Follow the Money: Capital Controls as Migrant Control

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Shayak Sarkar, *Capital Controls as Migrant* Controls, 109 **Cal. L. R.** 799 (2021).

When I picture immigration enforcement, my mind's eye sees walls bisecting dusty hills, "POLICE" slashed across ICE uniforms, sheriffs with immigrant detainers, and the bright painted bricks and silvery wire of detention facilities. I don't see money.

At least, I didn't. Then I read Shayak Sarkar's *Capital Controls as Migrant Controls*. Now, like a Sixth Sense, when I picture immigration control, I see money. I see it everywhere, walking around. *Capital Controls* will shift your perspective on the relationship between how we control capital and how capital is a tool of immigration control.

I am a sucker for legal history, and *Capital Controls* delivers. The article narrates the arc of financial regulation theory—from "financial liberalization," advocating for the removal of capital controls to expand development, to a 180-degree-Keynesian turn toward stronger financial borders to prevent flows of foreign capital from exacerbating domestic financial problems. Financial borders were also promoted as a way to address national security concerns. The narrative arc alights on the current state of affairs in which capital controls have largely fallen to the wayside over the last few decades. Now, scholars of finance, political science, and law critique the asymmetry between human and capital movement, as with Nobel Laureate Gary Becker advocating for lifting border controls to match more closely the movements of goods, services, and capital.

Immigration scholars have expended many pixels examining how the law of immigration admissions and welfare have drawn lines between citizen haves and noncitizen have-nots. Sarkar adds a wholly new dimension, exploring "the law's disparate treatment of migrant wealth and the institutions responsible for creating and enforcing such laws." As he points out, "ordinary people crossing borders …. accumulate capital, whether that crossing occurs lawfully or unlawfully." That is, noncitizens are no different from citizens in moving money from one place to another in order to live, provide for family, work, and operate in a society organized around capital. Much of that money flows across borders.

Controlling the particular ways that migrants move money, says Sarkar, constitutes a form of migration control. Capital controls distinguish migrants from citizens "by regulating a migrant's access to their own money." The article examines three forms of capital controls acting as migrant controls. The first is the popcorning of federal and state proposals to tax remittances that noncitizens use to transfer money earned in the United States to their country of origin. Oklahoma is the only state thus far to have passed actual legislation; other proposals would base taxation on either the cross-border destination of the capital or the immigration status of the sender, or both. Most seek to constrict or prevent the cross-border entry of undocumented noncitizens.

Second, the U.S. government conditions an undocumented immigrant's receipt of earned Social Security benefits on leaving the United States. As Sarkar points out, these provisions press for expelling migrants themselves. They "create a Faustian bargain: relinquish your adopted homeland or relinquish your capital." This condition operates as a form of migrant control, but also imposes a collateral consequence on the United States of expelling the capital from the country.

Last, post-9-11 legislation compels banks and similar institutions (also known as “insured depository institutions”) to “identify” their customers, but without saying much about how. Inspired by the employment eligibility requirements of the Immigration Reform and Control Act, the law largely leaves it to banks to figure out how to comply with the identity verification requirements. The law provides few guidelines and no determinative list of acceptable documentation of the sort that is a feature of the employment verification system (itself a flawed and much-critiqued enforcement system). These identity requirements have resulted in suspended accounts due to uncertainty about a noncitizen customer’s identification. They have also created a division based on citizenship status between those with access to the relative security of a bank and those who cannot access such services or perceive them as a part of the immigration enforcement infrastructure.

These financial controls act to regulate both migrants and migration. They screen out those whom governmental or private institutions deem undesirable, burdening movement into or within the United States and pushing outward migration of those deemed undesirable. By drawing distinctions based on citizenship status, they also communicate that noncitizens occupy a less favored tier on the membership scale in the community to which they have moved.

What I like (lots) about this article, beyond pulling the scales from my eyes about the significance of capital regulation as a means of migration control, is that it applies a seemingly orthogonal area—the law and policy of finance—to immigration law. It also contributes in a new way to the substantial literature on the private and subfederal enforcement of immigration law. The collage in my mind’s eye of immigration enforcement was mostly composed of images of federal agencies employing brute-force methodologies for controlling the movement of people through a crimmigration and securitization framework. Sarkar takes us into the liminal world of financial controls populated not with ICE and the Customs and Border Patrol but rather with private institutions such as banks, state and local regulators, and financial and welfare agencies like the Social Security Administration and the IRS.

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