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Demanding Identity Papers

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I. INTRODUCTION

Federal statutory law includes a set of provisions that appear to mandate the registration and fingerprinting of every person, age fourteen or above, who is present in this country but is not a U.S. citizen. Those same provisions direct that noncitizens, while in the United States, "at all times carry with [them] and have in [their] personal possession" the immigration documents issued to them as part of that process.[1] That body of law, as administered today, is convoluted, confusing, and significantly incoherent. There is substantial uncertainty regarding to whom it applies and under what circumstances. In this short Article, I'll set out the statute's requirements and explain its modern administration. I'll then explain the history of the statutory provisions, so as better to explain how we got where we are now. Finally, I'll address key questions as to the scope of the law today.[2]

II. THE PUZZLE OF ALIEN REGISTRATION

Our starting points are sections 262(a) and 266(a) of the Immigration and Nationality Act ("INA"), which require that "every alien now or hereafter in the United States . . . apply for registration and to be fingerprinted."[3] Section 264(d) of the Act directs the United

* Professor of Law, Wayne State University. I am deeply honored and gratified to submit a paper to accompany a lecture by Hiroshi Motomura, who has been a gracious and inspiring mentor to me since I began teaching immigration law. I owe special thanks, for comments either on this paper or on a companion piece, to Jessica Litman, Gabriel "Jack" Chin, Linus Chan, Lance Gable, Chris Lund, Elizabeth McCormick, and Nancy Morawetz.

I'm indebted in this work to Nancy Morawetz and Natasha Fernandez-Silber, whose excellent paper (Nancy Morawetz & Natasha Fernandez-Silber, *Immigration Law and the Myth of Comprehensive Registration*, 48 U.C. DAVIS L. REV. 141 (2014)) is the first lengthy consideration of this issue, and whose conclusions are similar to mine. I began this project before I encountered their then-unpublished paper, and I like to think that my short piece, although retracing some ground they trod, makes its own worthwhile contributions.

1. Immigration and Nationality Act § 264(e), 8 U.S.C. § 1304(e) (2012).

2. In a separate paper, I talk about the larger phenomenon that section 264(e) of the Immigration and Nationality Act of 1965 ("INA") exemplifies: requirements throughout American history that various groups of people carry legitimating documents, including free blacks in the antebellum South, Chinese under the Geary Act, men subject to draft registration, and aliens under section 264(e). *See* Jonathan Weinberg, *"Papers, Please!"* (in draft) (on file with author).

3. 8 U.S.C. §§ 1302(a), 1306(a) (2012).

States, upon such registration, to issue the alien a "certificate of alien registration or an alien registration receipt card."[4] And section 264(e) directs "every alien, eighteen years of age and over, [to] at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him."[5]

These provisions seem straightforward enough; they inspired the state of Arizona, just a few years ago, to enact a law it called Senate Bill 1070, the Support Our Law Enforcement and Safe Neighborhoods Act.[6] Section 3 of that statute created a crime of "failure to . . . carry an alien registration document."[7] Arizona read the INA to say that it was a federal crime for a noncitizen, here in this country without authorization, to walk its streets unaccompanied by an "alien registration document" issued by the U.S. government, and it reasoned that it could make the same conduct a state crime.[8] The U.S. Supreme Court, while striking down that law as invading federal authority, did not challenge Arizona's understanding of the INA.[9]

Yet sections 264(e), 262, and 266 are not so simple, and there is good reason not to take them at face value. For starters, their language does not match up with modern immigration procedures or documentation: the registration process Congress had in mind when it enacted those sections has not existed for many decades. If you look in the Code of Federal Regulations today to find out how a noncitizen can register in conformance with the law, you'll find eleven different documents listed as "prescribed registration forms"—apparently, the filing of any of these eleven documents, during a wide range of possible interactions with the immigration bureaucracy, counts as "apply[ing] for registration" from the government's perspective.[10]

But the list is an awkward one at best. The first-listed of its forms is an inspection record issued under a special statute providing for the status legalization of refugees from the 1956 Hungarian uprising.[11] That is great, I guess, for elderly Hungarian refugees, but—by contrast—the more important and commonly filed I-589 asylum application is *not* on the list as a "registration form[]."[12]

The second item on the list is the I-94 form historically filled out by foreign visitors to the U.S.[13] That would work well enough, except that

4. 8 U.S.C. § 1304(d).
5. 8 U.S.C. § 1304(e).
6. S.B. 1070, 2010 Leg. 49th 2d Reg. Sess. (Ariz. 2010).
7. ARIZ. REV. STAT. ANN. § 13-1509 (2011).
8. *See* Arizona v. United States, 132 S. Ct. 2492, 2501–02 (2012).
9. *See id.* at 2501–03.
10. *See* 8 C.F.R. § 264.1(a) (2015).
11. *Id.*
12. *See infra* note 101 and accompanying text.
13. 8 C.F.R. § 264.1(a).

the Department of Homeland Security ("DHS") no longer directs most visitors to fill out that form today. Instead, it collects the relevant information from their airline-supplied electronic travel records.[14] Elsewhere on the list are documents that might more plausibly work as registration forms, such as the I-485 green card application. But not every noncitizen in the United States has had the opportunity to file one of those forms.

Crucially, the list includes no "registration forms" that could be filed by a person in the United States without authorization—and that includes people who have been granted relief under the Deferred Action for Childhood Arrivals ("DACA") program, people with Temporary Protected Status, or others with deferred action. If section 264(e) is read to criminalize those persons' failure to file a form on the list, it would contravene longstanding government policy, some of it explicitly set out in the statutory law.[15] It would effectively criminalize unlawful presence in the United States, something Congress has consistently declined to do.[16] Moreover, I will point out later in this Article, it would violate the Fifth Amendment privilege against self-incrimination.[17]

Next, the federal government does not issue any single document called, or easily understood as, a "certificate of alien registration or an alien registration receipt card."[18] If we return to 8 C.F.R. § 264.1, we see instead a list of eleven or twelve documents that are said to constitute "evidence of registration." That list works a little better. It includes the I-551 green card, the I-776 employment authorization document, and "a valid, unexpired nonimmigrant DHS admission or parole stamp in a foreign passport."[19] In general, people legally admitted to the United States will have one of these.

Again, though, people who were not legally admitted will not have one—and that includes people with Temporary Protected Status or DACA relief, unless they have work authorization. Presenting oneself

14. *See Arrival/Departure Forms: I-94 and I-94W*, U.S. CUSTOMS & BORDER PROTECTION, http://www.cbp.gov/travel/international-visitors/i-94-instructions [http://perma.cc/QB9U-LY24].

15. Section 244 of the INA, 8 U.S.C. § 1254a (2012), for example, authorizes the U.S. government to grant Temporary Protected Status ("TPS") to noncitizens who entered the United States without authorization and are otherwise not entitled to legal status, if the noncitizen cannot safely return to her home country because of such conditions as earthquake or ongoing armed conflict. Such a person cannot "apply for registration" within the meaning of section 264(a), because no document she can file constitutes such an application under 8 C.F.R. § 264.1(a) (although, if she seeks work authorization, she will receive a card the agency deems "evidence of registration" under 8 C.F.R. § 264.1(b)). It would be incoherent, though, to say that the person, by accepting TPS and remaining in the country, is violating 8 C.F.R. § 264(a); it would be odder still to say that a teenager or retiree can avoid criminal liability only by seeking work authorization.

16. *See infra* note 121.

17. *See infra* notes 124–137 and accompanying text.

18. Immigration and Nationality Act of 1965 § 264(d), 8 U.S.C. § 1304(d).

19. *See* 8 C.F.R. § 264.1(b).

for deportation *might* generate an "evidence of registration" document, because the I-862 Notice to Appear (typically, the first step in the removal process) is on the list. But the mere fact that DHS has been made aware of an illegal entrant does not mean that it will issue an I-862.[20]

In sum, many noncitizen residents in the United States, often with the acquiescence of the U.S. government, have no "evidence of registration" document or anything else resembling an "alien registration receipt card," and no way to get one. If we focus on the text of section 264(e)'s carry requirement (that is, the rule that a noncitizen must "at all times carry with him and have in his personal possession any [registration document] issued to him"), it is pretty clear that a person cannot be criminally charged for failing to "carry with him and have in his personal possession" a document he never got and could not get.[21]

But the U.S. government seems not to see it the same way. From time to time, federal prosecutors charge illegal entrants with violations of both sections 262 (the registration requirement) and 264(e) (the carry requirement); defendants do not contest those charges, and the cases end in guilty pleas.[22] In other cases not involving section 262 or 264(e) charges, courts have accepted the argument that section 264(e) provided probable cause for the arrests of suspected illegal entrants.[23]

Outside of the courtroom, U.S. Customs and Border Protection ("CBP") treats sections 262 and 264(e) as imposing an obligation on all noncitizens, authorized or unauthorized, to carry immigration documentation at all times. 8 U.S.C. § 1357 gives CBP agents the right, on or off the border, to "interrogate any . . . .person believed to be an alien as to his right to be . . . in the United States."[24] It gives CBP the right, without a warrant, to stop and search any vehicle within "a reasonable distance from any external boundary of the United States."[25]

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20. *See* Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [http://perma.cc/VLV3-PVED] (Department of Homeland Security ("DHS") officers and attorneys should not devote resources to removal unless the targets fall in a priority enforcement category or removal would otherwise serve an important federal interest).

21. *See infra* notes 112–114 and accompanying text.

22. *See, e.g.*, Veliz v. Caplinger, No. 96-1508, 1997 U.S. Dist. LEXIS 1655 (E.D. La. Feb. 12, 1997) (noting that the plea was entered at an earlier stage of the proceedings); United States v. Castillo-Garcia, 70 F. App'x 465 (9th Cir. 2003) (same); *see also* United States v. Abrams, 427 F.2d 86 (2d Cir. 1970) (lawyer who without "legitimate reason" retained his clients' I-94 forms in his files convicted for causing them to violate section 264(e); no action taken against clients).

23. *See, e.g.*, Davila v. N. Reg'l Joint Police Bd., No. 14-00070, 2014 U.S. Dist. LEXIS 102143 (W.D. Pa. July 28, 2014) (collecting cases).

24. 8 U.S.C. § 1357(a)(1) (2012).

25. *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975). The two cases hold that CBP may establish fixed checkpoints within 100 miles of the border, and may refer drivers to secondary inspection at those checkpoints simply because they look Mexican, but it may not use roving patrols to pull over cars based on the occupants'

CBP has defined that "reasonable distance" as 100 miles, and is said to operate 170 checkpoints within that 100-mile-wide zone (which includes nine of this country's ten largest cities, and two-thirds of our population).[26] And the law gives CBP the right to conduct warrantless search of any property, other than dwellings, within twenty-five miles of the border.[27]

CBP routinely detains people encountered within 100 miles of a border whom an agent believes to be foreign-born if they do not have on their persons what CBP describes as "required identification papers."[28] Its paperwork commonly notes § 264(e) as justification for those detentions.[29]

CBP agents have told foreign students that the law requires them to carry the I-20 forms provided to them by their schools to support their visa applications.[30] They have emphasized to foreign nationals in the United States that the registration law requires them to carry their passports or visas even on a "walk to the grocery store."[31] More generally, CBP believes that its agents have a duty to "verify the immigration status of the individuals they encounter."[32] Its view is that agents are empowered to arrest a person, and detain her at the station, whenever that person cannot produce documents establishing her legal status, and the agent cannot verify her status through a radio call requesting a database check. Because database checks are frequently inconclusive, CBP agents frequently detain persons with legal status but without papers on their persons demonstrating that status.[33]

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apparent Mexican ancestry without more. *See id.*

26. 8 U.S.C. § 1357(a)(3); *see* ACLU, *Customs and Border Protection's (CBP's) 100-Mile Rule*, https://www.aclu.org/sites/default/files/assets/13_08_01_aclu_100_mile_cbp_zone_final.pdf [http://perma.cc/Q7YN-X8MZ]; ACLU; ACLU, *The Constitution in the 100-Mile Border Zone*, https://www.aclu.org/immigrants-rights/constitution-100-mile-border-zone [http://perma.cc/VUF8-X6LS]; Amy Leiberman, *Arizona's Checkpoint Rebellion*, SLATE (July 20, 2014), http://www.slate.com/articles/news_and_politics/politics/2014/07/arizona_immigration_checkpoint_criticism_border_patrol_harasses_people_and.single.html [http://perma.cc/4VMT-HBZ8].

27. 8 U.S.C. § 1357(a)(3) (2012).

28. Brian Hastings, *Agency Doesn't Pay for Arrests, Allow Racial Profiling*, BUFFALO NEWS (Feb. 26, 2013), http://www.buffalonews.com/2026226/another_voice_agency_doesn_x2019_t_pay_for_arrests_allow_racial_profiling.html [http://perma.cc/NPJ4-346S]; *see also* Nancy Morawetz & Natasha Fernandez-Silber, *Immigration Law and the Myth of Comprehensive Registration*, 48 U.C. DAVIS L. REV. 141, 143 n.5 (2014).

29. *See* Morawetz & Fernandez-Silber, *supra* note 28, at 192 n.261. That said, CBP sometimes detains even when the noncitizen identifies himself as in a lawful status for which no registration document exists, or when a noncitizen demonstrates compliance with section 264(e) by producing a document on DHS's "evidence of registration" list.

30. *See* Anna Schoenfelder, et. al., *Uncovering USBP: Bonus Programs for United States Border Patrol Agents and the Arrest of Lawfully Present Individuals*, 24 FAMILIES FOR FREEDOM at 25 (Jan. 2013), http://familiesforfreedom.org/sites/default/files/resources/Uncovering%20USBP-FFF%20Report%202013.pdf [http://perma.cc/S3MY-YFT3].

31. Morawetz & Fernandez-Silber, *supra* note 28, at 183 n.218.

32. Hastings, *supra* note 28.

33. See Schoenfelder, et. al., *supra* note 30, at 10–17.

According to a study of CBP enforcement activity in the Buffalo region, the vast majority of the agency's enforcement targets in that region are persons of South Asian, East Asian, African, and Caribbean backgrounds.[34] Those persons are subject to what amounts to a blanket requirement that, if they are within 100 miles of the border, they must carry papers or risk detention. All of this is based on a highly problematic reading of the relevant statute, and imposes on noncitizens a documentary surveillance regime that could not constitutionally be imposed on Americans.[35]

III. MONITORING SUBVERSIVES

How did we find ourselves in this position? In order to understand the sections 262 and 264(e) registration and carry requirements, it's worth understanding their history. After World War I, public fears about immigrants' loyalty and assimilability were heightened.[36] Many sought to restrict new migration to the United States, and there were voices urging registration of noncitizens already here— in other words, urging a requirement that *all* noncitizens in the United States (including those who had entered many years before) present themselves before, and submit identifying information to, the federal government. Even many proponents, though, saw mandatory registration as problematic.[37] Bills requiring registration were introduced as early as 1919, and repeatedly throughout the 1920s and 1930s, but never made it out of the legislative process.[38]

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34. *See id.* at 17–18; *see also* Nina Bernstein, *Border Sweeps in North Reach Miles Into U.S.*, N.Y. TIMES (Aug. 29, 2010), http://www.nytimes.com/2010/08/30/nyregion/30border.html?pagewanted=all&_r=1 [http://perma.cc/J8DD-D4F7].

35. *See* Kolender v. Lawson, 461 U.S. 352 (1983) (holding unconstitutional a state law allowing police, when armed with articulable suspicion of criminal activity, to stop persons and demand documentary identification); *see also* Hiibel v. Sixth Judicial Dist. Ct. of Nev., 542 U.S. 177, 188 (2004) (stating a new rule that police under certain circumstances can require an individual to state his name, but making clear that the Court was not upholding any requirement that a person provide "a driver's license or any other document"); Weinberg, *supra* note 2.

36. *See* U.S. SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: STAFF REPORT ON IMMIGRATION AND REFUGEE POLICY: SUPPLEMENT TO THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY 189 (1981); JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925, at 218–28 (2002).

37. One of them mused, thus, that registration would wind up involving intrusive "general police supervision of immigrants all over the country" and would fall on American citizens as well, because "the man who had already become an American citizen would also have to carry his papers to show to the police that he is a citizen and no longer an alien" *Percentage Plans for Restriction of Immigration: Hearings before the H. Comm. on Immigration & Naturalization*, 66th Cong. 57, 62 (1919) (testimony of Rev. Sidney Gulick, head of the National Committee for Constructive Immigration Legislation).

38. *See, e.g.*, H.R. 9101, 71st Cong., § 13 (1930); 70 CONG. REC. 189–90 (1928); H.R. 563, 66th Cong. (1919); A. Warner Parker, *Immigration Control*, THE SATURDAY EVENING POST, Feb. 28, 1920, at 81–82.

Bills imposing registration on aliens were somewhat more successful in state legislatures. Michigan enacted an alien registration law in 1931, motivated by fears that immigrants were the source of Communism and labor agitation (and moreover were criminals, were illegally present, and were stealing Americans' jobs).[39] Pennsylvania and two other states, later in the decade, did the same.[40] All of those laws, though, were ultimately struck down as invading federal authority.[41]

The fear of Communism that partly drove the Michigan law, together with fear of the Axis and the Fascist threat, finally moved Congress in 1940 to enact an alien registration statute of its own. One member of Congress explained that fingerprinting and registration of all noncitizens in the United States was "a measure of self-defense" against enemies waging war against us via "fifth columns": immigrants were entering the United States "to organize espionage, sabotage and subversive movements."[42] Another member similarly explained that registration and fingerprinting were needed in order to deal with the "greatest menace to this country": subversive enemy aliens "busily . . . boring from within."[43] As the *New York Times* characterized the public mood, "who could tell what secret agents were already at work in America?"[44]

The 1940 Smith Act[45] thus made it a crime to "advise, or teach the duty, necessity, desirability, or propriety of overthrowing . . . government in the United States by force or violence," and provided for the deportation of any noncitizen who had ever been a member of or affiliated with such a subversive organization.[46] As part of that effort, it required all noncitizens in the United States, on pain of criminal penalties, to appear at local post offices to be registered and fingerprinted, and thereafter to notify the government of every change

39. *See* LIBBY GARLAND, AFTER THEY CLOSED THE GATES: JEWISH ILLEGAL IMMIGRATION TO THE UNITED STATES, 1921-1965, at 160 (2014).

40. *See* Hines v. Davidowitz, 312 U.S. 52, 61 n.8 (1941). The other two states were North and South Carolina.

41. *Id.*; *see generally* Arrowsmith v. Voorhies, 55 F.2d 310 (E.D. Mich. 1931).

42. 76 CONG. REC. 9032, 9032–33 (1940) (statements of Rep. Hancock, Rep. Smith, and Rep. Hobbs).

43. 85 CONG. REC. 1375, 1378 (1939) (statement of Rep. Taylor); *see* CHERYL LYNNE SHANKS, IMMIGRATION AND THE POLITICS OF AMERICAN SOVEREIGNTY, 1890-1990, at 127–29 (2001).

44. Delbert Clark, *Aliens to Begin Registering Tuesday*, N.Y TIMES, Aug. 25, 1940, at 64.

45. The bill was introduced by Representative Howard W. Smith (D-VA), a conservative force in the House. Representive Smith saw Communist infiltration as the thin edge of the wedge leading to evils such as the civil rights movement, organized labor, and social welfare legislation. *See* Bruce Dierenfield, *Howard W. Smith*, ENCYCLOPEDIA VIRGINIA (June 5, 2014), http://www.encyclopediavirginia.org/Smith_Howard_Worth_1883-1976 [http://perma.cc/8GPV-A8F9].

46. Alien Registration Act of 1940, ch. 439, 54 Stat. 670, 3d Session (codified as amended 18 U.S.C. § 2385 (2012)). The key deportation provision was § 23 of the Act, amending the terms of the anti-anarchist Immigration Act of 1918.

of address.[47]

The statute did not impose a carry requirement; federal regulations were careful to note that "[t]he alien is under no legal obligation to carry [any document upon] his person, and he shall suffer no penalty or disadvantage from failing to do so."[48] Rather, what was key was that the government would have records allowing it to keep tabs on the foreigners in its midst. While policymakers recognized that not all noncitizens were subversives, they saw monitoring of all noncitizens as the best way to address the enemy threat.

After an elaborate Department of Justice ("DOJ") publicity campaign (in which the public was told both that there was no suspicion or stigma involved in the registration requirement and that a noncitizen's failure to register would be taken to mean that he had something to hide),[49] about five million people registered at local post offices. They submitted fingerprints and filled out questionnaires covering such matters as name; address; birth date and place; physical description; circumstances of immigration; occupation and employment information; membership in clubs, organizations, or societies; military service; applications for citizenship; U.S. relatives; criminal record; and activities on behalf of a foreign nation.[50] In return, each one received "evidence of registration" in the form of an Alien Registration Receipt Card, or AR-3.[51]

The AR-3 did not incorporate or refer to any determination of immigration status. Noncitizens could register, and receive AR-3s, without regard to whether they were legally in the U.S.[52] The goal of

47. The Act exempted persons under fourteen years old, those present in the United States for less than thirty days, and foreign government officials and members of their families. *See* Alien Registration Act §§ 31, 32(b), 54 Stat. 670, at 673–74; *see also* International Organizations Immunities Act, Pub. L. No. 79-201, § 7(a), 59 Stat. 669, 671–72 (1945) (exempting representatives to international organizations). In addition, it authorized the agency to prescribe special rules for the registration and fingerprinting of persons holding border crossing identification cards, and indeed any persons in the United States not lawfully admitted for permanent residence, as well as for seamen and persons confined in institutions or under order of deportation. *See* Alien Registration Act § 32(c), 54 Stat. at 674.

48. Regulations Concerning the Registration and Fingerprinting of Aliens in Accordance with the Alien Registration Act, 8 Fed. Reg. 2836, 2840 (Aug. 14, 1940) [hereinafter 1940 Regulations].

49. *See* Clark, *supra* note 44.

50. *See* Alien Registration Act §§ 31–33, 54 Stat. at 673–74; Clark, *supra* note 44; Morawetz & Fernandez-Silber, *supra* note. 28, at 156; *Alien Registration Records 1940-44*, SLOVK. GENEALOGY RES. STRATEGIES http://iabsi.com/gen/public/imm_names.htm#Alien_Registration_Records,_1940-1944_ [http://perma.cc/6HY4-US27] (reproducing replica AR-2).

51. 1940 Regulations, *supra* note 48, at 2840. *See, e.g.*, SLOVK. GENEALOGY RES. STRATEGIES, *supra* note 50.

52. *See* Marian Smith, *Why Isn't the "Green Card" Green?*, 70 No. 30 INTERPRETER REL. 1043 (1993). In recognition of the fact that some who registered would not have legal status, the 1940 Act was the first U.S. immigration statute that explicitly empowered the agency to legalize the status of otherwise deportable noncitizens. *See* Alien Registration Act § 20, 54 Stat. at 671–72; Arthur K. Davis, *Whom Shall We Welcome. Report of the President's Commission on Immigration and Naturalization*, 17 SCI. & SOC'Y 360–63 (1953). In the eight years following the 1940 registration, as the agency went through registration files and found cases involving "some illegal feature," it

the registration process, crucially, was to compile an inventory of all noncitizens present in the United States. By encouraging and securing registration of *all* noncitizens, whether legally or illegally present, the government saw itself as positioned to monitor the disloyal or politically undesirable.[53] As part of that enterprise, the FBI matched the newly-created Smith Act fingerprint files against its records of spying, crime, and subversive activity; it and other agencies began compiling lists of subversives to be detained if war were declared.[54]

The accuracy of the registration database began to break down almost immediately. Besides providing for the registration of new entrants at the border,[55] the Smith Act required that persons once registered were to report their changes of address to the Immigration and Naturalization Service ("INS").[56] The INS assigned the job of processing those reports to its new Alien Registration Division.[57] There was no record made, though, when noncitizens died or left the country.[58] Also, records of changes of address were incomplete; between five and forty percent of noncitizens changed address in the program's first two-and-a-half years while neglecting to file the forms.[59] The INS disbanded the Alien Registration Division in 1944, assigning its functions to other offices; it concluded "it was impossible to maintain a file of aliens' address cards with any degree of accuracy."[60]

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resolved a majority of them by exercising that legalization authority. *See Appropriation Bill for 1948: Hearings Before the Subcomm. Of the H. Comm. on Appropriations*, 80th Cong. 172 (1947) (testimony of the INS Commissioner Carusi).

53. *See* United States v. Ginn, 222 F.2d 289, 290 (3d Cir. 1955) (the purpose of the 1940 and 1955 registration requirements was "to get a record of aliens in the country together with a means of identifying them"); Morawetz and Fernandez-Silber, *supra* note 28, at 157; U.S. GENERAL ACCOUNTING OFFICE, GAO-03-188, HOMELAND SECURITY: INS CANNOT LOCATE MANY ALIENS BECAUSE IT LACKS RELIABLE ADDRESS INFORMATION 31 (2002); Elizabeth Burnes & Marisa Louie, *The A-Files*, NAT'L ARCHIVES http://www.archives.gov/publications/prologue/2013/spring/a-files.pdf [http://perma.cc/D6ZW-RLC7].

54. *See* William Seltzer & Margo Anderson, *After Pearl Harbor: The Proper Role of Population Data Systems in Time of War*, at 26 (Mar. 28, 2000 draft), https://pantherfile.uwm.edu/margo/www/govstat/newpaa.pdf [http://perma.cc/NJH3-RADN].

55. *See infra* notes 61–65 and accompanying text.

56. *See* Alien Registration Act of 1940, Pub. L. No 76-670, § 35, 54 Stat. 670, 675. The statute in somewhat ambiguous language also mandated the filing of address notifications every three months, even if a person had not changed address; the INS understood this provision to cover only nonimmigrants. *See* § 36(b), 54 Stat. at 675; Amending the Alien Registration Act of 1940, S. Rep. 80-2202 (1948), at 2 (letter of Assistant Attorney General Ford).

57. *See* U.S. GENERAL ACCOUNTING OFFICE, *supra* note 53, at 31.

58. *See id.* at 31–32.

59. *See id.* U.S. Attorneys had no interest in prosecuting those violations. *See id.* at 40–41.

60. *See id.* at 31–32. Congress enacted a new rule in 1950, imposing a requirement backed by criminal penalties that noncitizens file yearly address notification forms without regard to whether their addresses had changed. Internal Security Act of 1950, Pub. L. No. 81-831, § 24, 62 Stat. 987, 1012–13. The INS accordingly distributed Alien Address Report Cards to post offices nationwide so that noncitizens could report their addresses, see *Aliens to Begin Registration Under New Law*, CHI. TRIB., Dec. 31, 1950, Congress found substantial disparity between its records and reported addresses. U.S. General Accounting Office, *supra* note 53, at 32. The annual address reporting requirement stayed in place until 1981, although it was honored in the breach. *See id.*; Immigration and Nationality Act Amendments of 1981, Pub. L. 97-116, § 11, 95 Stat. 1611, 1617 (1981); Aliens and

Changes of address, though, were not the biggest challenge to accuracy of the government's files. What about new migrants entering the United States? How would their names be entered into the registration database? The Smith Act's answer was a requirement that henceforward no noncitizen would be allowed to enter the United States without a visa (or, in appropriate cases, a border crossing card or re-entry permit), that visas would be issued at U.S. consulates abroad, and that registration and fingerprinting would be a component of the visa issuance process.[61]

Under the post-1940 regime, in other words, both immigrants (that is, lawful permanent residents) and nonimmigrants (that is, people entering the United States in a temporary status) would normally receive a visa from a U.S. consulate abroad after presenting registration forms and being fingerprinted there.[62] Upon entering the United States and presenting their visa paperwork, immigrants would be entitled to receive a "green card" (more formally, an "I-551 alien registration receipt card").[63] Nonimmigrants would bring with them a document euphoniously known as "Foreign Service Form No. 257a," issued to them by the U.S. consulate abroad in order to provide them with evidence of registration and status.[64] Sometimes, an authorized nonimmigrant could not present a Form 257a; for those individuals, INS developed an I-94 "Record of Alien Admitted as Visitor" form, with room to note the fact of registration.[65]

Citizens of Canada, Newfoundland,[66] and Mexico could enter visa-free if they held border crossing cards, for which they had provided information and had been fingerprinted at the border.[67] Some citizens

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Nationality; Immigration and Nationality Act Amendments of 1981, 47 Fed. Reg. 12129, 12130 (1982).

61. *See* Alien Registration Act § 30, 54 Stat. at 673 (explaining that the consul should retain one copy of the registration and fingerprint record and attach a second copy to the visa for processing when the noncitizen entered the U.S.). The Act also stated a continuing requirement that all persons in the United States who had not yet registered were to register and be fingerprinted (if they were at least fourteen years old, and were here at least thirty days). *See id.*; Alien Registration Act § 31, 54 Stat. at 673–74. But, this "post office" registration fell into desuetude once registration was merged into the visa-issuance process. *See infra* notes 78–80 and accompanying text.

62. *See* Recording of Arrivals, Departures, and Registrations: Documentary Requirements for Aliens Entering the United States, 11 Fed. Reg. 9982 (Sept. 11, 1946) [hereinafter Recording of Arrivals, Departures and Registrations]; *see also* Exec. Order No. 6964, 6 Fed. Reg. 2741 (June 6, 1941).

63. *See* Recording of Arrivals, Departures, and Registrations, *supra* note 57, at 9982–84.

64. *See id.* at 9982.

65. *See id.* at 9983.

66. Newfoundland did not become part of Canada until 1949. J.K. Hiller, Newfoundland and Canada: 1864-1949, NEWFOUNDLAND & LABRADOR HERITAGE, http://www.heritage.nf.ca/articles/politics/confederation-1864-1949.php [http://perma.cc/94GQ-ZYB9].

67. *See* Recording of Arrivals, Departures, and Registrations, *supra* note 57, 9985 (adding new 8 C.F.R. § 176.06); Regulations Governing the Issuance and Use of Non-Resident Aliens' Border-Crossing Identification Cards, 8 Fed. Reg. 3195, 3196 (Aug. 28, 1940). Cuban citizens could also enter visa-free for up to thirty days. *See* The Immigration and Naturalization Systems of the United

of Canada and Newfoundland had leeway to enter for up to thirty days with neither a passport, visa, nor a border crossing card.[68] They would not have gone through a registration process under the 1940 Act incident to visa issuance. If they stayed more than thirty days, though, they were required to register.[69]

Pushing registration into the visa process meant that people exempted from the visa process ended up getting exempted from registration as well. Thus, the INS in 1946 amended its rules to allow Canadian citizens to travel to the United States for as long as six months without a passport, visa, or border crossing card, in much the same way U.S. citizens could visit Canada; it issued regulations exempting them from registration.[70]

Similarly, the United States in the early 1940s had begun a program of importing Mexican nationals, called "braceros," as temporary agricultural workers.[71] Congress in 1944 exempted the braceros from compliance with the Alien Registration Act (although it did direct that they be fingerprinted in a different, more summary process, and receive identification cards).[72] The INS accordingly promulgated regulations providing that braceros "shall not be registered but shall be fingerprinted" in accordance with the statute.[73] When the provisions of that statute expired at the end of 1947, the Secretary continued admitting braceros under his catch-all authority to allow temporary admission of otherwise inadmissible persons.[74] The regulations exempting them from registration remained in force, although they were now without statutory authority.[75] When Congress, in 1951, enacted new authority for the bracero program without addressing the

States, S. REP. NO. 81-1515, at 537 (1950).

68. *See* Recording of Arrivals, Departures, and Registrations, *supra* note 57, at 9986 (adding new 8 C.F.R. §§ 176.107(q), 176.108(b)).

69. *See* Regulations Governing the Issuance and Use of Non-Resident Aliens' Border-Crossing Identification Cards, *supra* note 67.

70. *See* Canadian Citizen Visitors, 11 Fed. Reg. 12537, 12538 (Oct. 25, 1946); *see also Border Crossing Rules are Eased on North Border*, CAPE VINCENT EAGLE, Oct. 24, 1946, at 5, http://nyshistoricnewspapers.org/lccn/sn94057709/1946-10-24/ed-1/seq-5/# [http://perma.cc/AHT6-72YE].

71. *See* MAE NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 127–66 (2004).

72. *See* Farm Labor Supply Appropriations Act, 1944 § 5(g), Pub. L. No. 78-227, 58 Stat. 11, 16 (1944); Admission of Agricultural Workers Under Special Legislation, 8 Fed. Reg. 14840 (Dec. 21, 1944). An image of the bracero card is available at Center for History & New Media, BRACERO HIST. ARCHIVE, http://braceroarchive.org/items/show/516 [http://perma.cc/A3E6-STCL].

73. 8 Fed. Reg. at 14840.

74. *See* STAFF OF H. COMM. ON JUDICIARY, 87TH CONG., STUDY OF POPULATION AND IMMIGRATION PROBLEMS: ADMISSION OF ALIENS INTO THE U.S. FOR TEMPORARY EMPLOYMENT AND "COMMUTER WORKERS, at 32–35 (Comm. Print 1963).

75. It is hard to argue that the Secretary's statutory authority to prescribe "special regulations for the registration and fingerprinting" of nonimmigrants, extended to exempting them from registration. *See* 1940 Regulations, § 32(c).

registration issue,[76] the agency promulgated new rules stating that its existing procedures would constitute registration under the 1940 Act.[77]

In 1950, the INS assimilated the registration requirement to the visa process in another way: it stopped issuing the AR-3. Instead, it provided that if a noncitizen registered after his entry into the United States, he or she would receive an I-551 green card (if a lawful permanent resident) or a Form 257a or I-94 (if a lawfully admitted nonimmigrant).[78] This meant that a noncitizen in the United States would not receive any evidence of registration absent a finding by the INS that he was legally entitled to be present in this country. A person not entitled to an I-551, Form 257a or I-94 would receive nothing. As I have indicated, that ran contrary to the conceptual underpinning of the 1940 registration, in which all noncitizens, whatever their status, were encouraged to provide information and fingerprints and receive registration cards in return.[79] It was possible for post office clerks to take registrations in 1940 because registration did not involve adjudication of status; everybody who filed out a form and presented fingerprints was entered into the system and received a card. The new system left no room for the old sort of registration, and the INS would let the regulations describing post office registration drop out of the Code of Federal Regulations.[80]

IV. THE CARRY REQUIREMENT

As fears of Communism grew after World War II, some Congress members returned to a focus on immigration as the source of the Communist contagion. A 1950 Senate committee report explained: "Communism is, of necessity, an alien force. It is inconceivable that the people of the United States would, of their own violition [sic], organize or become part of a conspiracy to destroy the free institutions to which generations of Americans have devoted themselves." In consequence, the report continued, "it is not strange that the vast majority of those

76. *See* An Act to Amend the Agricultural Act of 1949, Pub. L. 78, 65 Stat. 119 (1951).

77. *See* Temporary Admission of Agricultural Workers, 16 Fed. Reg. 7348, 7350 (amending 8 CFR §§ 115.11, 115.12 (July 23, 1951). The agency clarified in 1957 that nonimmigrant agricultural workers were not subject to registration outside of the bracero-card or visa process. *See* Miscellaneous Amendments to Chapter, 22 Fed. Reg. 4188, 4188–89 (June 14, 1957).

78. *See* Decentralization of Functions, 15 Fed. Reg. 574, 579–80 (Feb. 2, 1950).

79. *See supra* notes 52–53 and accompanying text; Morawetz & Fernandez-Silber, *supra* note 28, at 163–64.

80. The INS amended the regulations governing post office registration in 1957 to delete any reference to post offices, providing instead that aliens could be registered in the United States by "[i]mmigration officers and any officer or employee of the United States selected by the Commissioner." *See* Registration of Aliens in the United States: Forms and Procedure, 22 Fed. Reg. 9765, 9806 (Dec. 6, 1957) (amending 8 C.F.R. § 264.2). In 1960, it deleted the provisions completely and revoked the Form AR-2 registration form. *See* Alien Registration, 25 Fed. Reg. 7180, 7180–81 (July 29, 1960).

who would establish a Communist dictatorship in this country come from alien lands."[81] Another member of Congress reduced the immigrant threat to numbers: "Nine out of every ten of the Communists that have been convicted of treason in this country were foreign born."[82] Congress thus included a host of new anti-Communist provisions relating to immigration in the McCarran Internal Security Act of 1950, which broadened the grounds for exclusion and deportation of noncitizens who were deemed subversive.[83]

Two years later, Congress enacted the comprehensive immigration law revision known as the McCarran-Walter Act. That statute built on the Internal Security Act's revisions, and added the requirement now embodied in 8 U.S.C. § 264(e): that aliens, having registered, must carry their registration cards at all times. The legislative history does not set out the reasons for the change at any length.[84] Representative Preston of Georgia, though, put it this way: "I think we have mollycoddled these aliens long enough.... The time will not be too far off when we are going to want to get these people out and then we are going to have a very difficult time rounding them up."[85]

The McCarran-Walter Act, thus, carried forward the 1940 Act's language that any noncitizen present in the United States for more than thirty days, who had not already been registered and fingerprinted via

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81. *Id.* The report was released in support of what would become the 1952 McCarran-Walter Act, the forerunner of the current INA. The Immigration and Naturalization Systems of the United States, S. Rep. No. 1515, at 782 (81st Cong., 2d Sess.); *see also* 81 CONG. REC. 9303 (1950) (statement of Rep. Dondero) ("[C]ommunism in the United States is an alien movement; its ideology is alien, its leadership is alien, and its membership is largely of alien origin."); 95 CONG. REC. 13058 (1949) (statement of Rep. O'Conor) ("It is clear that the Communist apparatus in the United States is not a home-grown product."); Shanks, *supra* note 43.

82. 98 CONG. REC. 4315 (1952) (statement of Rep. John Rankin (D-MS)). Unsurprisingly, this was not an accurate statement. To my knowledge, no Communist has ever been convicted for treason in this country. And of the twelve members of the Communist Party USA National Board indicted for Smith Act violations in the landmark case of Dennis v. United States, 341 U.S. 494 (1951), all but three were native-born.

83. It also included a disquieting provision, reminiscent of the Japanese internment, that in case of war or "internal security emergency," the federal government could indefinitely detain any person, citizen or alien, for whom there was "reasonable ground to believe that such person probably will engage in or ... conspire with others to engage in acts of espionage or of sabotage." Internal Security Act of 1950, Pub. L. 81-831, 64 Stat. 987, §§ 100–16.

84. Representative Earl Chudoff (D-PA) sought to amend the bill to provide that a noncitizen was not in violation of the carry requirement unless he "willfully" failed to carry his card. Representative Chudoff urged that under the statute as drafted "it would be a crime for any alien to go into a shower or take a bath unless he had this card in his personal possession," and that the law should be solicitous of noncitizens who went out in public having inadvertently left their cards in a different handbag or suit, or who had simply not known about the carry requirement. 98 CONG. REC. 4433 (1952). His amendment was defeated. *See id.* at 4433, 4438. Others had struck the same theme, suggesting in hearings that the requirement not only was redolent of authoritarian Europe, but would be problematic for "women who constantly change purses." *See, e.g.*, Hearings before the President's Commission on Immigration and Naturalization, printed for the H. Comm. on the Judiciary, 82d Cong. 42, 318 (1952) (statement of Alice O'Connor concerning authoritarian Europe); *id.* at 719, 722 (statement of Elizabeth Wilson concerning handbags).

85. *Department of Justice Appropriations for 1952: Hearings Before the Subcomm. of the H. Comm. on Appropriations*, 82d Cong. 397 (1951).

the visa process or otherwise, had the duty to apply for registration and fingerprinting. Willful failure to do so was a misdemeanor.[86] This language was already problematic, because the law in 1952 provided no route to registration for many already in the country. In addition, though, Congress added these new provisions:

> Every alien in the United States who has been registered and fingerprinted under the provisions of the Alien Registration Act, 1940, or under the provisions of this Act shall be issued a certificate of alien registration or an alien registration receipt card in such form and manner and at such time as shall be prescribed under regulations issued by the Attorney General.[87]

> Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him pursuant to [§ 1304(d)]. Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor . . . .[88]

Section 264(e) was clear that it imposed no requirement to carry a card unless the noncitizen in question had been issued one: the mandate was that the noncitizen "at all times carry with him . . . any certificate of alien registration or alien registration receipt card issued to him pursuant to [§ 264(d)]."[89] The statutory language echoed the text of rules then in force requiring men of draft age to carry their draft cards at all times in their personal possession.[90] As with draft cards, the concept was that if all law-abiding noncitizens had registered and by virtue of section 264(e) were carrying the cards they had received, then anyone found without a card would be revealed to the authorities.[91]

To implement this, the agency had to scramble a bit. All men of draft age had registration certificates. But *was* it the case that all law-abiding noncitizens could present certificates issued under section 264(d)? The regulatory program atop which the carry requirement fit best—universal registration evidenced by an AR-3 registration card—was already gone. Almost all registration by 1952 took place via the visa

86. *See* McCarran-Walter Act of 1952, Pub. L. No. 82–414, §§ 262, 266, 66 Stat. 163, 224–25 (1952). As under the 1940 Act, the requirement was subject to a mix of exceptions. Some exceptions, like those for employees of foreign governments and international organizations, were explicit in statutory text; at least one—for visa-exempt Canadians—was not. *See* Immigration and Nationality Regulations, 17 Fed. Reg. 11469, 11532–33 (Dec. 19, 1952) (setting out new 8 C.F.R. § 263.2). Even without explicit statutory guidance, the Secretary saw no point in a registration requirement for persons he had allowed to enter visa-free.

87. Immigration and Nationality Act of 1965 § 264(d), 8 U.S.C. § 1304(d) (2012).

88. 8 U.S.C. § 1304(e).

89. 8 U.S.C. § 1304(d).

90. *See* Weinberg, *supra* note 2.

91. As Representative Rooney of New York put it, once noncitizens were required to carry the cards issued to them, "local police in municipalities all over the country [could] report[] unregistered aliens" to the INS. *Department of Justice Appropriations for 1952: Hearings Before the Subcomm. of the H. Comm. on Appropriations*, 82d Cong. 397 (1951).

issuance process, and the agency had stopped issuing AR-3s.[92] The INS's implementing regulations for the 1952 Act therefore listed nine different documents that could be treated as alien registration receipt cards for purposes of section 264(d).[93] They included the old AR-3 and related documents; the I-151 green card (in two versions); the nonimmigrant Form 257a and the I-94 (but only if the I-94 included a notation showing alien registration); the bracero identification card; and—strikingly —the I-200 administrative arrest warrant served by the INS on a noncitizen to initiate deportation proceedings (but again only if that document included a notation showing registration).

Inclusion of the I-200 was a curious choice. What goal was served by telling the population of noncitizens who had been arrested and were awaiting their deportation hearings, and who did not have other registration documentation, that "you are legally required to carry your arrest warrant at all times, but only if it contains a notation indicating that you registered (and were fingerprinted) at some point in that past, and not otherwise"? The answer, I think, is that the agency added the I-200 to its list of alien registration receipt cards because of some residual sense that, under a statutory scheme including section 264(e), all noncitizens *ought* to have some sort of document to carry and produce. In the system's welter of forms, though, that was not necessarily so.

By the late 1950s, the requirement that all entrants to the United States be fingerprinted caused tension with the Soviet Union and its allies, blocking travel and threatening the 1960 Squaw Valley Olympics.[94] Congress accordingly authorized the INS to promulgate rules waiving the fingerprint requirement,[95] and the agency did so for all nonimmigrants staying in the United States for less than one year.[96] Those persons still received I-94s, but there was now a substantial argument that the law did not require them to carry them. Section 264(e), by its terms, imposed no carry requirement unless a certificate had been issued to the noncitizen "pursuant to" section 264(d)—and section 264(d)'s mandate was to issue certificates to aliens who had been "registered and fingerprinted."[97] Beginning in 1958, nonimmigrants staying in the United States for less than a year were not that.[98]

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92. *See supra* text accompanying note 78.

93. *See* Immigration and Nationality Regulations, 17 Fed. Reg. 11469, 11532–33 (Dec. 19, 1952) (setting out new 8 C.F.R. § 264.1).

94. *See* Morawetz & Fernandez-Silber, *supra* note 28, at 166–68.

95. *See* Pub. L. No. 85-316, § 8, 71 Stat. 639, 641 (Sept. 11, 1957).

96. *See* 8 C.F.R. § 264.2(e)(2) (2015).

97. McCarran-Walter Act of 1952, Pub. L. No. 82-414, § 264(e), 66 Stat. at 224–25.

98. The agency's view of this question is less than clear. The INS had included language in its 1952 regulations stating that section 264(e) applied to every document listed in its regulations "as constituting evidence of alien registration," and a nonimmigrant would normally have one of those whether she had been fingerprinted or not. *See* Immigration and Nationality Regulations, 17 Fed.

By 1960, the U.S. government listed eight different documents as "registration forms," and ten as "evidence of registration."[99] As U.S. immigration law became more complicated and the sorts of statuses noncitizens could have in the United States multiplied, the lists of documents that the government would treat as registration forms, and the ones it listed as suitable evidence of registration, grew longer. The lists did not entirely keep up with the complexities of the changing law.[100] For example, Congress in 1980 amended the statute so that refugees arriving in the United States without papers could apply for asylum. But a person who did so would find no way to comply with the apparent statutory obligation to register; the agency did not list the I-589 asylum application as a registration document.[101] This was not a problem, on the other hand, so long as the agency took for granted that a person was not bound by the registration requirement unless there was a registration document meaningfully available for him or her to submit to the government.

In 1986, Congress repudiated much of the thinking behind the 1940 and 1952 Acts by making it a matter of agency discretion whether *any* visa applicant should be fingerprinted.[102] It turned out that the fingerprints collected by consular officials were not being used for anything —not in connection with processing the visa, not in any later criminal investigations, not in identification-related contexts.[103] After 1986, the State Department moved to confine fingerprinting of visa applicants to those cases where fingerprinting was "necessary for purposes of identification or investigation,"[104] so that "most nonimmigrant aliens [were] admitted to the United States without being

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Reg. 11469, 11533 (Dec. 19, 1952). But that language disappeared in a 1960 iteration of the rules. *See* Alien Registration, 25 Fed. Reg. 7180-81 (July 29, 1960); Morawetz & Fernandez-Silber, *supra* note 28, at 168 n.152.

99. *See* Alien Registration, 25 Fed. Reg. 7180–81 (July 29, 1960).

100. *See* Morawetz & Fernandez-Silber, *supra* note 28, at 170–71.

101. *See id.* at 170 n.161. Today, an arriving alien who establishes a credible fear of persecution and is paroled from Immigration and Customs Enforcement custody should receive an I-94, providing "evidence of registration." Other asylum applicants, however, will not. *See* Joint Appendix at 38–49 Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182) (declaration of Michael Aytes).

102. Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, §§ 5–6, 8–10, 100 Stat. 3655, 3656–57; H.R. Rep. 99-916, 99th Cong., 2d Sess., at 2 (1986). Section (9) of the 1986 law, intended as a conforming amendment implementing the deletion of the fingerprinting requirement, had the egregiously unintended effect of (apparently) mandating registration within the United States for all entrants; that requirement was ignored and the drafting error was corrected in the Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 8(h), 102 Stat. 2609, 2617.

103. *See* Morawetz & Fernandez-Silber, *supra* note 28, at 172; *Administration of the Immigration and Nationality Laws: Hearing on H.R. 4823, H.R. 4444, and H.R. 2184 Before the Subcomm. on Immigration, Refugees and International Law of the H. Comm. on the Judiciary*, 99th Cong. 146 (1986) (prepared statement of Joan Clark, Asst. Sec'y of State for Consular Affairs).

104. Regulations and Documentation Pertaining to Both Nonimmigrants and Immigrants Under the Immigration and Nationality Act, 52 Fed. Reg. 42,590, 42,609, 42,620 (Nov. 5, 1987).

either fingerprinted or photographed."[105] The number of folks entering the United States who had been "registered and fingerprinted" within the meaning of section264(d) dropped further.

The United States rediscovered the joys of fingerprinting, though, after 9/11. The Enhanced Border Security and Visa Entry Reform Act of 2002 called on the Executive to include "biometric identifiers" in all visas and other travel and entry documents.[106] The State Department began collecting fingerprints from all visa applicants at U.S. embassies and consulates abroad;[107] DHS for its part initiated a plan to collect fingerprints from all visitors at U.S. ports of entry so as to compare them with the fingerprints digitally stored on their visas and travel documents.[108] DHS also used 8 U.S.C. § 1303 authority in 2002 to initiate short-lived "special registration" rules requiring all adult men from any of two dozen Muslim countries, and living in the United States in nonimmigrant status, to report to an immigration office to be registered, fingerprinted, and photographed.[109]

Currently, as I stated in Part II, DHS regulations list eleven different documents as registration forms, and eleven or twelve others (including an unexpired nonimmigrant stamp on one's passport) as evidence of registration.[110] The regulations neither affirm nor deny section 264(e)'s carry requirement.

V. WHO IS COVERED?

With this history told, we are better positioned to answer doctrinal questions about the law's scope. First of all, what is the status under section 264 of noncitizens in the United States who have not received a document from the U.S. government listed as "evidence of registration" under 8 C.F.R. section 264.1? That category includes three large groups of people. First, and most numerous, are those who entered the United States illegally and have never interacted with U.S. officialdom. Second are those who entered without papers and later sought to regularize

105. Suspending the 30-Day and Annual Interview Requirements From the Special Registration Process for Certain Nonimmigrants, 68 Fed. Reg. 67,578 (Dec. 2, 2003).

106. Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, § 303(b), 116 Stat. 543, 553–54.

107. *See* Michael J. Gurfinkel, *Embassies to Start Fingerprinting Visa Applicants to Increase Security and Reduce Fraud* (October 24, 2004), http://www.gurfinkel.com/imm_archive/2004/oct24-2004.html [https://perma.cc/manage/vest/V556-YGEE].

108. *See id.*; *United States Visitor and Immigrant Status Indicator Technology (US-VISIT)*, ELECTRONIC PRIVACY INFO. CTR., https://epic.org/privacy/us-visit/ [https://perma.cc/25JL-UMM8]; Implementation of the United States Visitor and Immigrant Status Indicator Technology Program ("US-VISIT"); Biometric Requirements, 69 Fed. Reg. 468 (Jan. 5, 2004).

109. *See* Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 14–15 (2014); ANDORRA BRUNO, CONG. RESEARCH SERV., RL31570, IMMIGRATION: ALIEN REGISTRATION 5–6 (2004).

110. Unsurprisingly, these are not all documents that it's desirable or sensible to carry in one's wallet at all times. *See* Morawetz & Fernandez-Silber, *supra* note 28, at 180–81.

their status, but whose applications are pending somewhere deep in the immigration bureaucracy. Finally, there are those who entered without papers but have applied for *and been granted* the forms of immigration relief known as Temporary Protected Status ("TPS") or deferred action (including the Deferred Action for Childhood Arrivals ("DACA") program). Persons in the latter two groups will not have "evidence of registration" documents unless they have applied for and been granted work authorization.[111]

This question is easy: the statute provides a straightforward answer, which I have already mentioned. Section 264(e) only imposes an obligation to carry "any certificate of alien registration . . . issued to" the noncitizen. If none was issued, the noncitizen can hardly be in violation of an obligation to carry it. There appears to be only one federal court case in which this issue was squarely raised and addressed, and that is how the court ruled.[112] The DOJ issued an opinion some years back saying the same thing: "The requirements of 8 U.S.C. § 264(e) apply only to aliens who have been registered and issued a registration receipt card."[113] That seems pretty straightforward, notwithstanding the apparent different understanding of many DOJ line prosecutors and DHS border protection agents.[114]

Here is a harder question, though: what about sections 262 and 266? Those are the provisions of the original 1940 Act requiring "every alien now or hereafter in the United States" to apply for registration. Are persons who have entered the United States without authorization,

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111. *See id.* at 177 n.189. A 2005 study estimated that 1 to 1.5 million unauthorized migrants either had TPS status or were pending status regularization. *See* Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics*, PEW RES. CTR. (June 14, 2005), http://www.pewhispanic.org/2005/06/14/unauthorized-migrants/ [http://perma.cc/4JZ4-ZFGW]. That study did not anticipate the expansion of deferred action status under the Deferred Action for Childhood Arrivals ("DACA") program; as of 2012, about 600,000 people had DACA status. *See* Jeffrey S. Passel et al., *As Growth Stalls, Unauthorized Immigrant Population Becomes More Settled*, PEW RES. CTR. (Sept 3, 2014), http://www.pewhispanic.org/2014/09/03/as-growth-stalls-unauthorized-immigrant-population-becomes-more-settled/ [http://perma.cc/RE8D-KG88]. However, these numbers are too high for our purposes, since they sweep in a large number of persons with work authorization (which provides evidence of registration under 8 C.F.R. § 264.1(b)).

112. United States v. Mendez-Lopez, 528 F. Supp. 972 (N.D. Okla. 1981); *see also* Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47, 52 (2010).

113. *Assistance by State and Local Police in Apprehending Illegal Aliens*, 20 OP. O.L.C. 26 (Feb. 5, 1996), http://www.justice.gov/sites/default/files/olc/opinions/1996/02/31/op-olc-v020-p0026_0.pdf [http://perma.cc/94MS-4DV9] [hereinafter O.L.C. Opinion].

Judicial opinions have sometimes included broader statements in dictum. *See, e.g.*, Liu v. Phillips, 234 F.3d 55, 56 (1st Cir. 2000) (explaining that every alien 18 or older has the legal obligation to carry registration certificate); *see also* Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) ("Once here, aliens are required to register with the Federal Government and to carry proof of status on their person.") But courts are generally more careful to speak precisely. *See, e.g.*, United States v. Ritter, 752 F.2d 435, 437 (5th Cir. 1985) ("[Section 264(e)] makes it a criminal offense for a *documented* alien to fail to carry his or her alien registration card or other immigration documents.") (emphasis added); Katris v. INS, 562 F.2d 866, 869 (2d Cir. 1977) (stating that failing to carry a registration card is "a criminal offense for a *lawfully admitted* alien") (emphasis added).

114. *See supra* text accompanying notes 22–23.

and have never submitted one of the eleven documents that DHS classifies as a "registration form," in violation of that criminal requirement? The DOJ opinion suggests that they are, stating that an "alien's failure to register with INS after remaining in the United States for 30 days or longer is separately prohibited."[115] Dictum in a 1984 Supreme Court opinion points in that direction,[116] and lower-court judges have sometimes said the same thing.[117]

There are two big problems with this thinking, though. The first should be clear by now: if a noncitizen has entered the United States illegally and now wants to "register" pursuant to section 262, the Code of Federal Regulations provides no way for him to do so. One can only register today in connection with a lawful entry or as part of an application for immigration benefits, and persons who have entered the United States illegally within the past thirty days are unlikely to have a colorable claim to those benefits. (Some of them may apply for asylum, but an asylum application does not count as a registration form under DHS rules.)[118]

The regulations provide no route for an illegal entrant to comply with section 262 except perhaps by presenting himself for deportation—and perhaps not even then. Presenting oneself for deportation, after all, does not enable one to file any of the documents designated by DHS as "registration forms," so doing so would not satisfy section 262.[119] As I noted earlier, DHS does list the I-862 Notice to Appear (typically, the first step in the removal process) as "evidence of registration," so one

115. O.L.C. Opinion, *supra* note 113. The USDOJ Criminal Resource Manual says the same: "If the alien is undocumented and has been in the United States for longer than 30 days, he or she has also violated 8 U.S.C. § 1306(a)." U.S. ATTORNEYS' CRIMINAL RESOURCE MANUAL § 1918, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01918.htm [http://perma.cc/3FC9-5UC6].

116. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1047 n.3 (1984) (indicating that it is a crime under sections 262 and 266 for an illegal entrant to fail to apply for registration within thirty days). See also *Arizona v. United States* in which the Court stated:

> [Since 1940, key aspects of the] regime of federal regulation . . . have stayed the same. Aliens who remain in the country for more than 30 days must apply for registration and be fingerprinted. Detailed information is required, and any change of address has to be reported to the Federal Government. The statute continues to provide penalties for the willful failure to register.

132 S. Ct. 2492, 2502 (2012).

117. *See* Estrada v. Rhode Island, 594 F.3d 56, 69 (1st Cir. 2010) (Lynch, C.J., concurring); *see also* Martinez-Medina v. Holder, 673 F.3d 1029, 1036, 1036 n.4 (9th Cir. 2011) (recognizing that a noncitizen's unauthorized presence in the United States is not a crime, but "willful failure to register [one's] presence in the United States when required to do so" is a crime; noncitizens who have overstayed valid visas may be unlawfully present without being liable for failure to register); United States v. Mendez-Lopez, 528 F. Supp. 972, 974–76 (N.D. Okla. 1981) (noting sections 262 and 266 as well as 264(e) represent "distinct provisions for registered aliens failing to carry their registration documents, and aliens failing ever to register in the first place").

118. The same is true of applications for status as a Violence Against Women Act self-petitioner or for a T or U visa. *See* Joint Appendix at 38–49, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182) (declaration of Michael Aytes).

119. *See* 8 C.F.R. §§ 262, 266 (2015).

could argue that anyone in the removal process has been registered willy-nilly. But the mere fact that DHS has been made aware of an illegal entrant does not mean that it will issue an I-862.[120]

In sum, if we are to understand Congress in the INA to have subjected migrants to a freestanding crime of "presence following unlawful entry," by virtue of the U.S. government's both commanding illegal entrants to register and then providing no means for them to do so, then Congress chose "an exceedingly peculiar way to say that."[121] This problem is heightened because section 262 bars only "willful" failure to register; the legislative history makes plain that Congress in 1940 intended to impose liability only on noncitizens who actually knew about their registration obligation.[122] And yet—even setting aside the question of knowledge—it is hardly clear how one can "willfully" fail to file a registration form that does not exist.[123]

The second problem is that a requirement that illegal entrants register with the U.S. government raises serious questions under the Fifth Amendment's self-incrimination clause. By law, the registration form must direct the registrant to state "the date and place of entry of the alien into the United States."[124] The answer to that question, by a person who crossed the border surreptitiously at a place other than a designated border crossing point, would directly incriminate that person in a violation of 8 U.S. C. § 1325.[125] But it is uncontroversial that the Fifth Amendment privilege against self-incrimination extends to noncitizens,[126] and to answers that do no more than "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."[127]

If the registration requirement is to be constitutional, it must be by virtue of the Fifth Amendment exception for "essentially regulatory"

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120. *See supra* note 20 and accompanying text.

121. Duncan v. Louisiana, 391 U.S. 145, 174 n.9 (1968) (Harlan, J., dissenting) (characterizing the view that the drafters of the Fourteenth Amendment meant to bind the states to follow all of the provisions of the Bill of Rights). Congress has repeatedly declined to criminalize illegal presence when the matter was put to it squarely. *See* S. Res. 2454, 109th Cong. §§ 206, 275 (2006); H.R. Res. 4437, 109th Cong. § 203 (2005).

122. *See* Chin et al., *supra* note 112, at 53–54.

123. *Cf.* Griffin v. United States, 173 F.2d 909 (6th Cir. 1949) (finding a prison escapee did not "willfully" violate a rule requiring him to have his draft card in his personal possession, when prison authorities had been holding the card).

124. 8 U.S.C. § 1304(a) (2012).

125. *Id.* § 1325 (making it a criminal offense to "enter the United States at any time or place other than as designated by immigration officers").

126. *See* United States v. Odeh, 552 F.3d 177, 199 (2d Cir. 2008) ("[I]t does not matter whether the defendant is a U.S. citizen or a foreign national: 'no person' tried in the civilian courts of the United States can be compelled 'to be a witness against himself.' "); United States v. Zaitar, 858 F. Supp. 2d 103, 114–15 (D.D.C. 2012); see also United States v. Balsys, 524 U.S. 666, 671 (1998) (finding lawful resident alien entitled to benefit of self-incrimination clause).

127. United States v. Hubbell, 530 U.S. 27, 38 (2000) (quoting Hoffman v. United States, 341 U.S. 479, 486 (1951)).

inquiries.[128] Under that doctrine, the government can require potentially incriminating disclosures where its questions are directed to "the public at large" (rather than to "a highly selective group inherently suspect of criminal activities") and relate to "an essentially noncriminal and regulatory area" (rather than "an area permeated with criminal statutes").[129] That is the doctrine under which the government can require the submission of ordinary income tax forms.[130] In *California v. Byers*,[131] for example, the Court by a 5-4 vote upheld a state law requiring the driver of a car involved in an accident to stop and give his name and address. The plurality reasoned that the statute was directed at "all persons who drive automobiles in California," effectively the public at large; that there was nothing necessarily criminal about being involved in an accident; and finally that "the statutory purpose is noncriminal and self-reporting is indispensable to its fulfillment."[132]

The U.S. Court of Appeals for the Ninth Circuit cited this doctrine in summarily rejecting, on different facts, a Fifth Amendment challenge to the Smith Act registration scheme,[133] and the Second Circuit did the same in upholding "special registration" rules in effect in 2002-03 requiring that persons from Muslim countries answer questions and produce their passports and I-94s to DHS.[134] The Second Circuit reasoned that deportation was a civil matter; that "[i]mmigration law is generally regulatory rather than criminal"; and that the special registration program was designed to serve national security interests rather than those of the criminal law.[135]

The problem here, though, is that the section 262 registration requirement applies *only* to persons present in the United States without already having been registered—which is to say, persons who have entered illegally.[136] It is not directed at the public at large; it is directed solely to a group defined by the fact that its members have violated a U.S. criminal law relating to surreptitious entry, and it asks them to reveal that fact. There is no way that inquiry can fit within the

128. Grosso v. United States, 390 U.S. 62, 68 (1968); *see* Baltimore City Dept. of Social Servs. v. Bouknight, 493 U.S. 549 (1990); California v. Byers, 402 U.S. 424 (1971); Marchetti v. United States, 390 U.S. 39 (1968); Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965).

129. *Albertson*, 382 U.S. at 79.

130. *See* United States v. Sullivan, 274 U.S. 259 (1927).

131. 402 U.S. 424 (1971).

132. *Id.* at 430–31 (plurality opinion).

133. United States v. Sacco, 428 F.2d 264, 271 (9th Cir. 1970).

134. Rajah v. Mukasey, 544 F.3d 427, 442–43 (2d Cir. 2008); *see supra* note 109 and accompanying text.

135. *Id.* at 442.

136. Section 262 imposes its registration requirement only on an "alien now or hereafter in the United States . . . who has not been registered" under 8 U.S.C. § 1201(b) as part of the visa or entry process. Conceivably, its coverage today could be seen to include people who legally arrived in the United States and failed to receive I-94s by reason of agency error, but the proportionate size of that group is miniscule. *See* Schoenfelder et al., *supra* note 30, at 24.

exemption just described.[137]

In sum, the law does not require illegal entrants or persons in liminal immigration statuses to carry documents they never received. Moreover, section 262 cannot sensibly be read to impose criminal liability on illegal entrants for "willful" failure to utilize nonexistent registration procedures that—if they existed—would involve constitutionally forbidden self-incrimination.

VI. CONCLUSION

There is substantial consensus that section 264(e) still does require most *legal* entrants to carry their papers at all times.[138] The Supreme Court, moreover, has approved roving law-enforcement stops in which CBP demands "the production of a document evidencing a right to be in the United States," so long as the stop is brief and predicated on reasonable suspicion that a person is in fact illegally in the United States[139] So the legal regime under which most noncitizens in the

137. That was not the case in *Sacco*, 428 F.2d at 265–66, where defendant had passed up the opportunity to register under the regulatory scheme originally in place in 1940, nor was it the case in *Rajah*, 544 F.3d at 442.

The court in *Rajah* presented the alternative rationale that the questioning of persons subject to special registration did not implicate the Fifth Amendment because it was "merely a condition on the continued receipt of the government benefit of being allowed to remain in this country," much as one must fill out government forms in order to receive food stamps. *Rajah*, 544 F.3d at 442, 443. That argument works better when applied, as in *Rajah*, to persons with legal status; those here illegally are in receipt of no such benefit. In any event, the statement that a noncitizen already in the United States can be forced to answer incriminating questions as "a condition on the continued receipt of the government benefit of being allowed to remain in this country" seems like another way of saying that the Fifth Amendment right against self-incrimination does not apply to noncitizens seeking to avoid deportation; the law, however, is to the contrary. *Id.* at 434; *see supra* note 126 and accompanying text.

Finally, it might be argued that any self-incrimination problem could be cured via a rule that information provided via registration could not be used against a person in subsequent criminal proceedings. See Baltimore City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549, 561 (1990). But *Bouknight*'s holding is that even if a rule is "essentially regulatory," subsequent use restrictions may be necessary to protect individuals' fifth amendment rights; that case nowhere holds that a rule that is *not* essentially regulatory can be saved by such restrictions. Indeed, Marchetti v. United States, 390 U.S. 39, 58–59 (1968), held otherwise,

138. *See* cases cited *supra* note 113. Morawetz and Fernandez-Silber argue that § 264(e) should not be read to apply to persons with nonimmigrant visas. *See* Morawetz & Fernandez-Silber, *supra* note 28, at 178, 179 n.196.

139. United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975). The Court has allowed such questioning even absent reasonable suspicion at fixed checkpoints, see *United States v. Martinez-Fuerte*, 428 U.S. 543, 543–44 (1976), or in contexts where the officers are said not to "convey a message that compliance with their requests is required," *Florida v. Bostick*, 501 U.S. 429, 437 (1991). Moreover, even in contexts where the law requires reasonable suspicion, it appears that CBP frequently detains individuals and demands documents without such suspicion. *See, e.g.*, Garcia de la Paz v. Coy, 786 F.3d 367 (5th Cir. 2015); Muniz-Muniz v. United States Border Patrol, 741 F.3d 668, 669 (6th Cir. 2013); Order on Cross Motions for Summary Judgment, Ramirez v. United States, No. C13-2325JLR (W.D. Wash. Mar. 23, 2015), https://docs.justia.com/cases/federal/district-courts/washington/wawdce/2:2013cv02325/198000/46 [https://perma.cc/4YDD-HD9F]; *NYCLU Challenges Border Patrol's Unlawful Arrest of U.S. Citizen*, NYCLU (Mar. 13, 2013), http://www.nyclu.org/news/nyclu-challenges-border-patrols-unlawful-arrest-of-us-citizen [http://perma.cc/2WRE-2D64]; and other cases collected in *CBP Abuse of Authority*, AM. IMMIGR. COUNCIL, http://www.legalactioncenter.org/cbp-abuse-authority [http://perma.cc/27BW-DZZ9]

United States must carry their papers at all times is secure, notwithstanding that the requirement is both inconvenient and pointless.

It is inconvenient, because it forbids the noncitizen to keep in a safe place documents that are both tremendously important and difficult to replace—replacing a lost or stolen green card, as of this writing, costs $450 and takes the better part of a year.[140] And it is pointless, because absent a universal carry requirement—one extending to citizens as well as noncitizens—we learn nothing from the fact that an individual is not carrying immigration documents on his person.[141] That person might be a citizen, who by law need carry none; or a lawful permanent resident who has failed to carry his; or someone present here by permission of the U.S. government who has been issued no documents to carry.

Why do we do it, then? I would argue that our requirement that noncitizens carry papers fits well into a larger historical practice of imposing such requirements on people in some manner outside our circle of citizenship—on free blacks before the Civil War, on Chinese under the 1892 Geary Act, on (racialized) vagrants under the stop-and-identify laws of the 1970s. Free blacks, the Supreme Court told us in *Dred Scott*,[142] were not citizens. Chinese immigrants were not citizens (and could not be). Aliens, tautologically, are not citizens—and Communists, the other real target of the 1940 and 1952 requirements, were "of necessity" not American. We imposed carry requirements in all of those cases in order to maximize state control over the persons of the "other," over those we considered outside our circle of belonging.[143]

The foundational aspect of identity cards, writ large, is that they connect one's physical body with a government database.[144] Without a requirement that persons carry identity papers, a law enforcement officer encountering an anonymous citizen has no access to the database-stored information that would provide basis for arrest. With such a requirement, that information is visible to the officer, and it puts the holder's body at risk. The government, after all, may have an extensive collection of information about me in its files, but what connects that (perhaps incriminating) information to me in a way that allows the government to arrest me, to deport me, to exercise its

(including a list of other cases).

140. *See* Morawetz and Fernandez-Silber, *supra* note 28, at 181 n.210. The chart for "NBC Processing Times" at https://egov.uscis.gov/cris/processTimesDisplayInit.do, when accessed on 3/22/2015, showed that the National Benefits Center had not completed any replacement applications filed after 7/16/2014.

141. *See supra* note 37.

142. 60 U.S. 393 (1857).

143. *See* Weinberg, *supra* note 2, in which I discuss this question at more length.

144. *See id.*

authority on my physical body? The answer comes when I hold in my hand, and display to law enforcement, an identification card containing my database pointer.[145] In the context of antebellum free blacks, of Chinese under the Geary Act, of the Communists against whom the Smith Act was directed, the requirement to carry and display identification was about showing a document that linked the holder to a dataset that told law enforcement officers whether they wanted to enslave, detain, arrest, or deport him. It was about maintaining state control over outsiders, people who were suspect, people who needed to be watched.[146]

But this would be a good time, perhaps, to recognize that we do badly to treat immigrants as an "other" to be controlled. Our constitutional law rightly downplays the distinction between citizen insider and alien outsider; it emphasizes that everyone in this country—citizen or alien, insider or outsider—is entitled to basic constitutional protections.[147] "[W]e live under a Constitution," said Alexander Bickel, "to which the concept of citizenship matters very little, that prescribes decencies and wise modalities of government quite without regard to the concept of citizenship."[148]

We in this country could not manage without the eleven million people currently here without status, any more than we could without the forty million foreign-born current residents here in any status. Of necessity, they constitute part of our society; we owe them, as we owe ourselves, "decencies and wise modalities of government."[149] In seeking to militarize the border, in handing noncitizens identification cards that they must carry and display, we divide us from ourselves. If we are to reform our immigration system and solve the problems that have left millions of people without legal identity, a good first step would be to reconsider rules that treat all noncitizens as the objects of state force

145. *See id.*

146. *See id.*

147. *See* Wong Wing v. United States, 163 U.S. 228 (1896); Yick Wo v. Hopkins, 118 U.S. 356 (1886); *but see* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (plurality opinion). The Fourth Amendment directs its protection to "the people" rather than "persons," and should be read to apply extraterritorially only to "persons who are part of [the U.S.] national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 283 (holding that the defendant—who was arrested in his Mexico home and involuntarily brought to the United States, and therefore had "no voluntary attachment to the United States"—did not fall in that category); United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011), cert. denied, 132 S. Ct. 1969 (2012).

148. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 53–54 (1975). To be sure, the case law does not point all in one direction. Justices have often extolled the transcendent importance of citizenship. *See, e.g.*, Afroyim v. Rusk, 387 U.S. 253, 268 (1967). It remains the case, though, that the Constitution makes little turn on a person's citizenship status without more, and limits the ways in which the democratic process can attach consequences to a person's citizenship. *Compare* Graham v. Richardson, 403 U.S. 365 (1971), *and* Plyler v. Doe, 457 U.S. 202 (1982), *with* Mathews v. Diaz, 426 U.S. 67 (1976).

149. Bickel, *supra* note 148, at 54.

and state policing.