega-national security alerts is driven by each country’s self-interest but requires a great deal of cooperation between them in order to be successful. Despite their significance in “shifting” the locus of immigration and custom regulation, few of these developments reach the popular media spotlight nor the often-inflated political rhetoric surrounding U.S. immigration law and policy reform. *See infra*, Part IV.

104. GLOBAL COMM’N ON INT’L MIGRATION, *MIGRATION IN AN INTERCONNECTED WORLD: NEW DIRECTIONS FOR ACTION* (2005), available at www.gcim.org/en/finalreport.html.

has decided to harden its borders, unilaterally creating a “fortress America.”¹⁰⁵ Perhaps no other legislative development better highlights this aspect of U.S. immigration regulation policy than the recently enacted Secure Fence Act of 2006, which authorizes the Secretary of Homeland Security to “take all actions . . . necessary and appropriate to achieve and maintain operational control over the entire international land and maritime borders of the United States.”¹⁰⁶ These actions include, as the Secure Fence Act clarifies, the systemic surveillance of the border through and the erection of “physical infrastructure enhancements to prevent unlawful entry by aliens into the United States.”¹⁰⁷ The very prospect of building a “reinforced fence” on the site of the U.S. international border with Mexico, with little or no consultation with its officials, has generated waves of anxiety, not to mention criticism from America’s NAFTA trading partners.¹⁰⁸

While representing a “strong” stance against unlawful admission, here translated into the promise of regaining *physical* control over the actual border, any closure imposed by the United States is, as one scholar aptly observes, “the equivalent of the world’s most powerful country imposing a trade embargo on itself.”¹⁰⁹ The U.S. border is not merely a site where people cross, most of them entering through recognized ports of entry with Canada and Mexico.¹¹⁰ It is also one of the main international hubs of economic activity, which facilitates, as a top U.S. government official recently estimated, “[n]early \$2.2 billion in trade flows among our three countries on a *daily* basis.”¹¹¹ Much of this mas-

105. See Peter Andreas, *A Tale of Two Borders: The U.S.-Canada and U.S.-Mexico Lines after 9-11*, in *THE REBORDERING OF NORTH AMERICA* 14–15 (Peter Andreas & Thomas J. Birsteker eds., 2003).

106. Secure Fence Act of 2006, Pub. L. No. 109-367, § 2(a), 120 Stat. 2638 (codified at 8 U.S.C. § 1701 (2006)).

107. Secure Fence Act § 2(a)(2).

108. Secure Fence Act of 2006, Pub. L. No. 109-367, § 3(2)(a), 120 Stat. 2638 (codified at 8 U.S.C. § 1103 (2006)). Mexico sent the U.S. a diplomatic note officially expressing its criticism of the plan to erect a fence at the border, calling it an “offence.” See Associated Press, *Mexico Angered by Lack of Immigration Reform, Decision to Increase Security at Border*, *INT. HERALD TRIB.*, Oct. 5, 2006.

109. See Stephen B. Flynn, *The False Conundrum: Continental Integration Versus Homeland Security*, in *THE REBORDERING OF NORTH AMERICA* 110–127, *supra* note 105.

110. For detailed analysis of I-94 non-immigrant admission in 2005, see DHS, 2005 *YEARBOOK OF IMMIGRATION STATISTICS* 63–88 (2005). On admission from Canada and Mexico, see JEANNE BATALOVA, *MIGRATION POLICY INSTITUTE, SPOTLIGHT ON TEMPORARY ADMISSIONS OF NONIMMIGRANTS TO THE UNITED STATES* (2006), available at <http://www.migrationinformation.org/USFocus/display.cfm?ID=418>.

111. See Mary Peters, Secretary of Transportation, Remarks for the Border Trade Alliance (March 1, 2007) (emphasis added), available at <http://www.dot.gov/affairs/peters030107.htm>.

sive trade flow relies on trucks hauling cargo across the U.S.-Canada and U.S.-Mexico land borders. The erection of fenced barriers, coupled with more intensive inspections *at the border* (rather than high-tech *pre-inspections* at the point of origin, which are already used extensively to screen travelers and cargo shipments entering the U.S.), may have a chilling effect on such exchanges, squeezing the already overburdened “cross-border transportation arteries that provides [NAFTA’s] life-blood.”¹¹²

This has not been lost on American policymakers. Vouching to get tough on illegal immigration by erecting a physical refortification at the traditional location of the border, the United States walls itself off from unauthorized intruders—reasserting in the process the most ancient symbol of state power: the physical presence of an almost impenetrable border. At the same time, as we have seen above, America’s immigration regulators and enforcers have embarked on a more toilsome (although less visible) process of “redrawing the line” of immigration regulation, allowing the DHS to create a “portable” enforcement regime that can be retreated inside, stretched outside, or simply relocated back to the traditional borderline, as in the case of the “reinforced fence.”

It is ironic that the U.S. immigration talk is so heavily focused on erecting the fence as a symbol of regained sovereignty, while its immigration regulation and enforcement actions are in fact far more multifaceted and nuanced.¹¹³ We find a similar discrepancy, though in the opposite direction, between the EU celebration of its “borderless” vision, and its restless erection of a state-of-the-art technological and regulatory border around its free-movement area.¹¹⁴ As noted above, the EU has recently become a major leader in pushing towards the adoption of a “global ID management system” to allow its member-states to better protect themselves against undesirable irregular entrants while facilitating rapid and reliable identification of international travelers deemed trusted and welcomed.¹¹⁵ This conflation of massive identity- and biometric-information collection, extensive collaboration among developed countries’ immigration officials and law-enforcement agencies (often stationed on each others’ territories), and a more flexible notion of the

112. See Andreas, *supra* note 105.

113. See the concrete examples discussed above, *supra* Parts II–IV.

114. See, e.g., COUNCIL OF EUROPE, IDENTITY AND TRAVEL DOCUMENTS AND THE FIGHT AGAINST TERROR, RECOMMENDATION REC(2005)7 ADOPTED BY THE COMMITTEE OF MINISTER OF THE COUNCIL OF EUROPE ON MARCH 2005 AND EXPLANATORY MEMORANDUM (2005). The European Union is bent on setting up a European Corps of Border Guards, in addition to extending the Schengen agreement to its accession members.

115. See Marino, *supra* note 20.

location of the border of immigration regulation, appears to be the wave of our brave new “de-territorialized” future. It is not a utopian vision of free movement for all, but rather a darker and more stratified—let alone tightly controlled—world of cross-border mobility. In this new world, the “static” territorial border is merely one component among many; increasingly, virtual legal barricades are also erected at a distance in order to protect and shield the national territory from “intruders.” In the process this permits the state to avoid the responsibilities and obligations that at one time applied to “unwanted” entrants at the moment of passing through “our gates”. Given these revamped immigration control measures, we can safely conclude that borders are by no means “disappearing,” though they are clearly changing. The evidence presented here shows that national and regional regulators and law-enforcement agencies have indeed “re-invented” and reinvigorated the moving walls of border control, fueling them with 21st-century security zeal and advanced technology to pursue the task.

If we were to return to the contrasting images of the border presented in the literature on citizenship and immigration, namely, the *static* versus the *disappearing* border, what would the recent legal developments recounted here tell us about the role of the regulatory state in an era of economic globalization and heightened national security alert? The conventional wisdom is that increased global interdependence, regional trade agreements, and the proliferation of international travel and commerce significantly erodes the ability of nations to exercise control over their borders. As I have shown here, despite—or perhaps because of—these rapid globalization challenges and increased national security concerns, regulatory states have “struck back,” re-claiming their immigration regulation power and authority.

In today’s reality, we find reinvented and reinvigorated borders, rather than disappearing or increasingly meaningless ones; this state of affairs contrasts sharply with the *decreased* regulatory-control predictions of many proponents of a world where territory is “unbundled” from its tie with national institutions and interests.¹¹⁶ The legal developments discussed here include separating physical entry from lawful admission; expedited removal procedures; collecting biometric information at ports-of-entry outside the destination country; entry into “smart-border” agreements that create semi-hemispheric regulation of the border; growing reliance on pre-inspection and interdiction techniques; or excision of

116. The term “unbundled” is drawn from an influential article by John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT’L ORG. 139 (1993).

certain parts of a country's territory to better manage its immigration regulation regime. All these developments powerfully indicate that developed countries have hardly given up on their authority to restrict access. While persisting in their exercise of sovereign authority to determine whom to admit and whom to remove, well-off countries have at the same time dramatically "retooled" the legal techniques and redefined the spaces in which they deter irregular migration and curb high-risk admission.

Unlike the vision of post-nationalists and globalists who see patterns of border-blurring as manifestation of the *declining* importance of national regulation of immigration, I have shown here that such "de-territorialization" of the border can be explained equally well as representing the *re-capture* by state agencies of their core mandate to permit access to "desirable" entrants (business visitors, skilled migrants, and so on) while ever more tightly restricting admission from others (interdicted travelers, unauthorized migrants, and high-risk security threats, to name a few "unwanted" categories).¹¹⁷ This more nuanced picture permits us to see a complex, multilayered, and ever-transforming border, one that is drawn and redrawn, through the words of law and acts of regulatory agencies, to better calibrate the admitting state's exclusion lines in response to new global challenges. This *shifting* border, unlike the refortified physical barrier, is not fixed in time and place. Instead, it relies on law's admission gates, rather than a specific frontier location, allowing greater flexibility for immigration officials to tailor new strategies (often taken in concert with their counterparts in other countries) to regain control in today's dangerous world.

We thus find a reality in which border control agencies have extended their reach—both physically and jurisdictionally—far beyond the national territory, with no sign of retreat in sight. The collateral consequence has been the delimitation of legal protections once granted to unauthorized migrants. The entrenched distinctions that have long guided American immigration law, such as that highlighted in *Zadvydas* between "an alien who has effected an entry into the United States" and "one who has never entered," rest uneasily on increasingly shifting sands.

117. I discuss these selective immigration regimes at length in Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 NYU L. REV. 149 (2006).