
Immigration Law and the Myth of Comprehensive Registration

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This Article identifies an insidious misconception in immigration law and policy: the myth of comprehensive registration. According to this myth — proponents of which include members of the Supreme Court, federal and state officials, and commentators on both sides of the immigration federalism debate — there exists a comprehensive federal alien registration system; this scheme obligates all non-citizens in the United States to register and carry registration cards at all times, or else face criminal sanction.

In truth, no such system exists today, nor has one ever existed in American history. Yet, federal agencies like U.S. Border Patrol refer to such a system to justify arrests and increase enforcement statistics; the Department of Justice points to the same mythic system to argue statutory preemption of state immigration laws (rather than confront the discriminatory purpose and effect of those laws); and, states trot it out in an attempt to turn civil immigration offenses into criminal infractions. Although this legal fiction is convenient for a variety of disparate political institutions, it is far from convenient for those who face wrongful arrest and detention based on nothing more than failure to carry proof of status. Individuals in states with aggressive “show me your papers” immigration laws or under the presence of U.S. Border Patrol are particularly at risk.

In an effort to dispel this dangerous misconception, this Article reviews the history of America’s experimentation with registration laws and the

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ultimate dissolution of each of these efforts. It describes the true state of registration today, dissecting the requirements imposed by federal law. Finally, it calls for a moratorium on enforcement of the registration laws and concludes that, going forward, the project of registration should be abandoned in light of contemporary values and resource constraints.

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INTRODUCTION

In 1940, Congress passed the Alien Registration Act, an ambitious wartime registration law designed to identify and expel political subversives from the United States.¹ The Act required virtually all non-citizens to register and be fingerprinted with the federal government.² It gave rise to an expansive new federal bureaucracy to perform registrations at post offices around the nation, centralize data, and provide receipt cards to more than 4.9 million registrants.³ Political support for alien registration continued into the Cold War and, in 1952, Congress put into effect a new provision requiring all registrants to carry their registration receipt cards at all times.⁴

While this historical episode has been mostly forgotten, the registration campaign of 1940 continues to cast a shadow on immigration law and policy. To this day, non-citizens in the United States face criminal arrest at the hands of both state and federal officials who believe a comprehensive registration scheme endures, which enables and requires all non-citizens to carry documents at all times.⁵

¹ See Alien Registration Act of 1940, Pub. L. No. 76-670, ch. 439, 54 Stat. 670, 670 (repealed 1952).

² See *id.* §§ 30–36, 54 Stat. at 673–75.

³ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-188, HOMELAND SECURITY: INS CANNOT LOCATE MANY ALIENS BECAUSE IT LACKS RELIABLE ADDRESS INFORMATION 31 (2002), available at <http://www.gao.gov/assets/240/236397.pdf> (noting 4,921,452 aliens registered); *News and Notes*, 46 AM. J. SOC. 377, 381 (1940) (describing new bureaucracy).

⁴ See Immigration and Nationality (McCarran-Walter) Act of 1952, Pub. L. No. 82-414, § 264, 66 Stat. 224, 224–25 (codified at 8 U.S.C. § 1304).

⁵ According to U.S. Border Patrol officials, such non-citizen arrests are justified where “agents encounter individuals who are not in possession of required identification documents.” Brian S. Hastings, *Another Voice: Agency Doesn't Pay for Arrests, Allow Racial Profiling*, BUFFALO NEWS (Feb. 26, 2013, 12:01 AM), http://www.buffalonews.com/20130226/another_voice_agency_doesn_x2019_t_pay_for_arrests_allow_racial_profiling.html. Federal prosecutors presume non-citizens who cannot produce a registration document are subject to arrest for entry without inspection or failure to register. See U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL, TITLE 9 CRIMINAL RESOURCE MANUAL § 1918 (1997) [hereinafter CRIMINAL RESOURCE MANUAL], available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01918.htm. They have used this logic to justify arrests of non-citizens for failure to carry registration documents. See *United States v. Moya-Matute*, 735 F. Supp. 2d 1306, 1345–46 (D.N.M. 2008). Architects of state immigration laws have made similar claims. See, e.g., OFFICE OF GOVERNOR JANICE K. BREWER, COMMON MYTHS AND FACTS REGARDING SENATE BILL 1070, available at <http://www.azgovernor.gov/documents/BorderSecurity/SB1070MythsandFacts.pdf> (defending Arizona's immigration law on grounds that federal criminal law already required aliens to register and carry paperwork); Kris W. Kobach, *Why Arizona Drew a Line*, N.Y. TIMES, Apr. 28, 2010, at A31 (“[S]ince 1940, it has been a federal crime for aliens to fail to keep such registration

In truth, no such scheme exists. The federal government abandoned comprehensive alien registration shortly after World War II and today's laws exempt vast numbers of nonimmigrant aliens from any obligation to register, carry documents, or both. Tellingly, when the federal government does perceive a need to collect information about non-citizens (as it did after the September 11 attacks) it does so via highly controversial "special registration" procedures.⁶

The belief in a comprehensive registration system has nonetheless had radiating effects on immigration policy, legal doctrine, and political discourse. The resurgence of state immigration legislation since 2000 has prompted vigorous debate over the propriety of "immigration federalism;"⁷ however, all sides of that debate have subscribed to the legal fiction of comprehensive registration.⁸ This much was made clear in

documents with them. The Arizona law simply adds a state penalty to what was already a federal crime.").

⁶ See Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584 (Aug. 12, 2002) (codified as amended at 8 C.F.R. pts. 214 & 264) (instituting "special registration" for entering and departing nonimmigrants, also known as National Security Entry-Exit Registration System ("NSEERS")).

⁷ See, e.g., Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2093 (2013) (defending structural preemption arguments); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 791-92 (2008) (arguing the Constitution "allow[s] for shared authority" between states and federal government).

⁸ Immigration "nationalists" argue federal law statutorily preempts state immigration laws, relying on *Hines v. Davidowitz*, 312 U.S. 52, 68-75 (1941), for the proposition that the nation's registration regime is "comprehensive." See Gulasekaram & Ramakrishnan, *supra* note 7, at 2088-89 (describing statutory preemption arguments). Federalists contend "redundant" state enforcement of comprehensive federal registration laws should pose no preemption issue. See Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 32-34 (critiquing the Supreme Court's rejection of Arizona's redundant enforcement of registration laws). There has been almost no critique of the extent to which both sides in the immigration federalism debate assume the same legal fiction when it comes to registration. For a rare discussion of the narrower scope of the alien registration laws, see Gabriel J. Chin, Carissa Byrne Hessick, Toni Massaro & Marc L. Miller, *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47, 52 (2010), which suggests that few intended defendants of the Arizona law would have violated federal registration laws. Various other scholars have questioned the relevance of the federalism debate generally, arguing state immigration laws should be challenged on civil rights or Fourth Amendment grounds. See, e.g., Kristina M. Campbell, *(Un)Reasonable Suspicion: Racial Profiling in Immigration Enforcement After Arizona v. United States*, 3 WAKE FOREST J.L. & POL'Y 367 (2013) (arguing current immigration policies run afoul of the Fourth Amendment); Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 577-79 (2012) (describing federal government's choice to litigate case on preemption rather than nondiscrimination grounds); Lucas Guttentag, *Discrimination, Preemption, and*

Arizona v. United States, where the Supreme Court embraced the expansive depictions of the nation's alien registration scheme put forward by both parties to the case.⁹ According to the Court, federal registration law, which it deemed "comprehensive," statutorily preempted state-level penalties for violations of federal registration law.¹⁰

The myth of comprehensive registration also informs contemporary political discourse. As Congress works on developing new immigration policy, some call for the institution of a new form of status based on "registration" as a provisional immigrant.¹¹ Meanwhile, those opposed to comprehensive reform have proposed ratcheting up enforcement of the existing registration laws, questioning the authority of the federal

Arizona's Immigration Law: A Broader View, 65 STAN. L. REV. ONLINE 1 (2012) (discussing how the federal government's challenge to Arizona law solely on preemption grounds obscured other arguments against that law's constitutionality, such as discriminatory purpose).

⁹ Compare Brief for Petitioners at 9, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 416748, at *9 ("[T]he INA requires almost all aliens present in the United States for longer than 30 days to apply for registration documents verifying their lawful status, and to carry those documents at all times." (citation omitted)), and *id.* at 49 ("[Federal law] require[s] registration and the carrying of registration papers."), with Brief for the United States at 2, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 939048, at *2 ("The INA includes a comprehensive scheme for the registration of aliens . . . Subject to certain exceptions, aliens are required to register upon (or before) entering the United States. An alien is given a registration document 'in such form and manner and at such times as shall be prescribed under regulations issued by the [Secretary].' Willful failure to register as required, or (for adults) failure to carry a registration document after receiving it, is a federal misdemeanor." (citations omitted)). This was not the first time that the Supreme Court presumed that the registration laws mean that nonregistrants are committing a crime. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1047 n.3 (1984) (plurality opinion) (stating that one of the respondents had committed a crime by failing to register (citing 8 U.S.C. § 1325)).

¹⁰ See *Arizona v. United States*, 132 S. Ct. 2492, 2502-03 (2012) (noting that while "[t]he present regime of federal regulation is not identical to the statutory framework considered in *Hines* [a 1941 case] . . . it remains comprehensive. Federal law now includes a requirement that aliens carry proof of registration. 8 U.S.C. § 1304(e) . . . Aliens who remain in the country for more than 30 days must apply for registration and be fingerprinted. . . . Under federal law, the failure to carry registration papers is a misdemeanor").

¹¹ See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. §§ 2101-2111 (as passed by Senate, June 27, 2013); DONALD M. KERWIN & LAUREEN LAGLAGARON, MIGRATION POLICY INST., STRUCTURING AND IMPLEMENTING AN IMMIGRANT LEGALIZATION PROGRAM: REGISTRATION AS THE FIRST STEP 1 (2010), available at <http://www.migrationpolicy.org/sites/default/files/publications/legalization-registration.pdf> (arguing comprehensive immigration reform should entail "a broad legalization program" and "begin with an initial registration process that rapidly identifies and vets applicants").

government to choose not to enforce federal immigration laws, including the registration laws.¹² There is also bipartisan consensus for increasing the number of federal officers in border communities.¹³ Border patrol officers routinely avail themselves of federal registration laws to detain and arrest individuals they believe to be non-citizens who are unable to present “papers,” a practice that results in wrongful arrests of citizens, tourists, students, and others.¹⁴

As enforcement pressures build on the federal government, courts, politicians, and agencies are simply wrong with respect to the critical question of what the registration statutes and regulations require and how they operate in practice. Why have so many diverse institutional actors succumbed to this legal fiction? One explanation is that commentators rely on vestigial language in the U.S. Code, dating back to 1940, while ignoring more recent statutory and regulatory amendments which over time relieved the majority of non-citizens from the registration and carry requirements.¹⁵ Historical amnesia, too, has been to blame. For over a century, the United States has experimented with, and then rejected, alien registration schemes; the same is true of the system set up in 1940.¹⁶

¹² See Jon Feere, *Rubio: Amnesty Needed to Identify Illegals — But Law Already Requires Registration*, CTR. FOR IMMIGRATION STUDIES (Apr. 26, 2013), <http://www.cis.org/feere/rubio-amnesty-needed-identify-illegals-law-already-requires-registration> [hereinafter *Rubio*] (“Sen. Rubio could demand that the Obama administration enforce 8 U.S.C. § 1302, ‘Registration of Aliens’, which makes it ‘the duty of every alien’ to register their presence in the United States if they remain here 30 days or longer. . . . [Instead, he] appears to have fallen into President Obama’s trap. The Obama administration refuses to enforce immigration laws and then points to the resulting illegal immigration as a reason for amnesty.”).

¹³ The Senate, for example, has proposed funding for 3,500 additional Border Patrol officers and National Guardsmen. See Alan Gomez, *Border Enforcement in Immigration Bill Raises Questions*, USA TODAY (Apr. 17, 2013, 8:16 PM), <http://www.usatoday.com/story/news/politics/2013/04/17/senate-immigration-border-security/2091381>.

¹⁴ Federal border patrol agents routinely arrest people for failure to carry registration papers. See ANNA SCHOENFELDER, NATASHA RIVERA SILBER & NANCY MORAWETZ, *UNCOVERING USBP: BONUS PROGRAMS FOR UNITED STATES BORDER PATROL AGENTS AND THE ARREST OF LAWFULLY PRESENT INDIVIDUALS* 9 (2013) [hereinafter *UNCOVERING USBP*], available at <http://familiesforfreedom.org/sites/default/files/resources/Uncovering%20USBP-FFF%20Report%202013.pdf> (describing agency’s internal documents that detail wrongful arrests).

¹⁵ See discussion *infra* Part I (describing ways in which courts, politicians, and law enforcement officials interpret the nation’s registration laws by reference to the 1940 statute without taking into account administrative realities and regulatory enactments).

¹⁶ See discussion *infra* Part I (narrating the history of alien registration in the United States).

More fundamentally, the myth of comprehensive registration serves a range of (sometimes competing) institutional interests. Federal agencies like U.S. Border Patrol (“USBP”) subscribe to the myth to justify arrests and increase enforcement statistics; the Department of Justice points to the same myth to argue statutory preemption of state immigration laws rather than confront the discriminatory purpose and effect of those state laws and the federal government’s own improper use of registration laws as a pretext for arrest; and states trot it out in an attempt to turn civil immigration offenses into criminal infractions.¹⁷ Although this legal fiction is convenient for a variety of political institutions, it is far from convenient for those who face wrongful arrest and detention based on nothing more than failure to carry proof of status. Individuals in states with aggressive local immigration laws or under the presence of USBP are particularly at risk.¹⁸

This Article attempts to dispel the dangerous myth of comprehensive registration. It proceeds as follows: Part I provides a brief history of registration. It reveals alien registration in the United States to be fundamentally crisis-driven and episodic, with national panics over “yellow peril,” lurking “fifth columns,” Communists and Trotskyists, and, most recently, terrorists, each producing schemes for the registration of non-citizens. These schemes, including the 1940 campaign, were all discarded once their triggering crises faded. While a costly registration apparatus seemed prudent in light of the exigencies of World War II, the nation ultimately balked at funding a system that strained the budget, created diplomatic tension, and gave rise to civil rights concerns.

Part II then contrasts the reality of alien registration today with its mythic depictions in public discourse. It begins by dissecting the laws and regulations governing registration, arguing that no functional registration system currently exists and that vestigial registration and carry laws apply, if at all, only to lawful permanent residents and selected nonimmigrant groups. It then explores the manifestations of the myth in immigration enforcement, legal doctrine, and public discourse.

¹⁷ See discussion *infra* Part II.B (describing manifestations of the myth in immigration enforcement and politics).

¹⁸ This population is sizeable, as Border Patrol officers operate within 100 miles of the border where two-thirds of Americans reside. See, e.g., *Are You Living in the Government’s “Border” Zone?*, AM. CIVIL LIBERTIES UNION, <http://www.aclu.org/national-security/technology-and-liberty/are-you-living-constitution-free-zone> [hereinafter *Border Zone*] (analyzing demographic data to determine proportion of U.S. population living within 100 miles of land or sea border).

Part III considers the future of alien registration in the United States. It begins by calling for a moratorium on enforcement of the registration laws, which results in wrongful arrests and racial profiling. It then asks what a viable registration scheme with a carry requirement might look like and whether such a regime would be politically viable or desirable in light of contemporary values. Ultimately, it concludes that while the federal government could construct a robust registration apparatus, Americans would likely balk at its costs, both economic and social, as they have over the course of U.S. history. Moreover, alien registration should not be pursued because such schemes have historically proven unjustifiably dangerous to ethnic and political minorities. While a universal system of registration for citizens and non-citizens alike might address this concern, Americans have, for decades, rejected proposals for such a system.

I. ALIEN REGISTRATION IN THE UNITED STATES: A HISTORY

This section takes stock of the early alien registration campaigns that occurred in the United States between 1798 and 1940: the Naturalization Act of 1798, Chinese Exclusion laws, the registration of “alien enemies” during World War I, and the Alien Registration Act of 1940. It then narrates the demise of the 1940 registration system in the postwar period.

A. *Early Models: 1798–1940*

The federal government has experimented with alien registration laws a number of times over the course of American history. Registration schemes were part of the Naturalization Act of 1798, the notorious Chinese Exclusion laws of the late 19th century, the nation’s World War I-era regulation of “alien enemies,” and the fight against foreign-born subversives during World War II. Examination of these regimes lays bare frequent claims made about the nation’s contemporary registration system. The sort of “broad-based” (in the sense of applying to all or virtually all non-citizens) registration requirement presumed to exist today has only been successfully imposed once — as part of the sweeping Alien Registration Act of 1940. All other successful registration schemes have been “targeted” in nature, requiring specific subgroups (generally based on country of origin) to register. Moreover, registration laws have been very rarely designed to provide status-specific documentation to non-citizens that must be carried at all times. This history also shows the tremendous costs of alien registration: diplomatic conflict, budgetary strain, and threats to civil rights. Citizens

too are often ensnared, as officials are forced to determine, on the spot, who is a non-citizen (subject to registration obligations) and who is not — an impossible task in a diverse nation like the United States. Given these realities, the nation has typically rejected alien registration in times of peace, as it did after World War II.

1. The Naturalization Act of 1798

The nation's complicated relationship with alien registration stretches back almost to the founding. The Naturalization Act of 1798, which increased the length of time residents had to live in the United States before they could become citizens, also established a nascent system of alien registration.¹⁹ All aliens arriving into the United States were required to report to a designated officer within forty-eight hours of arrival and, thereafter, to obtain a certificate of registry.²⁰ Those already residing in the country were required to register within six months.²¹ Failure to register was punishable by fine.²²

This early, broad-based registration system was short-lived. A few years after passage of the 1798 Act, a newspaper described the registration requirements as a failure, having “been disregarded both by aliens themselves and by the magistrates of places in which they resided.”²³ Apparently, the threat of deportation deterred immigrants from calling themselves to the government's attention by filing declarations of intent to become citizens.²⁴ In response, Congress eliminated the legal requirement that all aliens register in 1802.²⁵ The registration scheme of 1798 presaged an important lesson for federal officials. Unauthorized immigrants were unlikely to comply with registration obligations if deportation was a likely result. This was especially true when non-citizens could escape detection by blending in with the citizen population. Future registration regimes would deal

¹⁹ Naturalization Act of 1798, ch. 54, §§ 1, 4, 1 Stat. 566, 566-68 (repealed 1802); see also SUSAN F. MARTIN, *A NATION OF IMMIGRANTS* 78-79 (2011).

²⁰ See §§ 4, 6, 1 Stat. at 566-69 (1798) (noting certificates were to serve as mandatory evidence in later naturalization proceedings).

²¹ *Id.* § 4, 1 Stat. at 567-68.

²² *Id.* § 5, 1 Stat. at 568 (1798) (noting those who failed to register could also be compelled to give surety for future behavior).

²³ GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 41 (1996) (quoting FRANK G. FRANKLIN, *THE LEGISLATIVE HISTORY OF NATURALIZATION IN THE UNITED STATES* 107 (1906)).

²⁴ *Id.*

²⁵ Naturalization Act of 1802, ch. 28, § 5, 2 Stat. 153, 155 (repealing all previously enacted immigration laws, including those governing registration).

with this problem by either targeting a readily identifiable subset of the non-citizen population, or encouraging those without status to register with the promise of legalization.

2. Chinese Registration

The first effectual registration system in the United States was implemented as part of the infamous Chinese exclusion laws of the 19th century. Chinese laborers, who had come to the United States in large numbers after 1850, faced increasing hostility following completion of the Central Pacific Railroad and as gold mines of the West dried up.²⁶ Amidst this tension, Congress passed a series of increasingly stringent immigration restrictions, beginning with the Chinese Exclusion Act of 1882.²⁷ The Act of 1882 denied citizenship to all Chinese immigrants and instituted a ten-year moratorium on Chinese labor immigration. It also gave rise to an elaborate system for registering members of the Chinese population.²⁸ Chinese “laborers” already present in the United States had to obtain “return certificates” prior to traveling abroad.²⁹ Each certificate contained the name, age, occupation, last place of residence, personal description, and other “facts of identification” of the person to whom it was issued; this same data was logged in corresponding registry books to be kept at customs houses, so that registered laborers could later be identified for readmission.³⁰

Congress continued to expand Chinese registration system after 1882.³¹ In 1892, it passed the Geary Act, which made it the duty of all

²⁶ See generally Kitty Calavita, *The Paradoxes of Race, Class, Identity, and “Passing”: Enforcing the Chinese Exclusion Acts, 1882–1910*, 25 LAW & SOC. INQUIRY 1 (2000) (noting Chinese immigrants were cast as racially inferior and threats to the nation’s security, public health, and moral fiber).

²⁷ See Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 58–61, *repealed by* Act of Dec. 17, 1943, Pub. L. No. 78-199, § 1, 57 Stat. 600, 600-01.

²⁸ See Calavita, *supra* note 26, at 20 (noting prior to “routinization of passports as identification for travelers,” the federal government constructed, for the first time, “an elaborate system of registration, certification and identification” to monitor and control Chinese immigration (citations omitted)).

²⁹ § 4, 22 Stat. at 59–60 (1882).

³⁰ These certificates were designed to serve as *prima facie* evidence of the right to return, subject to Congress’s substantive elimination of any right in subsequent laws. See *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (upholding exclusion of Chinese resident who had traveled despite possessing return certificates). Immigration inspectors retained authority to deny admission even to those with certificates. See Calavita, *supra* note 26, at 24 & n.18 (noting inspectors maintained “discretion to ferret out imposters”).

³¹ Amendments passed in 1884 required special return certificates of those who had immigrated as “non-laborers.” Act of July 5, 1884, ch. 220, § 15, 23 Stat. 115, 115-16,

Chinese “laborers” in the United States to apply for and carry a “certificate of residence.”³² Chinese laborers who did not apply for a certificate, or were denied a certificate, were presumed subject to summary deportation.³³ Those found without a certificate were subject to arrest and deportation unless they could show membership in an exempt class or good cause for failing to register or carry documents.³⁴

Chinese registration was the quintessential “status-based” system.³⁵ In essence, anyone who registered, whether or not technically obligated to, was applying for proof that he or she already had lawful status (i.e., because he or she had entered prior to the 1882 moratorium on labor immigration or was part of an exempt class).³⁶ Registrants then received cards that served as proof of registration as well as proof of lawful status.³⁷ All others were subject to the presumption of deportability. But while, on its face, the Geary Act was limited to Chinese laborers, it admitted to affecting a much broader demographic. The Act provided that any Chinese in the “non-laborer” class, such as merchants or students, could apply for certificates of registration.³⁸ This option, no doubt, was made available in recognition of the reality that those not

118 (amending section 15 of the Chinese Exclusion Act to apply to “all subjects of China and Chinese, whether subjects of China or any other foreign power”).

³² Geary Act, ch. 60, § 6, 27 Stat. 25, 25 (1892). The Geary Act also extended the Chinese Exclusion Act for an additional ten years. *Id.* 27 Stat. at 25 (1892).

³³ See § 6, 27 Stat. at 25-26. Once arrested, the statute required that the Chinese laborer support his claim to status through at least one non-Chinese witness and placed the burden of proof upon the person arrested. *Id.* Any Chinese person who entered as a laborer after 1882 was ineligible to register and was subject to deportation. See *Ng Gun Yow v. United States*, 131 F.2d 325, 326 (10th Cir. 1942) (noting it was doubtful whether a person who entered unlawfully after 1882 as laborer could obtain certificate).

³⁴ See § 6, 27 Stat. at 25-26.

³⁵ Another bill that circulated but was rejected had proposed a system of universal registration of all Chinese in the United States. See LUCY SALYER, *LAWS HARSH AS TIGERS* 86 (1995) (describing Congressman Morrow’s proposal).

³⁶ Both Congress and administrators tightened the meaning of the exempt classes over time and cast more and more individuals into the prohibited class of laborers. See Calavita, *supra* note 26, at 16-18 (describing tightening of requirements to qualify as a merchant).

³⁷ C.S. HAMLIN, LETTER FROM THE ACTING SECRETARY OF THE TREASURY ON ENFORCEMENT OF THE GEARY LAW, H.R. EXEC. DOC. NO. 10, at 11 (53d Cong., 1st Sess. 1893) (describing information on certificate of proof of registration); Trish Hackett Nicola, *The Wong Family of Buffalo and the Chinese Exclusion Act*, W. N.Y. HERITAGE, Fall 2012, at 18, 24 (describing certificate as four by nine inches and made of sturdy paper, with a photograph).

³⁸ H.R. EXEC. DOC. NO. 10, at 11 (“[A]ny Chinese person other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right may apply for and receive the same without charge.”).

required to register were nonetheless vulnerable to arrest based upon the appearance of Chinese ancestry.³⁹

The initial registration of “laborers” under the Geary Act took place through May of 1894.⁴⁰ There was no financial cost associated with compliance.⁴¹ By the end of 1894, 106,811 persons of Chinese background had registered.⁴² After this initial drive, the federal government continued to issue certificates to persons of Chinese background who sought to travel or to obtain proof of their status.⁴³

Chinese registration would prove the nation’s first and only long-term experiment with an alien registration and carry requirement, continuing in force until its repeal in 1943.⁴⁴ Its durability was in no small part the result of the same racially discriminatory impulses that gave rise to Chinese registration in the first place. Unlike the broad-based system attempted in 1798, the burden of the Chinese registration system was borne by a subset of the population.⁴⁵ Moreover, members of this politically marginalized population were readily identifiable (at least in the minds of immigration officials), making racial targeting all the more feasible.⁴⁶ Because the law imposed no similar burden on most

³⁹ Ultimately, it was accepted that all persons of Chinese descent should bear the burden of proving lawful status. See *Louie Dai v. United States*, 238 F. 68, 73 (3d Cir. 1916) (“[T]he statute places upon Chinese persons generally the burden of proving their lawful right to be in this country . . .”).

⁴⁰ Chinese immigrants strongly opposed registration and brought litigation against the Geary Act. See SALYER, *supra* note 35, at 46-47 (describing legal challenges). Ultimately, the Geary Act was upheld in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

⁴¹ See *Chin Bow Hon v. United States*, 44 F.2d 299, 300 (6th Cir. 1930) (noting “the cost of registration was nothing”).

⁴² REPORT OF THE COMMISSIONER OF THE INTERNAL REVENUE SERVICE FOR THE FISCAL YEAR ENDED JUNE 30, 1894, H.R. EXEC. REP. NO. 4, at 24 (53d Cong., 3d Sess. 1894).

⁴³ See, e.g., DEP’T OF COMMERCE & LABOR, BUREAU OF IMMIGRATION & NATURALIZATION, TREATY, LAWS AND REGULATIONS GOVERNING THE ADMISSION OF CHINESE 43-45 (1911) (listing agency regulations on procedures for issuance of certificates).

⁴⁴ Congress repealed the exclusion of Chinese and persons of Chinese descent in 1943. Magnuson Act, ch. 344, 57 Stat. 600 (1943).

⁴⁵ By 1909, the system had been explicitly extended to all persons of Chinese descent when they entered or left the country, even if they were born in the United States. See DEP’T OF COMMERCE & LABOR, BUREAU OF IMMIGRATION & NATURALIZATION, TREATY, LAWS AND REGULATIONS GOVERNING THE ADMISSION OF CHINESE 60 (1909) (providing certificates of identity for all persons of Chinese descent seeking admission or readmission, including U.S. citizens).

⁴⁶ Chinese registration was premised on the supposed identifiability of a suspect class of persons for whom lack of a registration document created a presumption of lack of status. Officials believed that physical traits, such as physical markings and “peculiarities,” would reveal whether a person was a Chinese laborer subject to the

non-Chinese non-citizens and citizens, resistance to the Chinese registration remained relatively contained.⁴⁷

3. World War I and the Interwar Period

With Chinese registration an ongoing project, the federal government instituted another targeted registration project at the start of World War I amidst fears of foreign-born subversive elements.⁴⁸ A series of presidential proclamations defined all non-naturalized U.S. residents who were “natives, citizens, denizens, or subjects of [a] hostile nation or government” as “alien enemies,”⁴⁹ as such, they were subject to rigorous registration requirements.⁵⁰ Alien enemies were required to appear at U.S. Attorneys’ offices, where field agents conducted interviews and performed fingerprinting.⁵¹ Information gathered at these interviews was placed in files created for each alien.⁵² Registrants had to carry registration cards at all times and could not travel or change residence without the advanced permission of the federal government.⁵³ Those who failed to register were threatened with internment.⁵⁴

registration obligation. See Calavita, *supra* note 26, at 21 (describing system’s fixation on cataloging aspects of registrants’ physical appearance).

⁴⁷ At this time, no other non-citizens were subject to a registration requirement in the United States. See *id.* at 21 n.15.

⁴⁸ See generally JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925*, at 234–60 (1995) (discussing widespread fears over subversive elements in the period leading up to World War I).

⁴⁹ See Proclamation of Nov. 16, 1917, 40 Stat. 1716, 1716–18 (1917) (“All alien enemies are hereby required to register at such times and places and in such manner as may be fixed by the Attorney General of the United States . . .”); *id.* at 1718 (authorizing Attorney General to “provide . . . for the issuance of registration cards to alien enemies” and providing that “an alien enemy shall not be found within the limits of the United States, its territories or possessions, without having his registration card on his person” after a date set by Attorney General); see also Proclamation No. 1364, 40 Stat. 1650, 1650 (Apr. 6, 1917) (defining alien enemies).

⁵⁰ See Proclamation of Nov. 16, 1917, 40 Stat. at 1716–18 (requiring all alien enemies to register); *id.* (authorizing Attorney General to “provide . . . for the issuance of registration cards to alien enemies” and imposing carry requirement).

⁵¹ See Adam Hodges, “Enemy Aliens” and “Silk Stocking Girls”: *The Class Politics of Internment in the Drive for Urban Order During World War I*, 6 J. GILDED AGE & PROGRESSIVE ERA 431, 433–34 (2007) (describing enemy alien registration during World War I).

⁵² See *id.* at 433.

⁵³ See *id.* at 433–34 (noting many of over 6,000 alien enemies placed in internment camps between 1917 and 1920 had failed to register).

⁵⁴ See *id.*

According to the Department of Justice, roughly 480,000 alien enemies were registered in 1918.⁵⁵

The registration of alien enemies, which ceased in the wake of hostilities,⁵⁶ differed markedly from predecessor schemes. Unlike Chinese registration, which was designed to give documents to those lawfully present (and deport all others), the alien enemy registration model was designed to create an inventory containing the identities, whereabouts, and activities of certain non-citizens in the United States. Such an inventory was intended to enable the authorities to identify those who were disloyal to the United States during war. Of course, these registration campaigns shared important commonalities as well, with each targeting particular ethnic groups.

The focus on registration of alien enemies during World War I gave way after the war to broader xenophobia and calls for a more expansive alien registration program. Often called the “heyday of nativists,”⁵⁷ the interwar period was marked by the passage of a series of exclusionary immigration laws, including the Act of 1924, which established immigration quotas for each of the nationalities.⁵⁸ These quotas dramatically curtailed immigration and confined it almost entirely to the northern and western European “races.”⁵⁹ Despite their dramatic effect, the quotas did not appease all nativists who grew concerned that thousands of immigrants were entering the country illegally despite the restrictions.⁶⁰ Some proposed a federal alien registration law requiring that all aliens be fingerprinted and forced to carry identification cards; such a registration law could facilitate both the identification of those deemed undesirable immigrants (such as those espousing radical, leftist politics) and those who had entered illegally.⁶¹ According to one

⁵⁵ *Id.* at 434.

⁵⁶ See HIGHAM, *supra* note 48, at 260.

⁵⁷ See Richard W. Steele, *The War on Intolerance: The Reformulation of American Nationalism, 1939–1941*, 9 J. AM. ETHNIC HIST. 9, 10 (1989) [hereinafter *The War on Intolerance*] (describing social anxieties related to the influx of Southern and Eastern Europeans during interwar period).

⁵⁸ See Immigration (Johnson-Reed) Act of 1924, Pub. L. No. 68-139, § 11, 43 Stat. 153, 159-60.

⁵⁹ See Steele, *The War on Intolerance*, *supra* note 57, at 10.

⁶⁰ See *id.* at 10-11 (describing nativist complaints that immigration restrictions failed to deal with subversive potential ascribed to existing foreign-born population).

⁶¹ *Id.* at 11 (noting others called for measures to tighten border). See generally Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 LAW & HIST. REV. 69, 79 (2003) (arguing nativists advocating compulsory alien registration in the interwar period conceived of it as a device to facilitate wide-scale deportation).

prominent nativist, the “registration of incoming aliens [was] a necessity for the enforcement” of the new immigration restrictions and a “necessary prelude to deportation on a large scale.”⁶² He even suggested registration be “extended ultimately to the entire population,” arguing no one could “legitimately take exception to accurate identification.”⁶³

Despite concern about illegal immigration, public opinion remained firmly opposed to nativist proposals for comprehensive alien registration.⁶⁴ As historian Mae Ngai explains, in a diverse nation, alien registration inevitably gave rise to the problem of differentiating citizens from non-citizens.⁶⁵ Many citizens feared that they too would be affected and rejected registration as a threat to all Americans’ right of “free movement, association, and privacy.”⁶⁶ The federal government also opposed nativists’ calls for comprehensive registration, as it considered wide-scale deportation wholly infeasible in light of resource constraints.⁶⁷

4. The Alien Registration Act of 1940

The nation’s resistance to broad-based alien registration faltered in the lead-up to World War II. The start of hostilities in Europe in September of 1939 gave rise to a national panic over the advancement of a so-called “fifth column” — a legion of foreign-born agents planted

⁶² Madison Grant, *America for the Americans*, THE FORUM 346, 354 (1925), available at <http://www.unz.org/Pub/Forum-1925sep-00346>.

⁶³ *Id.* (explaining “universal registration would [also] prove of great eugenical value”).

⁶⁴ See Ngai, *supra* note 61, at 80.

⁶⁵ See *id.* (“The problem of differentiating illegal immigrants from citizens and legal immigrants signified the danger that restrictionists had imagined — to them, illegal aliens were an invisible enemy in America’s midst. Yet their proposed solutions, such as compulsory alien registration and mass deportations, were problematic exactly because undocumented immigrants *were* so like other Americans.”). As one critic described, “if every man who wears a beard and reads a foreign newspaper is to be suspected unless he can produce either an identification card or naturalization papers, we shall have more confusion and bungling than ever.” *Id.* at 79 (citation omitted).

⁶⁶ See *id.* at 80 & n.29 (noting organized labor, which was generally restrictionist, also opposed alien registration on grounds that such information could be used against union activists).

⁶⁷ The Immigration and Naturalization Service (“INS”) made no comprehensive attempt to locate aliens unlawfully in the country during this period, conducting few mass raids nationally and virtually none in the North during the late 1920s and 1930s. Ngai, *supra* note 61, at 80 (citing I.F. Wixon, *Lack of Funds for Deportations: Hearing Before the H. Immigration Comm. on H.R. 3, H.R. 5673, and H.R. 6069*, 70th Cong. 22-23 (1928)).

in the “disguise of immigrants or visitors” plotting to overtake the United States.⁶⁸ In this climate, the Immigration and Naturalization Service (“INS”) began pressing Congress to adopt a system of alien registration that might ascertain information regarding the size, whereabouts, and activities of the non-citizen population.⁶⁹ In June of 1940, after rejecting a similar bill in 1939,⁷⁰ Congress hastily enacted the Alien Registration Act (also known as the “Smith Act”), an ambitious registration law designed to identify and expel political subversives from the United States.⁷¹ Under the Act, virtually all aliens, irrespective of immigration status, were obligated to register and be fingerprinted with the federal government.⁷² The registration requirement covered aliens seeking entry into the United States, as well as non-citizens already in the country.⁷³ Any alien in the United States who remained thirty days or longer was to register and be fingerprinted at a local post office.⁷⁴ Resident aliens were also required to report their current address every ninety days and to notify INS of any change of address within five days.⁷⁵ Failure to register or to comply with address requirements was punishable by fine, imprisonment, or both.⁷⁶

⁶⁸ Francis Biddle, U.S. Solicitor Gen., Address Before the Fifth General Assembly of the Council of State Governments 4 (Jan. 21, 1941) [hereinafter Biddle Address], available at <http://www.justice.gov/ag/aghistorical/jackson/1941/01-21-1941.pdf> (“Many persons have fears that the United States is especially vulnerable to fifth column betrayal because we have a foreign born population that in 1930 numbered over 14,000,000, or about one out of ten of our total. Of these almost 3,400,000 come from Axis countries, and many more from countries now Axis controlled.”).

⁶⁹ See Biddle Address, *supra* note 68, at 4; see also Richard W. Steele, “No Racial”: Discrimination Against Ethnicity in the American Defense Industry, 1940–42, 32 LAB. HIST. 66, 70–72 (1991); *Alien Registry Bill is Signed, With a Warning*, N.Y. HERALD TRIB., June 30, 1940, at 16.

⁷⁰ See *Hines v. Davidowitz*, 312 US 52, 72 (1941) (noting that the 1940 bill that passed Congress did not include many controversial provisions in the original bill from 1939); see also *Aliens to Begin Registering Tuesday, Postoffices Will Be Scenes of a Mass Listing Effort*, N.Y. TIMES, Aug. 25, 1940, at 64.

⁷¹ See Alien Registration (Smith) Act of 1940, Pub. L. No. 76-670, 54 Stat. 670 (codified at 8 U.S.C. § 451) (repealed 1952).

⁷² Foreign government officials and their families were exempted from registration. See *id.* §§ 31(b), 32(b), 54 Stat. at 674 (1940).

⁷³ See *id.* § 30, 54 Stat. at 673 (1940) (“No visa shall hereafter be issued to any alien seeking to enter the United States unless said alien has been registered and fingerprinted in duplicate.”).

⁷⁴ See *id.* § 31(a), 54 Stat. at 673–74 (imposing duty); *id.* § 33(a), 54 Stat. at 674 (1940) (designating post offices as places of registration).

⁷⁵ See *id.* § 35, 54 Stat. at 675 (1940).

⁷⁶ See *id.* § 36, 54 Stat. at 675 (1940) (listing these penalties).

The stated purpose of registration in this period was to facilitate the creation of an “inventory” of all non-citizens in the United States.⁷⁷ With such an inventory, authorities could monitor subversive activities and potentially deport Communists and other political undesirables.⁷⁸ In order to achieve this purpose, full compliance with the registration requirement was needed. To this end, the law incorporated the promise of legalization for unlawfully present immigrants who registered, vesting in the Attorney General broad authority to suspend deportation for registrants.⁷⁹ While those who entered unlawfully could receive such relief, those with ties (at any time) to radical leftist organizations could not.⁸⁰

Federal officials went to great lengths to inform the public about the possibility of legalization for those who registered.⁸¹ In December of 1940, days before the deadline to register, then-Attorney General Robert H. Jackson directed a radio address to non-citizens who feared registering “because of some real or imagined irregularity connected with their entrance into the United States.”⁸² He explained the federal government was aware of the “many illegal entries” that had occurred in “years gone by,” but implored the foreign born to “not risk a deliberate law violation” (failure to register) in order to cover up what

⁷⁷ See Robert H. Jackson, U.S. Attorney Gen., Speech Over the Broadcasting Facilities of the Columbia Broadcasting System Station WJSV: Alien Registration and Democracy 1 (Dec. 21, 1940) [hereinafter Jackson Speech], available at <http://www.roberthjackson.org/files/thecenter/files/bibliography/1940s/alien-registration-and-democracy.pdf> (describing purpose of statute as facilitating the creation of an inventory).

⁷⁸ According to the Alien Registration Act, any alien who, at any time since entering the United States, was a member of or affiliated with any organization advocating the overthrow or destruction of the government was subject to deportation and exclusion. See § 2(a)(3), 54 Stat. at 671 (1940). It explicitly overruled *Kessler v. Strecker*, 307 U.S. 22, 30 (1939), in which the Supreme Court had rejected retroactive application of deportation grounds targeted at past membership in the Communist Party. Later, in *Harisiades v. Shaughnessy*, 342 U.S. 580, 590 (1952), the Court would conclude that the Alien Registration Law permitted retroactive application of deportation based on past membership in the Communist Party.

⁷⁹ See *id.* § 20(c), 54 Stat. at 672 (1940) (allowing for suspension of deportation in cases involving aliens of good moral character if deportation would result in “serious economic detriment” to the alien’s immediate family).

⁸⁰ See *id.* § 20(d), 54 Stat. at 672-73.

⁸¹ See, e.g., 1941 ATT’Y GEN. ANN. REP. 8 (noting the federal government sought and obtained “cooperation of the foreign language press, labor groups, social welfare agencies, and many others who might be influential with the alien population . . . [to convince non-citizens] of the importance of registration as a means of protecting themselves against unwise and often illegal local harassment, as well as the importance of the measure to the Government itself”).

⁸² Jackson Speech, *supra* note 77, at 3.

he termed an “unintentional one” (illegal entry).⁸³ Although failure to register would be harshly punished, he promised non-citizens who complied with the law would “receive all consideration” for suspension of deportation, “reliev[ing] many of the penalties of illegal entry.”⁸⁴ And, he emphasized, registration was for the purpose of inventory formation, not status differentiation.⁸⁵ As he explained, alien registration was no different than the “year-end inventory of assets . . . customary . . . of sound business.”⁸⁶

The creation of such an inventory, as well as the registration of millions of aliens, required the establishment of a sweeping new administrative and regulatory apparatus.⁸⁷ In order to tackle the challenges involved (e.g., developing questionnaires, retrieving data, determining where the records should be located, and devising a system whereby forms might be organized for both statistical and administrative purposes), INS created a new unit, the Alien Registration Division.⁸⁸ It called upon the expertise of other administrative agencies, including the Division of Statistical Research of the Bureau of the Census, to implement the best practices for the maintenance of an up-to-date inventory capable of accounting for the movements of aliens within and into the United States.⁸⁹

⁸³ *Id.*

⁸⁴ *Id.* at 4 (adding while federal government was bound to protect “national welfare . . . it [had] no desire to break up families or homes needlessly”).

⁸⁵ *See id.* at 1.

⁸⁶ *Id.* (“Five days from today the United States of America will complete an inventory of those persons within its borders who are not citizens.”). Contemporary accounts also describe registration during this period as inventory oriented. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 3, at 31 (“In implementing the Alien Registration Act of 1940, INS sought to create an inventory of aliens in the United States to include their locations and to maintain current address information.”).

⁸⁷ *See* William Seltzer & Margo Anderson, *After Pearl Harbor: The Proper Role of Population Data Systems in Time of War* 24 (Mar. 8, 2000) (unpublished manuscript), available at <https://pantherfile.uwm.edu/margo/www/govstat/newpaa.pdf> (noting the size and unprecedented nature of the system required to carry out 1940 law); *see also* Office of Population Research, *Current Items: Alien Registration*, 6 POPULATION INDEX 250, 250-51 (1940) (“A system of registering a large segment of the population of the United States was instituted by the Alien Registration Act. . . . Whatever the primary purpose of the Act, it may prove of importance to students of population by establishing a precedent for non-military registration as well as by providing statistics on non-citizens.”).

⁸⁸ *See generally* *News and Notes*, *supra* note 3, at 381 (noting that the “Immigration and Naturalization Service” was created as a division of the Department of Justice in order to keep registration up to date).

⁸⁹ *See id.* (reporting the Census Bureau loaned out its chief statistician, Calvert L. Dedrick, to consult on technical issues for the Alien Registration Division).

Registration, which began on August 27, 1940,⁹⁰ was free and could be performed at any one of 45,000 local post offices.⁹¹ Non-citizens were required to submit to fingerprinting and to fill out, under oath, registration forms called “AR-2s.”⁹² Once collected, these forms, along with fingerprint cards (“AR-4s”), were organized and centralized. Copies were sent to the FBI to identify aliens with criminal records⁹³ as well as the INS for processing.⁹⁴ Once the INS processed a registration form, it would mail back an Alien Registration Receipt Card (“AR-3”) to the registrant.⁹⁵ This card demonstrated compliance with the law and contained the holder’s name, address, and alien identification number.⁹⁶ It bore no reference to the immigration status of its holder.⁹⁷

⁹⁰ Regulations Governing the Registration and Fingerprinting of Aliens in Accordance with the Alien Registration Act, 1940, 5 Fed. Reg. 2,836, 2,838 (Aug. 14, 1940) (to be codified at 8 C.F.R. pt. 29.3(a)).

⁹¹ *Alien Registration Reaches End Today: Director Issues ‘Final’ Warning on Compliance with Law*, N.Y. TIMES, Dec. 26, 1940, at 19; “I (Have, Have Not) . . .”, TIME, Aug. 12, 1940, at 12, available at <http://content.time.com/time/magazine/article/0,9171,764317,00.html>.

⁹² In addition to the inquiries mandated under the statute, AR-2s required registrants to provide information regarding their race, relatives in the United States, past or pending applications for citizenship, and military service record for the United States or any other country. See *AR2 Form Image Gallery*, U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., <http://www.uscis.gov/history-and-genealogy/genealogy/ar2-form-image-gallery> (last updated Sept. 13, 2013).

⁹³ See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 3, at 31.

⁹⁴ See Regulations Governing the Registration and Fingerprinting of Aliens in Accordance with the Alien Registration Act, 1940, 5 Fed. Reg. at 2,840 (to be codified at 8 C.F.R. § 29.5(a)) (requiring “registration forms and fingerprints . . . be sent promptly by registration officers to the Immigration and Naturalization Service at Washington, D.C.”); *Green Card Background*, AM. IMMIGRATION LAWYERS ASS’N (Apr. 21, 1998), <http://www.aila.org/content/default.aspx?docid=3460>. This was the first time individual files were kept for all aliens admitted to the United States. Coded by an “A” followed by a seven or eight-digit A-number, they became known as A-files. See PAUL WORMSER, NAT’L ARCHIVES, DOCUMENTING IMMIGRANTS: AN EXAMINATION OF IMMIGRATION AND NATURALIZATION SERVICE CASE FILES I (2013).

⁹⁵ See Regulations Governing the Registration and Fingerprinting of Aliens in Accordance with the Alien Registration Act, 1940, 5 Fed. Reg. at 2,840 (to be codified at 8 C.F.R. pt. 29.4(p)) (“The Immigration and Naturalization Service shall, at the earliest practicable date, cause to be delivered to the alien (or his parent or guardian) a receipt of registration (Form AR-3), which shall be evidence of registration.”); see also *id.* (“The alien is under no legal duty or obligation to carry said receipt on his person, and he shall suffer no penalty or disadvantage from failing to do so.”).

⁹⁶ See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 3, at 31; WORMSER, *supra* note 94, at 1.

⁹⁷ See generally *Green Card Background*, *supra* note 94 (noting that both illegal and legal alien residents had to register and obtain AR-3 cards).

The Attorney General soon began exercising the discretion vested in him by the statute to suspend deportations of unlawful entrants.⁹⁸ The regulatory and administrative regime that ultimately rolled out embodied the objectives of Congress when it passed the Alien Registration Act. The system offered the possibility of suspension for unlawful entrants in order to facilitate the registration of all non-citizens, irrespective of status. It also made compliance straightforward and easy, setting up streamlined, status-neutral registration procedures and imposing no obligation that registrants carry proof of registration at all times.

Measured against its objective of obtaining a complete inventory of non-citizens in the United States, the 1940 registration campaign was remarkably successful.⁹⁹ By January 1941, nearly five million non-citizens had registered.¹⁰⁰ By February of 1943, the INS had also received about 1,850,000 notifications of changes of address.¹⁰¹

The nation's experience with registration in 1940 is instructive for several reasons. It demonstrates the amount of federal attention and resources required to run a comprehensive registration system, as well as the importance of providing registrants a pathway to legalization in order to ensure full participation. And, it reveals the inescapable dark side of registration. Despite innocuous descriptions of the registration drive, harsh consequences befell registrants deemed deportable on criminal grounds or as subversives.¹⁰² And, as is often true of registration schemes, ethnic minorities were uniquely affected by registration in the World War II-era. For many Japanese-Americans, registration was the precursor to internment.¹⁰³

⁹⁸ See Ngai, *supra* note 61, at 105 (noting "INS suspended the deportations of several thousand aliens a year from 1941 through the late 1950s").

⁹⁹ See 1941 ATT'Y GEN. ANN. REP. 8 ("For the first time in the history of the United States a Nation-wide inventory of aliens exists. . . . This task was performed by the Immigration and Naturalization Service with the cooperation of the Post Office Department. Approximately 5 million aliens were registered and fingerprinted. . . . [This] was . . . accomplished without serious difficulty or major friction . . .").

¹⁰⁰ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 31.

¹⁰¹ See *id.*

¹⁰² See, e.g., *Ouster Ordered of Claudia Jones: Hearing Officer Finds Her an Alien Who Became Member of Communist Party*, N.Y. TIMES, Dec. 22, 1950, at 13 (describing deportation order under McCarran Act based on evidence of individual's Communist Party membership included in Alien Registration form on December 24, 1940); Robert F. Whitney, *Only 2,971 Enemy Aliens Are Held: Rest of the 1,100,000 Being Watched here Are Unmolested*, N.Y. TIMES, Jan. 4, 1942, at 8E (describing detention of those deemed deportable under the Act).

¹⁰³ Following the bombing of Pearl Harbor on December 7, 1941, President Roosevelt issued a series of presidential proclamations authorizing the detention of

B. *The Demise of Comprehensive Registration: 1944–1990*

Although current discussions treat federal registration laws as static since the 1940s or 1950s, there is a rich history of transformation in the decades following World War II.¹⁰⁴ Almost immediately after the war, regulatory enactments replaced post office registration with a system in which registration became the byproduct of other administrative adjudications, such as the processing of a person's immigration status as they entered the United States. Despite this change, Congress attempted initially to bolster the system by adding a carry requirement for some non-citizens in 1952.¹⁰⁵ However, by 1957, Cold War diplomatic crises ultimately forced a Congressional about-face on the issue.¹⁰⁶ The federal government continued to dismantle the registration regime into the early 1990s.

1. Regulatory Transformation: 1944–1952

The dismantling of the nation's comprehensive alien registration system began almost immediately after World War II. In December of 1944, INS officials decided to eliminate the Alien Registration Division, which had administered post office registration in 1940.¹⁰⁷ According to an agency survey, the Division's functions could be administered more efficiently if integrated into the central office.¹⁰⁸ The elimination of the Division signaled the beginning of a new registration era. Going forward, registration would be incorporated into the agency's general immigration operations. As a result, it would cease to occur via independent procedural mechanisms or serve policy goals distinct from

allegedly dangerous enemy aliens. See Proclamation No. 2525, 6 Fed. Reg. 6321, 6323 (Dec. 10, 1941); Proclamation No. 2526, 6 Fed. Reg. 6323, 6324 (Dec. 10, 1941); Proclamation No. 2527, 6 Fed. Reg. 6324, 6325 (Dec. 10, 1941). On January 14, 1942, Roosevelt ordered re-registration of suspected "enemy" aliens on the West Coast. Proclamation No. 2537, 7 Fed. Reg. 329, 329 (Jan. 17, 1942); see also Travel and Other Conduct of Aliens of Enemy Nationalities, 7 Fed. Reg. 844, 844 (Feb. 10, 1942) (to be codified at 28 C.F.R. pt. 30) (defining persons required to apply as "[a]ll aliens of the age of 14 years or older who were or are natives, citizens, or subjects of Germany, Italy, or Japan."). And, on February 19, 1942, he authorized the removal of both Japanese American aliens and citizens from the West Coast. Exec. Order No. 9066, 7 Fed. Reg. 1407, 1407 (Feb. 19, 1942) (authorizing physical removal of all Japanese Americans into internment camps).

¹⁰⁴ See *infra* Part II.A (describing current interpretations of the nation's registration laws).

¹⁰⁵ See 98 CONG. REC. 4433 (1952) (statement of Rep. Chudoff).

¹⁰⁶ See *infra* Part I.B.2–3 (describing the demise of the registration system).

¹⁰⁷ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 31.

¹⁰⁸ See *id.*

those of the agency. Importantly, it would also occur with dramatically fewer federal employees and resources, resulting in a less efficient, accessible system.

Regulations promulgated by the INS in subsequent years would bear this out. In 1946, the agency eliminated the old rules mandating post office registration.¹⁰⁹ Under new regulations, registration was to occur at ports of entry.¹¹⁰ A series of new documents served as proof of registration under this scheme. These forms, unlike the old AR-3s, reflected the immigration status of their holders. Visitors, for example, were to receive "I-94s,"¹¹¹ while lawful permanent residents were to be given "I-151s" (which became known as "green cards").¹¹² These documents were designed more to communicate an individual's immigration status than to demonstrate compliance with the registration laws.¹¹³ None of the new forms were available to persons without lawful admission status.¹¹⁴ In addition, these new forms were not provided to preferred non-citizens whom the agency chose to exempt, such as Canadian citizens.¹¹⁵ Canadians had no obligation to register, present a passport, or obtain a visa if they visited the United States for less than six months.¹¹⁶ Thus, as early as 1947, there was in fact no universal registration requirement for non-citizens despite the apparent universal language of the statute.¹¹⁷

¹⁰⁹ Compare Regulations Governing the Registration and Fingerprinting of Aliens in Accordance with the Alien Registration Act, 1940, 5 Fed. Reg. 2836, 2838 (Aug. 14, 1940) (to be codified at 8 C.F.R. pt. 29.3(b)) (describing post office registration), with Recording of Arrivals, Departures, and Registrations; Documentary Requirements of Aliens for Entering United States, 11 Fed. Reg. 9982, 9982-83 (Sept. 11, 1946) (to be codified at 8 C.F.R. pt. 108) (detailing registration at ports of entry).

¹¹⁰ See Recording of Arrivals, Departures, and Registrations; Documentary Requirements of Aliens for Entering United States, 11 Fed. Reg. at 9982 (to be codified at 8 C.F.R. pt. 108) (listing newly prescribed registration forms).

¹¹¹ See *id.* at 9983 (to be codified at 8 C.F.R. pt. 108.5) (naming requirements governing nonimmigrant aliens).

¹¹² *Green Card Background*, *supra* note 94.

¹¹³ See Recording of Arrivals, Departures, and Registrations; Documentary Requirements of Aliens for Entering United States, 11 Fed. Reg. at 9982-84 (to be codified at 8 C.F.R. pt. 108.3(b)(3)) (governing immigrant aliens).

¹¹⁴ See *id.* at 9982-83.

¹¹⁵ See Registration and Fingerprinting of Aliens in Accordance with the Alien Registration Act, 1940, 12 Fed. Reg. 5130, 5131 (July 31, 1947) (to be codified at 8 C.F.R. pt. 170.1(m)) (exempting Canadians who visited for less than six months from registration laws).

¹¹⁶ See *id.* at 5143-44 (to be codified at 8 C.F.R. pt. 176) (exempting Canadians who visited for less than six months from presenting a visa at the border).

¹¹⁷ These regulations illustrate that from the start the registration law was understood to incorporate an implied delegation to the Executive to create exceptions

In 1950, the agency officially revoked the AR-3,¹¹⁸ the registration receipt from the 1940 law and one of the last vestiges of the status-neutral system of 1940. Although old AR-3s were grandfathered in as proof of registration,¹¹⁹ their significance was dramatically altered. Non-citizens with permanent lawful status were given the ability to replace their old AR-3s with I-151s.¹²⁰ Those able to “upgrade” had every incentive to do so, as an I-151 indicated the right to live and work permanently in the United States, not just compliance with registration laws. Meanwhile, aliens who applied for a Form I-151, but who could not prove legal status, were subject to prosecution for violating immigration laws.¹²¹ Meanwhile, the regulations kept in place exemptions for preferred groups, meaning that the lack of registration alone was not proof of unlawful status.¹²²

The agency’s post-war regulations dramatically undermined the inventory logic formally governing alien registration by making it

from registration. Other exceptions included: foreign government officials, employees and their families or representatives of international conventions, aliens entering the United States under orders of their government, and laborers imported under a “general or group waiver.” *Id.* at 5131 (to be codified at 8 C.F.R. pt. 170.1(i)). The term “general or group waiver” refers to those admitted under the Bracero program. *See generally* Adam Cox & Cristina Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 485-91 (2009) (providing background on the Bracero program).

¹¹⁸ *See* Registration and Fingerprinting of Aliens in Accordance with the Alien Registration Act, 1940, 15 Fed. Reg. 579, 579-80 (Feb. 2, 1950) (to be codified at 8 C.F.R. pt. 170 (p)) (revoking Form AR-3 and specifying aliens would receive, instead, Forms I-151, I-94, or 257a).

¹¹⁹ *See* Registration of Aliens in the United States: Forms and Procedure, 17 Fed. Reg. 11,532, 11,532 (Dec. 19, 1952) (to be codified at 8 C.F.R. pt. 264.1(a)) (listing AR-3 as evidence of registration).

¹²⁰ *See id.* at 11,534 (to be codified at 8 C.F.R. pt. 264.51(b)) (allowing issuance of replacement Form I-151 to lawful residents whose “original receipt card [was] not prima facie evidence of . . . lawful admission . . . (such as the Form AR-3 or AR-103)”); Registration and Fingerprinting of Aliens in Accordance with the Alien Registration Act, 1940, 15 Fed. Reg. at 580 (to be codified at 8 C.F.R. pt. 170.9(d)) (“[D]istrict director may, if satisfied . . . that the applicant has been lawfully admitted for permanent residence, issue a new receipt card on Form I-151. . . notwithstanding that the [alien’s first registration receipt card] . . . was issued originally on Form AR-3.”).

¹²¹ *See* Registration of Aliens in the United States: Forms and Procedure, 17 Fed. Reg. at 11,534 (to be codified at 8 C.F.R. 264.51(b)) (“If the district director is not satisfied that the application should be granted, he shall deny the application and take whatever action he deems appropriate to the case.”); Registration and Fingerprinting of Aliens in Accordance with the Alien Registration Act, 1940, 15 Fed. Reg. at 580 (to be codified at 8 C.F.R. pt. 170.9(d)) (“If district director is satisfied that a [I-151] should not be issued, he shall deny the application and take whatever action is deemed appropriate under existing laws and regulations.”).

¹²² *See supra* note 120 and sources therein.

impossible for aliens who had entered without inspection to register. This represented a marked change from the 1940 system, under which unlawful entrants were able (and, in fact, encouraged with promise of an opportunity for legalization) to register.¹²³ With unlawful entrants excluded from the agency's databases, registration requirements ceased to be universal or to serve their former inventory function.¹²⁴ Going forward, the nation's registration model would be far more status-oriented. Instead of affirmatively registering via a distinct procedure (designed to create an inventory), non-citizens were expected to fulfill the obligation by applying for some form of immigration status.

2. Statutory Erosion: 1952–1957

Although these early changes were administrative in nature, Congress would eventually reenter the fray. The Immigration and Nationality Act ("INA") of 1952 seemingly bolstered the 1940 registration regime.¹²⁵ By the terms of the statute, all aliens remained obligated to register, as they had since 1940.¹²⁶ However, no accommodation was made for the fact that registration had become far less accessible since 1940, had exempted preferred groups, and had become impossible for those who had entered without inspection. The law also imposed new burdens on non-citizens who registered, adding the requirement that all aliens "registered and fingerprinted" who received an alien receipt card carry

¹²³ See *supra* notes 82–86 and sources therein (discussing speech by Attorney General Jackson encouraging all non-citizens to register, regardless of their immigration status).

¹²⁴ See Recording of Arrivals, Departures, and Registrations; Documentary Requirements for Aliens Entering United States, 11 Fed. Reg. 9982, 9982 (Sept. 11, 1946) (to be codified at 8 C.F.R. pt. 108.2) (listing newly prescribed registration forms, none of which were available to those without lawful immigration status).

¹²⁵ See Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952).

¹²⁶ *Id.* § 261, 66 Stat. at 223 (1952) ("No visa shall be issued to any alien seeking to enter the United States until such alien has been registered and fingerprinted in accordance with section 221(b), unless such alien has been exempted from being fingerprinted as provided in that section."); *id.* § 262(a), 66 Stat. at 224 (1952) ("It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 221 (b) of this Act or section 30 or 31 of the Alien Registration Act, 1940, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days."); *id.* § 264(d), 66 Stat. at 225 (1952) ("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.").

proof of registration at all times.¹²⁷ Failure to do so was a misdemeanor, punishable by both fine and imprisonment.¹²⁸

The carry requirement, which was reminiscent of Chinese registration and the registration of enemy aliens during World War I, represented a “doubling down” on the fiction that a comprehensive registration system still existed in the United States.¹²⁹ It would not take long for this incongruity to be drawn to the fore. Prior to the Act’s passage, critics spoke out against the unnecessarily harsh consequences that would result from what was widely viewed as a draconian carry requirement.¹³⁰ One member of Congress complained that it was common practice for non-citizens to store their registration cards in safe places to prevent loss; and, he quipped, “it would be very difficult for an alien to sit in the bathtub with a piece of soap in one hand and the registration card in the other.”¹³¹ And the requirement soon proved impracticable. According to one newspaper account, a thirty-year-old

¹²⁷ See § 264(d)–(e), 66 Stat. at 224–25 (“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 received card issued to him pursuant to subsection (d).”).

¹²⁸ *Id.* § 264(e), 66 Stat. at 225 (“Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor and shall upon conviction for each offense be fined not to exceed \$100 or be imprisoned not more than thirty days, or both.”). Pursuant to regulations enacted the same year, the carry requirement would attach to “every receipt card, certificate, or other document or paper . . . constituting evidence of alien registration.” *Registration of Aliens in the United States: Forms and Procedure*, 17 Fed. Reg. 11,532, 11,533 (Dec. 19, 1952) (to be codified at 8 C.F.R. pt. 264.1(e)).

¹²⁹ For examples of how this method of “doubling down” was ineffective because comprehensive registration was a fiction, see *Registration of Aliens in the United States: Provisions Governing Special Groups*, 22 Fed. Reg. 4188, 4188–89 (June 14, 1957) (to be codified at 8 C.F.R. pt. 263); *Registration of Aliens in the United States: Provisions Governing Special Groups*, 18 Fed. Reg. 3531, 3531 (June 19, 1953) (to be codified at 8 C.F.R. pt. 263.2); Will Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 338–39 (1956).

¹³⁰ Many considered the INA draconian and contrary to the nation’s foreign policy objectives. See, e.g., PRESIDENTIAL COMM’N ON IMMIGRATION & NATURALIZATION, *WHOM SHALL WE WELCOME: REPORT OF THE PRESIDENT’S COMMISSION ON IMMIGRATION AND NATURALIZATION* 55–56 (1953) (noting discriminatory features of 1952 Act damaged U.S. relationship with countries of Southern Europe); Memorandum from Frederick J. Lawton, Dir., Bureau of the Budget, to President Harry S. Truman (May 9, 1952), available at <http://history.state.gov/historicaldocuments/frus1952-54v01p2/d243> (describing carry requirement as “unnecessary in the first place” and containing a penalty “extremely harsh for the nature of the offense”). Conservatives pushed the law through despite these concerns, and over the veto of President Truman. See HARRY S. TRUMAN, *IMMIGRATION AND NATIONALITY ACT*, H.R. DOC. NO. 82-520, at 1 (1952).

¹³¹ 98 CONG. REC. 4433 (1952) (statement of Rep. Chudoff).

Hungarian woman was expelled from her own naturalization ceremony for leaving her registration card in her car.¹³²

In light of these absurdities, the registration laws soon began to fall into desuetude. Prosecutors largely refused to enforce address reporting requirements under the registration laws. In 1954, U.S. Attorneys declined to bring criminal prosecutions for willful failure to file address reports in 15,000 cases reported to them by the INS; of the 304 prosecutions that were instituted, 159 were dismissed.¹³³ The INS also crafted the regulations implementing the 1952 Act to include exemptions for discrete groups of nationals. The 1953 regulations implementing the 1952 Act exempted visitors from Britain and Canada from registration requirements unless they remained for over six months.¹³⁴ In 1957, the INS exempted agricultural workers on nonimmigrant visas,¹³⁵ thereby removing the farcical obligation that workers in the fields carry documents at all times.¹³⁶

Registration also created serious diplomatic consequences for the nation. In 1952, the United States was the only country in the world that subjected non-citizens from most countries, including relatively short-term visitors, to registration, fingerprinting, and carry requirements.¹³⁷ In the increasingly hostile climate of the Cold War, such a policy stirred significant resentment among foreign nations.¹³⁸ Operating under principles of "reciprocity," many leaders, particularly those of the Soviet Bloc, refused to allow their citizens to be fingerprinted in the United States, meaning they could no longer enter the country.¹³⁹ This standoff soon proved a "major obstacle" to cultural

¹³² See *Lack of Alien Registration Bars Women from Court*, HARTFORD COURANT, Mar. 14, 1953, at 2.

¹³³ Maslow, *supra* note 129, at 339 (citing U.S. DEP'T OF JUSTICE, IMMIGRATION & NATURALIZATION SERV. ANN. REP. 9 (1954)) ("It is accordingly recommended that *failure to comply with the alien registration requirements should not be a ground for deportation.*").

¹³⁴ See Registration of Aliens in the United States: Provisions Governing Special Groups, 18 Fed. Reg. at 3531.

¹³⁵ See Registration of Aliens in the United States: Provisions Governing Special Groups, 22 Fed. Reg. 4188, 4188-89 (June 14, 1957) (to be codified at 8 C.F.R. pt. 263.2).

¹³⁶ See *id.*; see also Admission of Agricultural Workers Under Special Legislation: Temporary Admission of Agricultural Workers, 16 Fed. Reg. 7348, 7350 (July 27, 1951) (to be codified at 8 C.F.R. pt. 115) (describing the process "deemed" to be registration for temporary agricultural workers).

¹³⁷ See 103 CONG. REC. 15,491 (1927) (statement of Sen. Eastland) ("No other country requires fingerprinting.").

¹³⁸ See C.P. Trussell, *House Approves Measure to Ease Alien Hardships: 293-58 Vote on Senate Bill is Seen as Immigration Setback for President*, N.Y. TIMES, Aug. 29, 1957, at 1.

¹³⁹ See *id.*

exchange between the United States and Soviet Union.¹⁴⁰ Many tourists, as well as famed athletes, musicians, and dancers, were unable to visit the United States.¹⁴¹ While individual artists could sometimes find a way around the restrictions, large ensembles like the symphonic orchestra of Czechoslovakia¹⁴² or the Bolshoi ballet could not.¹⁴³

The issue came to a head in 1957 when the Soviet Union, China, Bulgaria, and other nations refused to send athletes to the 1960 Winter Olympics to be held in California.¹⁴⁴ Faced with a burgeoning diplomatic crisis, Congress repealed the compulsory fingerprinting requirement that had “proven so obnoxious to many visitors to [the nation’s] shores.”¹⁴⁵ Under the 1957 amendment to the INA, the Secretary of State and the Attorney General were authorized, “in their discretion and on a basis of reciprocity” to waive fingerprinting “in the case of any nonimmigrant alien” via regulation.¹⁴⁶ A “nonimmigrant” alien was defined as including any alien with “a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure.”¹⁴⁷

Shortly after passage of the 1957 Act, then-Secretary of State John Foster Dulles announced he would waive the registration and fingerprinting requirement for Olympic athletes.¹⁴⁸ The waiver of fingerprinting requirements for nonimmigrant aliens represented a fundamental dismantling of the statutory registration requirement. For the first time, Congress was forced to join the agency and break with the fiction of universal registration and make explicit exceptions for a

¹⁴⁰ *Text of Soviet Note on Cultural Ties*, N.Y. TIMES, Jul. 28, 1957, at 4.

¹⁴¹ *See id.*

¹⁴² *See* Trussell, *supra* note 138, at 1.

¹⁴³ *See Hurok Signs Pact on Soviet Artists: U.S. Impresario to Present Bolshi Ballet if He Can Break Diplomatic Barrier*, N.Y. TIMES, June 28, 1957, at 25.

¹⁴⁴ *See* 103 CONG. REC. 16,543 (1957) (statement of Rep. Vanik) (“It was our Nation’s fingerprinting requirements of cultural exchange visitors which resulted in the cancelation this year of the Cleveland Orchestra’s appearance scheduled in Prague and threatened the conduct of the winter Olympics”); *see also Olympians Relieved by House Bill*, WASH. POST & TIMES HERALD, Aug. 29, 1957, at C1 (describing “headache” caused by fingerprinting requirement as Soviet Bloc nations announced refusal to send teams to Winter Olympics unless requirement was waived).

¹⁴⁵ 103 CONG. REC. 16,303 (1957) (statement of Sen. Keating).

¹⁴⁶ Act of Sept. 11, 1957, Pub. L. No. 85-316, § 8, 71 Stat. 639, 641.

¹⁴⁷ Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(15)(B), 66 Stat. 163, 167 (1952) (current version at 8 U.S.C. § 1101(a)(15)(B) (2012)).

¹⁴⁸ *See* Donald J. Gonzales, *U.S. to Admit Reds for Winter Olympics*, WASH. POST & TIMES HERALD, Sept. 18, 1957, at A3; *U.S. to Ease Way for Red Visitors*, N.Y. TIMES, Sept. 4, 1957, at 6 (reporting end of fingerprinting rule would spur “East-West” exchange).

substantial population of non-citizens known as “nonimmigrant visitors.”¹⁴⁹

The fingerprinting waiver also altered the implications of the carry requirement. As explained above, the carry requirement passed in 1952 applied only to those “registered *and fingerprinted*” under federal law who received a registration receipt.¹⁵⁰ Those not fingerprinted on account of the waiver, such as nonimmigrant aliens, and those not issued a receipt were not bound by the carry requirement.¹⁵¹ After 1957, significant portions of the non-citizen population ceased being subject to the carry requirement. Consistent with this reality, the carry requirement was removed from the Code of Federal Regulations in 1960.¹⁵²

3. Continued Dismantling

Even beyond the fingerprinting waiver triggered by the Olympics diplomacy crisis, 1957 marked a watershed in the history of alien registration. That year, the Supreme Court issued a series of opinions striking blows to alien registration, making it impracticable for its once intended purpose, the deportation of political subversives. *Yates v. United States*¹⁵³ held unconstitutional the convictions of numerous Communist party leaders, distinguishing between advocacy of an idea for incitement and the teaching of an idea as a concept. And in *Rowoldt v. Perfetto*,¹⁵⁴ the Court held that statements made in a registration

¹⁴⁹ See generally § 101(a)(15)(B), 66 Stat. at 167 (describing class of non-citizens not included under term immigrant).

¹⁵⁰ See 8 U.S.C. § 1304(e) (1958) (subjecting to carry requirement only those non-citizens in possession of evidence of registration issued pursuant to subsection (d)); see also *id.* § 1304(d) (providing for the issuance of such evidence only to aliens “registered *and fingerprinted*” under provisions of the Act or under other provisions of Chapter 8 (emphasis added)).

¹⁵¹ See *id.* § 1304.

¹⁵² Compare Registration and Fingerprinting of Aliens in the United States, 25 Fed. Reg. 7180, 7181 (July 29, 1960) (lacking carry requirement provision), with Registration of Aliens in the United States: Forms and Procedure, 22 Fed. Reg. 9805, 9806 (Dec. 6, 1957) (requiring “*Carrying and possession of proof of alien registration*.” The provisions of section 264(e) of the Immigration and Nationality Act shall be applicable to every receipt card, certificate, or other document or paper referred to in this section as constituting evidence of alien registration”).

¹⁵³ 354 U.S. 298, 304, 324-29 (1957) (holding unconstitutional convictions of numerous party leaders and distinguishing between advocacy of an idea for incitement and the teaching of an idea as a concept), *overruled by* *Burks v. United States*, 437 U.S. 1 (1978).

¹⁵⁴ 355 U.S. 115, 120-21 (1957); see also *Watkins v. United States*, 354 U.S. 178, 197 (1957) (holding defendants could use the First Amendment as defense against “[a]buses

interview regarding communist party membership were insufficient to establish the meaningful association necessary to support an order of deportation, and overturned a deportation order that had been premised on such an admission. In light of such precedent, the federal government had increasingly little reason to maintain a costly registration system.

Not surprisingly, in the following decades, alien registration became an administrative backwater, the victim of neglect, and at times, active dismantling by federal authorities. Recall that when post office registration was replaced in 1944 with a scheme contemplating registration at ports of entry, there were only three types of immigration status, the adjudication of which were relatively simple.¹⁵⁵ In 1980, Congress began an expansion of statuses that would ultimately lead to a dramatic expansion of categories.¹⁵⁶ Relatedly, status adjudications grew increasingly complicated and protracted.¹⁵⁷ Meanwhile, federal law increasingly provided non-citizens on nonimmigrant visas with the ability to become lawful permanent residents after arriving in the United States. “Adjustment” of status, which was almost never used in the 1950s, became commonplace.¹⁵⁸

of the investigative process”).

¹⁵⁵ See *supra* notes 109–12 and accompanying text.

¹⁵⁶ Beginning in the 1980s, there was a proliferation of new forms of immigration status available to people already in the United States. See, e.g., Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 107, 114 Stat. 1464, 1474-80 (2000) (codified as amended in scattered sections of the U.S.C.) (protecting victims of human trafficking); *id.* § 1513(a)(2)(A), 114 Stat. at 1533-34 (2000) (protecting victims of certain crimes to encourage their aid in investigation and prosecution of those crimes); Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2193 (1997) (protecting certain asylees from Nicaragua, Cuba, El Salvador, Guatemala, and the former Soviet bloc); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 2024 § 101(a)(15)(S) (establishing visa for alien witnesses and informants); Immigration Act of 1990, Pub. L. No. 101-649, § 153(a), 104 Stat. 4978, 5005-06 (authorizing Attorney General to provide immigrant status to juveniles neglected or abandoned by parents); *id.* § 203(a), 104 Stat. at 5015 (authorizing Attorney General to provide “temporary protected status” to immigrants unable to safely return to home countries because of ongoing crises); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.) (recognizing asylum claims).

¹⁵⁷ See Act of October 3, 1965, Pub. L. No. 89-236, § 10, 79 Stat. 911, 917-18 (establishing labor certification procedures for employment-based visas).

¹⁵⁸ In 1952, adjustment was rarely used. See *Nonimmigrant Business Visas and Adjustment of Status: Hearing Before the Subcomm. on Immigration & Refugee Policy of the S. Comm. on the Judiciary*, 97th Cong. 14 (1981) (statement of Diego Ascencio, Assistant Sec’y for Consular Affairs, Dep’t of State) (noting requirements for original form of adjustment were so stringent they were not used). Adjustment was not available to persons from the Western Hemisphere until 1976. *Id.* at 15. By 1981, the number of

These new realities complicated compliance with the registration requirements in myriad ways. Asylum, for example, was designed for humanitarian purposes and made available to non-citizens who had entered without inspection.¹⁵⁹ Similarly, applicants for status under the Immigration Reform and Control Act of 1986¹⁶⁰ typically would not have presented themselves at the border. In order to give some of these people a way to “register,” the agency began haphazardly adding new types of status applications to the regulations listing prescribed registration forms; however, not all of these new status applications were added to the regulations.¹⁶¹ As a result, non-citizens who had presented themselves to the government were not necessarily considered to have “registered” within the meaning of the statute and regulations. The mismatch of “registration” documents and those treated by the regulations as “evidence of registration” is illustrated by the application for adjustment: while the application itself was deemed registration, those who registered in this way would not, under the

persons granted adjustment or conversion of status was 174, 724. *Id.* at 21. (statement of Doris Meissner, Acting Comm'r, Immigration & Naturalization Serv., Dep't of Justice). Today, the majority of persons who are granted an immigrant visa are first present in the United States and adjust to immigrant status. See RANDALL MONGER & JAMES YANKAY, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, U.S. LEGAL PERMANENT RESIDENTS: 2012, at 2 (2013), available at https://www.dhs.gov/sites/default/files/publications/ois_lpr_fr_2012_2.pdf. Similarly, in 1972 there were less than 500 applicants for asylum status each year and those applications were handled on an ad hoc basis; by the mid-1980s, over 30,000 asylum applications were granted per year. Peter Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 39-40 (1984) (noting between 1972 and 1984 asylum claims granted grew from 500 to 30,000 a year).

¹⁵⁹ See Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102, 102. See generally *supra* note 156 (describing laws creating new forms of humanitarian relief made available to non-citizens); Lenni B. Benson, *Breaking Bureaucratic Borders*, 54 ADMIN. L. REV. 203, 264-290 (2002) (describing complexity of employment visa process).

¹⁶⁰ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3445 (1986).

¹⁶¹ While applications for temporary residence status under the 1986 law were added to the regulations as registration forms, other applications were not. See generally Registration and Fingerprinting, 8 C.F.R. § 264.1(a) (1988) (excluding as forms of registration “I-130” petitions for alien relatives, “I-140” petitions for alien workers, “I-539” applications to Extend/Change Status, “I-589” application for asylum, “I-821” application for Temporary Protected Status, “I-821D” petitions for consideration for Deferred Action for Childhood Arrivals, “I-914” applications for T-nonimmigrant status, “I-918” petitions for U-nonimmigrant status, and “I-929” petitions for qualifying family members of U-1 nonimmigrants).

regulation, receive a document constituting “evidence” of registration until the adjustment application was approved.¹⁶²

The registration regulations were not revised and expanded to deal with these complications. Instead of expanding the registration to accommodate this new complexity, both Congress and the INS took steps to affirmatively dismantle the alien registration apparatus even further. In 1981, Congress eliminated the requirement that aliens annually report their addresses and that nonimmigrants report their address every ninety days.¹⁶³ In 1982, regulations relieved Lawful Permanent Residents (“LPRs”) of annual registration requirements.¹⁶⁴ In 1986, Congress waived the fingerprinting requirement for visa applicants and repealed the Attorney General’s vestigial authority to issue fingerprinting forms for nonimmigrant aliens prior to arrival.¹⁶⁵

¹⁶² Years later, in 1996, the INS added employment authorization documents (EADs) as evidence of registration. Introduction of New Employment Authorization Document, 61 Fed. Reg. 46,534, 46,535 (Sept. 4., 1996) (to be codified at 8 C.F.R. pts. 210, 245(a), 264, 274(a) & 299). An application for employment authorization (Form I-766) is not, however, a listed registration document. See Registration and Fingerprinting, 8 C.F.R. § 264.1(a). In addition, because an applicant for adjustment may seek (and pay for) employment authorization, it is only possible for such an applicant to have a registration document once the employment authorization application is processed. Many persons seeking adjustment, such as the elderly, children, the disabled, and those who have no intention to work, will not have a reason to seek employment authorization and will be without a registration document during the processing of their applications. Many other persons seeking a form of immigration status will not be eligible for an employment document during the pendency of their application. See, e.g., *id.* § 274(a)(12) (listing the specific categories of non-citizens who can apply for an EAD and omitting applicants for U visa status, cancellation of removal, relief under the Convention against Torture, and applicants for a change in status); *id.* § 274(a)(12), (c)(8) (barring application for employment authorization for asylum applicants for 150 days).

¹⁶³ Compare Change of Address, 8 C.F.R. § 1305 (1976) (requiring registered aliens to notify the Attorney General about their current address annually, and about any subsequent changes in address, and further requiring nonimmigrant aliens to notify the Attorney General about their address every three months), with Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 11, 95 Stat. 1611, 1617 (1981) (codified as amended at 8 U.S.C. § 1305 (1982)) (amending section 265 of the INA to remove the annual address reporting requirement for registered aliens and the ninety day reporting requirement for nonimmigrants).

¹⁶⁴ See Aliens and Nationality; Immigration and Nationality Act Amendments of 1981, 47 Fed. Reg. 12,129, 12,130 (Mar. 22, 1982) (codified in scattered sections of 8 C.F.R.) (“8 C.F.R. 265.1 is amended to eliminate the annual registration requirement for permanent resident aliens who were required to file Form I-53 each year; however, they must continue to report new addresses and changes of address using Form AR-11.”).

¹⁶⁵ Compare Forms for Registration and Fingerprinting, 8 U.S.C. § 1304 (1982) (stating that the Attorney General and Secretary of State are “authorized and directed” to prepare forms for fingerprinting), with Immigration and Nationality Act

Apparently, due to resource constraints, fingerprinting records were not reviewed and, as a result, had become “outdated and of little use.”¹⁶⁶ Two years later, Congress made a conforming technical correction to the section of the 1940 Act that required registration for those nonimmigrants in the United States.¹⁶⁷

In sum, by the mid-1980s, there was no universal statutory requirement for nonimmigrants to be registered and fingerprinted either at the border or after admission. And there was no regulatory apparatus in place to register anyone outside of the ordinary process of applying for selected forms of immigration status. Without such a registration and fingerprinting requirement, significant numbers of non-citizens were not subject to a registration and carry requirement.

4. Understanding Statutory Registration and Carry Language in Light of Amendments, Regulatory History, and Practice

The history of the erosion of the registration and carry requirements over time stands in stark contrast to federal statutory language, which appears, at first blush at least, to create a universal registration and carry requirement that applies to “[e]very alien.”¹⁶⁸ And, it begs several questions: Is there in fact a statutory registration and carry requirement that applies to all non-citizens? Does the statute in fact require the Executive to implement a universal registration and carry requirement, which it has failed to do?

Amendments of 1986, Pub. L. No. 99-653, § 10, 100 Stat. 3655, 3657 (codified as amended at 8 U.S.C. § 1304 (1988)) (amending section 264(a) of the INA to remove authorization of the Attorney General and Secretary of State to prepare forms for fingerprinting).

¹⁶⁶ *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. 2d Sess. 13 (1986) (statement of Joan M. Clark, Assistant Sec’y for Consular Affairs) (explaining fingerprint records required by INA section 221(b) were “entered into the bureau’s civil files only when resources are available,” meaning “[t]he FBI [did] not review fingerprinting records in visa cases nor [were] they used in checking criminal records or used for identification purposes”).

¹⁶⁷ See Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 8(h), 102 Stat. 2609, 2617 (codified as amended at 8 U.S.C. § 1302 (1992)) (stating that the Attorney General may waive the requirement of fingerprinting for nonimmigrants). The House sponsor explained that the bill “would correct many mistakes and oversights in immigration law and it would make immigration laws more accessible and understandable. Finally, it would make possible a new, updated, and long-overdue edition of the compiled immigration and nationality law.” 134 CONG. REC. 9844 (1988) (statement of Rep. Mazzoli).

¹⁶⁸ 8 U.S.C. § 1304 (2012).

Arguably, one must interpret the current registration requirement through the prism of decades of regulatory erosion of the registration requirement and Congressional acquiescence. Indeed, the Executive has never understood federal law as mandating a universal obligation for non-citizens to register and carry documents. While the Alien Registration Act of 1940, as originally implemented, gave rise to a virtually universal registration requirement (albeit with no corresponding carry requirement),¹⁶⁹ by 1952, regulations plainly exempted various groups (e.g., Canadians who were visiting for less than six months and workers in the Bracero program) from any registration requirements,¹⁷⁰ even though there was no explicit authorization in the statute for those exemptions.¹⁷¹

Arguably, Congress then acquiesced to this regulatory erosion.¹⁷² Indeed, despite several occasions on which Congress revisited the registration laws after 1940, it never reinstated the universal system. For example, the Congress which updated the registration laws in 1952 would have been aware of the regulatory exemptions; however, it chose not to alter the law to eliminate these exemptions by adding corrective language.¹⁷³ Instead, it layered upon the law a carry requirement, which would be subject to the same exemptions.¹⁷⁴ Similarly, when Congress again revisited the registration law in 1957, it only sought to authorize exceptions, not to bar those that had been granted in the past.¹⁷⁵ The

¹⁶⁹ In 1940, the only individuals exempt were diplomats. See Amended Regulations Governing the Exemption of Foreign Government Officials and Members of Their Families from Registration and Fingerprinting in Accordance with the Alien Registration Act, 1940, 5 Fed. Reg. 4560, 4560 (Nov. 20, 1940).

¹⁷⁰ See *supra* notes 115-17.

¹⁷¹ Cf. 8 U.S.C. § 1304 (1952) (authorizing preparation of forms for registration and fingerprinting with no mention of exceptions to the requirements). And as discussed above, regulatory erosion of universal registration would continue through 1960, when, in the waning months of the Eisenhower administration, the carry requirement was deleted from the regulations.

¹⁷² For examples of cases considering the degree to which inaction may be treated as acquiescence, see *Watson v. United States*, 552 U.S. 74, 82-83 (2007), which noted fourteen years in which Congress had not revisited an interpretation of a statute, and *Am. Insurance Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003), which noted congressional acquiescence of an executive practice that dates back over two hundred years. But see *Rapanos v. United States*, 547 U.S. 715, 749-50 (plurality opinion) (urging caution in interpreting congressional acquiescence).

¹⁷³ See *supra* notes 125-28 and accompanying text (noting 1952 law nearly mirrored the 1940 registration law, but also added a carry requirement).

¹⁷⁴ See *id.*

¹⁷⁵ See *supra* note 146 and accompanying text (discussing waiver of compulsory fingerprinting for visitors under 1957 law).

amendments of the 1980s only further limited the scope of the law.¹⁷⁶ By 1986, when Congress last revisited registration, it presumably was aware that there were many new forms of status for which there was no means of registration and therefore no plausible document that could be carried; yet, it sought only to reduce reporting requirements for those covered by the law.¹⁷⁷ The history of Congressional acquiescence thus suggests that the current statute cannot properly be read as subjected all non-citizens to a registration and carry requirement.

Another way to reconcile the apparent breadth of the statute with the actual history of implementation is to note that the statutory duty for “every alien” is only “to apply” for registration and to carry a document if it is provided as a receipt for registration.¹⁷⁸ If there is no application mechanism, there can be no duty to apply. In this way, the statute authorizes a registration scheme that is as broad as the registration apparatus developed by the Executive. When that apparatus disappears, or is not applied to groups of non-citizens, those non-citizens are not breaching any duty. Furthermore, the statute only required that such a mechanism be created.¹⁷⁹

Yet another possibility is that the Executive has simply failed to enforce its statutory mandate of enacting a universal registration and carry requirement. However, while one might fault the Executive for not continuing to have a comprehensive registration mechanism, the Executive’s choice not to maintain a registration system cannot justify the arrest of those who are not required to register or provided with a system for doing so. The Executive’s dismantling of a universal registration and carry scheme over more than sixty years cannot be ignored when it comes to understanding the obligation of non-citizens to carry documentation in 2014. It is this topic to which we now turn.

II. THE REALITY AND THE MYTH OF REGISTRATION TODAY

Part II contrasts the reality of today’s broken alien registration scheme with its popular depictions. It begins by dissecting the statutory, regulatory, and administrative systems governing alien registration. It then explores manifestations of the myth of comprehensive registration

¹⁷⁶ See, e.g., Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102, 102 (1980) (codified as amended in scattered sections of 8 U.S.C.) (amending the INA to establish asylee immigrant status).

¹⁷⁷ See *supra* notes 163–167 and accompanying text.

¹⁷⁸ 8 U.S.C. § 1304 (2012).

¹⁷⁹ See *id.* (authorizing and directing the preparation of forms for registration and fingerprinting).

in contemporary immigration enforcement, legal doctrine, and political discourse.

A. *Registration Today*

The history of registration's demise has left little by way of a coherent registration scheme in the United States. As this section describes, registration requirements today are largely illusory, with huge swaths of the non-citizen population exempt from registration and carry requirements. Moreover, the administration of the registrations laws has become fundamentally haphazard and dysfunctional.

1. Illusory Registration Requirements

Proponents of "papers please" policing are quick to point to vestigial language from the 1940 Act that remains in the U.S. Code.¹⁸⁰ This language, they claim, creates a universal registration and carry requirement, and any non-citizen who cannot produce a registration document is subject to arrest either for entry without inspection or failure to register.¹⁸¹ Such interpretations of federal law are inaccurate and ahistorical. As we have seen, in 1957, Congress effectively waived the fingerprinting and carry requirement for vast numbers of non-citizens, including tourists and other short-term visitors.¹⁸² Moreover,

¹⁸⁰ See 8 U.S.C. § 1302(a) (2012) ("It shall be the duty of every alien . . . who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 1201(b) of this title or section 30 or 31 of the Alien Registration Act, 1940, and (3) remains . . . for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days."); *cf. id.* § 1306(a) (2012) (maintaining the 1940 Act's requirement that "[a]ny alien required to apply for registration and to be fingerprinted . . . who willfully fails or refuses to make such application or to be fingerprinted, and any parent or legal guardian required to apply for the registration of any alien who willfully fails or refuses to file application for the registration of such alien shall be guilty of a misdemeanor"); *id.* § 1304(e) (2006) (restating the 1940 Act's requirement that "[e]very 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 subsection (d) of this section. Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor").

¹⁸¹ See, e.g., OFFICE OF GOVERNOR JANICE K. BREWER, *supra* note 5, at 4 (explaining "[f]ederal law already requires aliens to register with the federal government and carry their documentation (e.g., 'green card') pursuant to 8 United States Code §§ 1304(e) and 1306(a)" and that "[a] violation of these laws is a federal misdemeanor"); Kobach, *supra* note 5, at A31 ("[S]ince 1940, it has been a federal crime for aliens to fail to keep such registration documents with them. The Arizona law simply adds a state penalty to what was already a federal crime.").

¹⁸² See *supra* Part I.B.2 (detailing statutory erosion of the registration and

the timeworn language in the INA respecting alien registration, when understood in conjunction with present day regulations and administrative systems, does not provide for anything near a uniform obligation to register and carry documents. Under current conditions, the registration and carry requirements are largely illusory. Most non-citizens in the United States are exempt from registration and carry requirements pursuant to statute, regulation, administrative design, and systemic inefficiencies.

Grasping the illusory nature of the registration requirement requires an understanding of the regulatory framework that governs alien registration, as well as the way it interacts with other aspects of contemporary immigration law. Recall that after the INS dispensed with post office registration in 1944, it promulgated regulations that defined “registration” as the act of application for various forms of immigration status and separately designated status-related documents as “evidence” of registration.¹⁸³ In essence, “registration” occurred when one applied for certain forms of immigration status, linking the process of alien registration inextricably to application for immigration status and to the adjudication of such applications.

The adjudicatory, status-driven regulatory framework for registration, which exists to the present, dramatically affects who is subject to registration requirements and who can be held criminally liable for their violation.¹⁸⁴ As an initial matter, many non-citizens who are ineligible to apply for lawful immigration status are precluded from registering. This group includes, most obviously, many non-citizens who entered the United States without inspection (commonly referred to as “EWIs”). Typically, no immigration status is available to EWIs, and current regulations provide them no other way to affirmatively register their presence.¹⁸⁵ As a result, EWIs, the primary targets of the

requirements).

¹⁸³ See *supra* Part I.B.1 (detailing transformation of registration regulations after World War II).

¹⁸⁴ Current registration regulations deem some applications for immigration status as “forms” of registration; they separately list various documents related to those adjudications as constituting “evidence” of registration. See Registration and Fingerprinting, 8 C.F.R. § 264.1(a) (2014) (listing forms of registration); *id.* § 264.1(b) (listing evidence of registration).

¹⁸⁵ See 8 C.F.R. § 264.1(a) (listing forms of registration, none of which are available to immigrants who entered without inspection); see also *supra* Parts I.A.4–B.1 (describing the 1940 regime, which allowed and explicitly encouraged EWIs to register, and demonstrating how after WWII, EWIs were excluded from the registration process).

registration law enforcement (particularly in the states),¹⁸⁶ cannot plausibly be held criminally liable for failure to register. Were the federal government to bring charges against an EWI for failure to register or carry evidence of registration, the defendant would have an impossibility defense.¹⁸⁷ In addition to EWIs, there are many other non-citizens who cannot register under the terms of current regulations; it remains the case that many valid applications for status or relief (including applications for extensions or changes to nonimmigrant status, U visas, T visas, special juvenile status, and Temporary Protected Status) do not count as “forms” of registration.¹⁸⁸ People seeking these forms of status have presented themselves to the federal government; however, they are not technically “registered” under the regulations.¹⁸⁹

Meanwhile, many non-citizens who have registered under the regulations cannot be charged with noncompliance with the supposed carry requirement because the regulations do not provide for evidence of registration while their applications for status are pending.¹⁹⁰ For

¹⁸⁶ See *United States v. Alabama*, 813 F. Supp. 2d 1282, 1301 (N.D. Ala. 2011), *rev'd*, 691 F.3d 1269 (11th Cir. 2012) (describing Alabama law as criminalizing those “guilty of willful failure to complete or carry an alien registration document” who were also “alien[s] unlawfully present in the United States”); Eric Fleischauer, Op-Ed., *What’s Left of State Illegals Law*, *DECATUR DAILY*, Oct. 2, 2011, *available at* 2011 WLNR 20145603 (noting Alabama law would only require unlawful immigrants to carry papers).

¹⁸⁷ See *United States v. Mendez-Lopez*, 528 F. Supp. 972, 973 (N.D. Okla. 1981) (dismissing criminal complaint against EWI by reasoning that “[i]t is apparent to the Court [that] 1304(e) is intended to apply only to aliens who have been registered and fingerprinted and who have thus been issued a certificate or receipt card.”).

¹⁸⁸ Applications for status not listed in the regulations today include Forms I-130 (petition for alien relatives), I-140 (petition for alien workers), I-539 (application to extend/change status), I-589 (application for asylum), I-821 (application for Temporary Protected Status), I-821D (consideration for Deferred Action for Childhood Arrivals), I-914 (application for T nonimmigrant status), I-918 (petition for U nonimmigrant status), and I-929 (petition for qualifying family member of U-1 nonimmigrant). Oddly, this use of a partial list of applications named by form number remains in the regulations even though United States Citizenship and Immigration Service (“USCIS”) has otherwise revised its regulations to remove specific references to forms to better accommodate an electronic environment. See *Immigration Benefits Business Transformation, Increment I*, 76 Fed. Reg. 53,764, 53,766 (Aug. 29, 2011) (codified in scattered sections of 8 C.F.R.). The determination of what constitutes registration appears haphazard.

¹⁸⁹ Even if a non-citizen obtains a type of status such as TPS, he or she will not receive a registration document within the meaning of the regulations from the federal government. See 8 C.F.R. § 264.1(a) (listing forms of registration that do not include those for TPS applicants). Unless, the TPS applicant seeks, for example, work authorization, he or she will not receive any “registration” document. *Cf.* 8 C.F.R. § 264.1(b) (listing employment authorization document as evidence of registration).

¹⁹⁰ See, e.g., DAVID A. MARTIN, *MIGRATION POLICY INST.*, *TWILIGHT STATUSES: A CLOSER*

example, although an application to “adjust” status is listed as a “registration form,”¹⁹¹ regulations provide for no corresponding document constituting evidence of registration until such adjustment is granted.¹⁹² While the application for adjustment is pending, non-citizens may have no registration document to carry.¹⁹³ And, because immigration adjudications are notoriously complex, protracted, and often appealable, this state of pendency can last for years on end.¹⁹⁴

When we peel back the myth of comprehensive registration, we see that today, the majority of non-citizens in the United States are not subject to registration and carry requirements. A huge number of non-citizens find themselves unable to comply with vestigial registration requirements. Each year, upwards of 165 million people enter the United States as nonimmigrants.¹⁹⁵ As nonimmigrants, they are not subject to the registration and carry laws, as they were modified in 1957

EXAMINATION OF THE UNAUTHORIZED POPULATION 2 (2005), *available at* www.migrationpolicy.org/pubs/MPI_PB_6.05.pdf (describing millions of immigrants with “twilight” status, meaning they officially lack legal status, but government sanctions their presence while their applications for status or relief are pending).

¹⁹¹ See 8 C.F.R. § 264.1(a).

¹⁹² See *id.* § 264.1(b) (listing forms of evidence and not providing for corresponding document constituting evidence while adjustment is pending). The person would have to separately obtain employment authorization through payment of associated fees to obtain a “registration” document. See *id.* (listing permanent resident card and employment authorization card as proof of registration).

¹⁹³ People with such pending applications may accrue lapses in law status that are retroactively deemed not to constitute unlawful presence after their applications are adjudicated. During the pendency of the process, however, they lack documents recognized as evidence of registration and cannot comply with registration requirements. See 9 FOREIGN AFFAIRS MANUAL § 40.92 N1 (U.S. Dep’t of State, 2013) [hereinafter FOREIGN AFFAIRS MANUAL], *available at* <http://www.state.gov/documents/organization/87120.pdf> (describing treatment of unlawful presence in cases of application delays).

¹⁹⁴ Even the adjudication of a straightforward adjustment application takes months. See, e.g., *USCIS Processing Time Information for New York City NY Field Office*, U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., <https://egov.uscis.gov/cris/processTimesDisplayInit.do> (enter “New York City, NY” in Field Office field) (last updated Sept. 19, 2014) (showing eight-month processing time for adjudication of adjustment in New York office). In any given case, the time lag can be years. See, e.g., *Labaneya v. U.S. Citizenship & Immigration Servs.*, 965 F. Supp. 2d 823, 833-34 (E.D. Mich. 2013) (ordering USCIS to show cause why the Court should not conclude that USCIS abandoned or refused to process the adjustment application which was pending for four years).

¹⁹⁵ See, e.g., RANDALL MONGER, U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, NONIMMIGRANT ADMISSION TO THE UNITED STATES: 2012, at 1 (2013), *available at* http://www.dhs.gov/sites/default/files/publications/ois_ni_fr_2012.pdf (stating 165 million nonimmigrants were admitted into the United States in 2012).

and 1988.¹⁹⁶ Another 11.5 million non-citizens who are undocumented¹⁹⁷ are not subject to registration because the federal government has abandoned an inventory model and only allows for any form of registration when it is linked to status. Only a minority of non-citizens, including the 13.3 million who are lawful permanent residents,¹⁹⁸ can be plausibly charged with an obligation to carry documents. Even for these persons, the regulatory apparatus is slow and cumbersome, and it does not promise that all those who register will receive a document they can carry.¹⁹⁹

2. Defunct Administration

Beyond the ways in which registration requirements are inapplicable to many non-citizens, the administrative apparatus devoted to alien registration is defunct. Unlike in 1940, there is no longer a centralized system through which eligible non-citizens register. Instead of going to a local post office, registrants must locate and complete complicated status applications, a process which often requires the assistance of an attorney to complete.²⁰⁰ Registration itself, which was free in 1940,²⁰¹

¹⁹⁶ The carry requirement passed in 1952 applied only to those “registered and fingerprinted” under federal law; those not fingerprinted, such as nonimmigrant aliens after 1957, are not bound by the carry requirement. See Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(15)(B), 66 Stat. 163, 167 (1952) (emphasis added) (describing class of non-citizens not included under term immigrant) (current version at 8 U.S.C. § 1101(a)(15)(B) (2012)); see also Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653 § 10, 100 Stat. 3655, 3657 (codified as amended at 8 U.S.C. § 1304 (1988)) (amending section 264(a) of the INA to remove authorization of the Attorney General and Secretary of State to prepare forms for fingerprinting).

¹⁹⁷ See MICHAEL HOEFER, NANCY RYTINA & BRYAN BAKER, U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRATION POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011, at 1-3 (2012) [hereinafter JANUARY 2011 UNAUTHORIZED IMMIGRATION POPULATION], available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf.

¹⁹⁸ NANCY RYTINA, U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2012, at 1 (2013), available at http://www.dhs.gov/sites/default/files/publications/ois_lpr_pe_2012.pdf.

¹⁹⁹ See *infra* Part II.A.2 (describing rampant dysfunction in current system).

²⁰⁰ For a discussion of how complicated such applications are, see Careen Shannon, *To License or Not to License? A Look at Differing Approaches to Policing the Activities of Immigration Service Providers*, 33 CARDOZO L. REV. 437, 439-41 (2011), which describes immigrants whose applications were denied due to lack of proper assistance.

²⁰¹ Cf. 8 C.F.R. § 29.3 (1940) (explaining time and place of registration without mention of required fees).

has become increasingly expensive.²⁰² Today, registration can cost hundreds or even thousands of dollars for non-citizens.²⁰³

The distribution of registration documents has also become notoriously inefficient.²⁰⁴ There can be enormous delays between the time one registers and the time one receives evidence of registration. Unlike during the 1940s or under the Chinese exclusion laws, when registrants received standardized receipt cards, non-citizens who “register” today (if they receive anything at all) may be granted any number of eligible documents, many of which are unamenable to carrying.²⁰⁵ Today’s list of so-called registration documents contains various letter-sized paper documents, none of which could realistically be carried at all times for years on end. The “Notice to Appear” for a person in removal proceedings, which is proof of registration, illustrates this point.²⁰⁶ A person would have to fold up this paper and keep it in his or her wallet for years to comply with the carry requirement. During this time it would degrade and eventually become impossible to decipher.²⁰⁷

²⁰² See Registration of Aliens in the United States: Forms and Procedure, 17 Fed. Reg. 11,531, 11,534 (Dec. 19, 1952) (codified at 8 C.F.R. pt. 264.51(b)) (imposing five-dollar fee for application for new alien registration receipt card).

²⁰³ An I-485 application for adjustment of status now costs \$985; in addition, an applicant must pay a biometrics fee of \$85 for a total cost of \$1,070. This figure does not include attorney costs or the costs associated with the underlying petition for recognition of a family relationship. *I-485, Application to Register Permanent Residence or Adjust Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., <http://www.uscis.gov/i-485> (last updated Aug. 8, 2013).

²⁰⁴ See Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 89 (2005) (noting “dismal record of bureaucratic inefficiency and misplacement of documents cast[s] doubt on the ability of the old INS — or the new U.S. Customs and Immigration Service (USCIS) — to process the [registration] forms”).

²⁰⁵ There are now 12 different forms constituting evidence of registration. See Registration and Fingerprinting, 8 C.F.R. § 264.1(b) (2014). With the scaling back of paper I-94 forms, passport stamps now also constitute evidence of registration. Definition of Form I-94 to Include Electronic Format, 78 Fed. Reg. 18,457, 18,461 (Mar. 27, 2013) (codified as amended at 8 C.F.R. pt. 264.1(b)).

²⁰⁶ See Immigration and Naturalization Service, Department of Justice, 19 Fed. Reg. 3,253, 3,253 (June 3, 1954) (codified as amended at 8 C.F.R. pt. 263.3) (providing for endorsement of order to show cause, predecessor document to a notice to appear, for document to be evidence of registration). One might hardly notice the small print, which explains that it constitutes a registration document, whereas under original regulations, there was a stamp put on the document clearly indicating it was proof of registration.

²⁰⁷ See, e.g., SCHOENFELDER, SILBER & MORAWETZ, UNCOVERING USBP, *supra* note 14, at 26 (describing CBP arrest of a non-citizen who had been granted withholding of removal due to the “poor condition and quality” of the evidentiary document showing

The only non-citizens who still fit within the terms of the statute and are provided a durable registration receipt document to carry at all times are lawful permanent residents.²⁰⁸ But it makes virtually no sense to force permanent residents to carry their “green cards” at all times. In addition to wrongful deportation, LPRs who lose these valuable documents face the risk of identity theft,²⁰⁹ delays in reissuance of replacements, and steep replacement costs.²¹⁰ Understandably, they may seek to protect their green cards by leaving them at home. Even more fundamentally, LPRs have permission to stay in the United States permanently and are generally accorded many of the same rights and privileges as citizens.²¹¹ In recognition of this reality, proponents of

judge’s decision).

²⁰⁸ Once admitted, lawful permanent residents receive an I-551 “Permanent Resident Card.” See Changing the Name of the Alien Registration Receipt Card to the Permanent Resident Card (Form I-551), 63 Fed. Reg. 70,313, 70,314 (Dec. 21, 1998) (changing name from Alien Registration Card). In 1989, INS placed an expiration date on the I-551, requiring permanent residents to apply for replacement cards every ten years. Application Process for Replacing Forms I-551 Without an Expiration Date, 72 Fed. Reg. 46,922, 46,923 (Aug. 22, 2007) (describing move to ten-year card); see also 8 C.F.R. § 264.5(b) (2014) (requiring permanent residents to file for renewal of I-551 within six months of expiration).

²⁰⁹ Government officials commonly advise people to store personal information in a safe place to prevent identity theft. *Prevent and Report Identity Theft*, USA.GOV, <http://www.usa.gov/topics/money/identity-theft/prevention.shtml> (last updated July 17, 2014). And DHS instructs its employees to treat “A numbers,” the critical identification number for non-citizens that appears on a lawful permanent residency card, as “[s]ensitive PII [personal identifying information].” U.S. DEP’T OF HOMELAND SEC., HANDBOOK FOR SAFEGUARDING SENSITIVE PERSONAL IDENTIFYING INFORMATION 6 (2012), available at http://www.dhs.gov/sites/default/files/publications/privacy/Guidance/handbookforsafeguardingsensitivePII_march_2012_webversion.pdf.

²¹⁰ As of 2012, it cost \$450 to replace a lost or stolen green card. See Fees, 8 C.F.R. § 103.7(b)(1)(i)(C), (G) (2012) (\$365 application plus \$85 biometric fee). Delays are significant. See *USCIS Processing Time Information for the National Benefits Center*, U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., <https://egov.uscis.gov/cris/processTimesDisplayInit.do> (click on “NBS Processing Dates”) (last updated Sept. 19, 2014) (noting an estimated seven-month delay time for processing replacement of permanent resident card). The wait can be far longer if status issues arise during the renewal process. See, e.g., *Alnabi v. Gonzales*, No. 06-1721 (DSD/JJG), 2006 WL 2990338, at *1 (D. Minn. 2006) (stating a delay of nine months in issuance of a replacement card after inquiring about initial unspecified delay).

²¹¹ See, e.g., *Vartelas v. Holder*, 132 S. Ct. 1479 (2012) (upholding *Fleuti* doctrine for LPRs with pre-1996 convictions); *Landon v. Plasencia*, 459 U.S. 21 (1982) (“[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.”); *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276 (1966) (holding federal government must prove by “clear, unequivocal and convincing” evidence that an LPR should be deported); *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) (holding lawful permanent

“papers please” policing have made clear that they have no interest in enforcing the registration laws against LPRs.²¹²

While registration has become infinitely more complicated, the federal government makes little effort to educate the public, visitors, or its own employees about the way the registration works. Gone are the radio addresses and propaganda campaigns of the 1940s, which were devoted to informing non-citizens about their duty to register.²¹³ Today, many so-called registration documents do not state that they must be carried at all times.

The history of Form I-94 illuminates the government’s abandonment of any usable registration document for many non-citizens. Prior to 2014, non-citizens on nonimmigrant visas were issued I-94s, a paper form placed inside the passport as one entered the country.²¹⁴ Titled an “arrival departure form,” the I-94 stated nowhere that it should be carried at all times; instead, it emphasized with bold script that it should be surrendered upon departure from the United States.²¹⁵ Curiously, the federal government has now discontinued the issuance of even these flimsy registration documents for most visitors.²¹⁶ Instead of issuing

residents are not regarded as making “entries” into United States upon returning from brief, casual and innocent trips abroad).

²¹² See, e.g., *United States v. Alabama*, 813 F. Supp. 2d 1282, 1301 (N.D. Ala. 2011), *rev’d*, 691 F.3d 1269 (11th Cir. 2012) (describing Alabama law as criminalizing those guilty of “willful failure to complete or carry an alien registration document” who were also aliens “unlawfully present in the United States”); Eric Fleischauer, *supra* note 186 (noting Alabama law would only require unlawful immigrants to carry papers).

²¹³ See *supra* Part I.A.4 (describing media outreach related to alien registration campaign of 1940).

²¹⁴ See *I-94 Goes Electronic*, U.S. CUSTOMS & BORDER PROT., U.S. DEP’T OF HOMELAND SEC., <http://www.cbp.gov/travel/international-visitors/i-94-instructions> (last visited Aug. 18, 2014) (referring to previous policy of issuing paper I-94s).

²¹⁵ See U.S. CUSTOMS & BORDER PROT., U.S. DEP’T OF HOMELAND SEC., OMB No. 1651-0111, I-94 ARRIVAL/DEPARTURE RECORD INSTRUCTIONS (2008), *available at* <http://forms.cbp.gov/pdf/arrival.pdf> (stating in small print that I-94 form must be retained in one’s possession and surrendered on departure, but not that it must be in one’s personal possession at all times). USBP’s takes the view that all visitors are required to carry their passport and I-94 on their person at all times. See, e.g., Colin Woodard, *Far from the Border, U.S. Detains Foreign Students*, CHRON. OF HIGHER EDUC. (Jan. 9 2011), <http://chronicle.com/article/Far-From-Canada-Aggressive/125880> (describing USBP enforcement practices).

²¹⁶ See U.S. CUSTOMS & BORDER PROT., U.S. DEP’T OF HOMELAND SEC., I-94 AUTOMATION 1 (2013) [hereinafter I-94 AUTOMATION], *available at* http://www.cbp.gov/sites/default/files/documents/i94_factsheet_2.pdf (describing automation of new I-94s “to increase efficiency, reduce operating, costs and streamline the admissions process”); *Arrival/Departure-Record Process for Foreign Visitors Arriving via Air or Sea*, U.S. CUSTOMS & BORDER PROT., U.S. DEP’T OF HOMELAND SEC., <http://www.cbp.gov/travel/international-visitors/i-94-instructions/i94-rollout> (last visited Aug. 18, 2014)

paper I-94s to such visitors, the agency now stamps their passports.²¹⁷ Some believe that visitors now have to carry their passports at all times, or else face arrest and criminal penalties for failure to carry evidence of registration.²¹⁸ U.S. Customs and Border Protection (“CBP”) has fostered that impression by placing a provision in the registration regulations stating that a valid unexpired admission or parole stamp in a passport constitutes evidence of registration.²¹⁹ However, CBP has made little effort to clarify whether it truly is of the view that all foreign visitors to the United States must carry their passports at all times, a view that is at odds with the 1957 and 1988 revisions to the registration statute.²²⁰ The agency’s list of “frequently asked questions” regarding the automation of I-94s makes no mention of whether the passport must now be carried at all times by tourists; instead, it states that “[i]f a traveler needs a copy of their [sic] I-94 (record of admission) for verification of alien registration, immigration status or employment authorization, it can be obtained [online].”²²¹ While this suggests visitors need not carry their passports to demonstrate compliance with

[hereinafter *Arrival/Departure Record Process*] (“Those who need to prove their legal-visitor status-to employers, schools/universities or government agencies-can access their CBP arrival/departure record information online.”).

²¹⁷ See *Arrival/Departure Record Process*, *supra* note 216 (“Upon arrival, a CBP officer stamps the travel document of each arriving non-immigrant traveler with the admission date, the class of admission, and the date that the traveler is admitted until.”).

²¹⁸ The Border Patrol has also expressed this view in response to questions from foreign nationals. For example, the Green Valley Canadian Club, a group that includes Canadians living and visiting Arizona, maintains a website regarding members’ experiences at checkpoints and their efforts to obtain guidance from Border Patrol. It states that in response to two inquiries from group members, officials with the Border Patrol said that failure to carry a passport or a visa was a criminal act, based on a citation to the registration laws. See *Passports and Border Patrol Checkpoints*, CANADIAN CLUB OF GREEN VALLEY, ARIZ., <http://www.greenvalleycanadianclub.com/Law%20pertaining%20to%20Border%20Patrol%20and%20Passports.html> (last visited Aug. 18, 2014) (on file with author). A discussion forum on a U.K. traveler site has also recorded travelers’ experiences with U.S. Border Patrol. See SameerPlus (107), Comment to *Green Card Discussion Forum (I-485): Questioned by Border Patrol*, TRACKITT (Jan. 27, 2011), <http://www.trackitt.com/uk-discussion-forums/i485-eb/652856185/questioned-by-border-patrol> (documenting discussion of non-citizen experiences with Border Patrol and being told to carry documents even on a “walk to the grocery store”).

²¹⁹ See Definition of Form I-94 to Include Electronic Format, 78 Fed. Reg. 18,457, 18,473 (March 27, 2013) (to be codified as amended at 8 C.F.R. pt. 264.1(b)).

²²⁰ See *supra* Part I.B.2 (describing 1957 Congressional waiver of registration and carry requirements for nonimmigrant aliens).

²²¹ See I-94 AUTOMATION, *supra* note 216, at 1.

the registration laws, CBP appears to be representing otherwise in response to questioning.²²²

In addition to poorly informing visitors about their registration obligations, federal officials gravely misconstrue the registration laws they purport to enforce. According to their own records, USBP agents routinely arrest persons under 8 U.S.C. § 1304(e) (failure to carry proof of registration) who present valid employment authorization documents (“EADs”).²²³ Apparently, they are unaware that EADs are recognized by regulation as evidence of registration.²²⁴ Agents also appear unaware that EADs, by design, do not communicate the full length of a person’s protected stay in the United States, as the federal government frequently extends the duration of protected status for non-citizens of various nations. While these extensions are published in the federal register, they are not reflected on the EAD.²²⁵

The current administration of the federal alien registration system is too inefficient and haphazard to accomplish any real immigration or law enforcement objectives, such as inventory formation or status differentiation. When the federal government really does perceive a need to register non-citizens, it has done so through highly controversial special registration procedures. This was the case following the attacks of September 11, when the federal government sought to gather information about certain non-citizens in the country.²²⁶

²²² See, e.g., Woodard, *supra* note 215 (describing USBP enforcement practices).

²²³ See SCHOENFELDER, SILBER & MORAWETZ, UNCOVERING USBP, *supra* note 14, at 23 & n.60.

²²⁴ See Registration and Fingerprinting, 8 C.F.R. § 264.1(b) (2014).

²²⁵ 8 U.S.C. § 1254a(b)(3)(A) (2012) (requiring designation, extension and termination of temporary protected status be published in Federal Register); *Extension of Work Authorization for Temporary Protected Status (TPS) and Delayed Enforced Departure (DED)*, U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV. http://www.justice.gov/crt/about/osc/htm/work_extension.php (last updated Jan. 2014) (explaining that the face of an EAD may show that the card has expired when it is extended through an automatic extension).

²²⁶ In 2002, the INS initiated NSEERS, commonly referred to as “special registration.” See Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584, 52,591-92 (Aug. 12, 2002) (codified as amended at 8 C.F.R. pt. 264.1) (amending special registration requirements for certain nonimmigrants). Initially limited to male visa holders age sixteen and over from mostly Arab and Muslim countries, special registration required nonimmigrant visa holders to report to local immigration offices to be photographed, fingerprinted, and questioned under oath, under penalty of deportation. See *Saudis, Pakistanis Added to Special Registration List, Armenians Deleted; Advocates Organize*, 80 INTERPRETER RELEASES 2, 2-3 (2003). These registration laws were roundly condemned as racially-biased and ineffective counter-terrorism mechanisms. See, e.g., OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND

B. Manifestations of the Myth

Despite the realities described above, there is an enduring belief in a comprehensive registration system. This section explores the pervasive effect of this belief on enforcement practices, legal doctrine, and political discourse.

1. Immigration Enforcement

The myth of comprehensive registration undergirds a significant portion of immigration enforcement today. Non-citizens (and those believed to be non-citizens) face arrest by both federal and state officers who believe failure to carry registration papers constitutes grounds for criminal arrest. This sort of “show me your papers” enforcement has been particularly controversial at the state level. While the Supreme Court ruled certain forms of state immigration enforcement impermissible on preemption grounds (including the provision imposing criminal penalties for failure to register and carry under federal law),²²⁷ it upheld so-called “stop and verify” provisions, which require local police to determine the immigration status of persons stopped if “reasonable suspicion” exists to believe they are “unlawfully present.”²²⁸ Stop and verify laws, which have been adopted by six states,²²⁹ presume that non-citizens carry proof of status at all times, enabling them to dispel suspicion with respect to their immigration status,²³⁰ and that local authorities will be able to ascertain, on the spot,

SEC., INFORMATION SHARING ON FOREIGN NATIONALS: BORDER SECURITY (REDACTED) 10-11 (2012), available at http://www.oig.dhs.gov/assets/Mgmt/2012/OIGr_12-39_Feb12.pdf (calling NSEERS database unreliable and characterizing program as an inefficient use of government resources, which prevented DHS agents from conducting more targeted security efforts).

²²⁷ See *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012). Other states imposed similar penalties. Section 10 of House Bill 56, an Alabama bill, which was later struck down by the court of appeals, provided: “In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document [under state law] if the person is in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a)” H.R. 56, 2011 Leg., Reg. Sess. § 10 (Ala. 2011).

²²⁸ ARIZ. REV. STAT. ANN. § 11-1051(B) (2010) (requiring police to determine immigration status of any person stopped if “reasonable suspicion” exists to believe such person “unlawfully present”); see, e.g., *Arizona*, 132 S. Ct. at 2507-10 (finding it unlikely that federal law would preempt “stop and verify”).

²²⁹ Utah, Indiana, Georgia, Alabama and South Carolina have also adopted stop and verify laws, over which there is ongoing litigation.

²³⁰ States maintain that individuals will be presumed *lawfully* present so long as they provide a proof of status. See, e.g., § 11-1051(B) (providing individual stopped by police will be presumed lawfully present so long as she provides “valid Arizona driver license,”

the immigration status of persons without papers by reference to some comprehensive federal database.²³¹ Only under the myth of comprehensive registration do such conditions exist. By upholding these laws, the Court implicitly condoned the use of vestigial registration laws as a pretext for checking individuals' immigration status, an enforcement strategy that results in wrongful arrests and detentions and rampant profiling.²³²

The enforcement activities of federal agencies are likewise organized around the myth of comprehensive registration. This is particularly evident in the enforcement agenda of the USBP, whose agents routinely arrest and detain individuals for failure to carry registration papers.²³³ The agency justifies these arrests by maintaining, incorrectly, that federal registration laws require all non-citizens, including short-term visitors, to carry proof of registration at all times.²³⁴ This ethos pervades federal enforcement agencies. Federal prosecutors presume that any person who cannot produce a registration document must be subject to arrest for either entry without inspection or failure to register;²³⁵ they

tribal identification, or identification from any unit of government in the United States that requires proof of lawful presence).

²³¹ See Petition for Writ of Certiorari at 23-24, *Frederick Cnty. Bd. of Comm'rs v. Santos*, 134 S. Ct. 1541 (2013) (No. 13-706), 2013 WL 6513782 at *23-24 (arguing verification of immigration status does not violate Fourth Amendment since it can be accomplished quickly by calling ICE's Law Enforcement Support Center).

²³² Even in states without immigration laws, local immigration enforcement practices are guided by the myth of comprehensive registration. In New York, for example, state police are instructed that "most aliens in the United States . . . lawfully . . . carry some kind of immigration documents to identify themselves." According to the state's police field manual, lack of such identification (not to mention inability to speak or understand English) also "may indicate that [a] person is an Illegal Entrant." It further provides that probable cause exists to arrest under 8 U.S.C. § 1325 (improper entry by an alien) where "a person of obvious foreign extraction" is "near the Canadian Border under suspicious circumstances without immigration documents or proper identification." NORMAN DENNY, *MANUAL FOR POLICE OF THE STATE OF NEW YORK* art. 33 (2000).

²³³ See, e.g., SCHOENFELDER, SILBER & MORAWETZ, *UNCOVERING USBP*, *supra* note 14, at 9-17 (documenting arrest of hundreds of lawfully present non-citizens for failure to carry proof of registration); Woodard, *supra* note 215 (discussing detention and arrest of foreign students and scholars who fail to provide documentation).

²³⁴ See *CBP Reminds Travelers to Obtain the I-94 Permit Early*, U.S. CUSTOMS & BORDER PROT., U.S. DEP'T OF HOMELAND SEC. (Mar. 11, 2013), <http://www.cbp.gov/newsroom/local-media-release/2013-03-11-040000/cbp-reminds-travelers-obtain-i-94-permit-early> ("By U.S. law, a foreign traveler must possess . . . entry documents, and if required, the I-94 permit, . . . at all times while in the United States."); cf. Hastings, *supra* note 5 (providing USBP Buffalo Sector chief patrol agent justification for detention where "agents encounter individuals who are not in possession of required identification documents").

²³⁵ See *CRIMINAL RESOURCE MANUAL*, *supra* note 5, § 1918 ("[A]ll aliens are issued

have successfully used this logic to justify arrests of non-citizens for failure to carry registration documents.²³⁶ While the symmetry between federal and state-level registration enforcement rationales is seemingly at odds with the acrimonious dispute that raged in the *Arizona* case, as we discuss below, both sides agree about the nature of the federal registration system.

2. Legal Doctrine

Beyond manifesting itself in enforcement practices, the myth of comprehensive registration pervades legal discourse. This is particularly true with respect to legal debates over the propriety of state immigration laws. This debate has often been channeled through the frameworks of preemption and federalism.²³⁷ Notably, both sides in the otherwise acrimonious “immigration federalism” debate agree on the comprehensive nature of the federal registration scheme. Immigration “nationalists” describe the federal registration scheme as “complete” and “comprehensive” in support of statutory preemption arguments.²³⁸ “New federalists,” on the other hand, rely on the same descriptions in

registration cards and must carry such cards with them at all times. . . . Consequently, a law enforcement officer confronting an alien who is unable to produce documentation arguably has probable cause to believe that a violation of 8 U.S.C. § 1304(e) (failure to possess documents) or 8 U.S.C. § 1325(a) (entry without inspection) has occurred.”).

²³⁶ See *United States v. Moya-Matute*, 735 F. Supp. 2d 1306, 1346 (D.N.M. 2008) (“A reasonable officer could conclude that Moya-Matute’s response that he was from Honduras, had papers, and that the papers were on the bus indicated that Moya-Matute was not a naturalized citizen, who did not have to carry papers, but was an alien from Honduras who had papers and was carrying them, but left them on the bus [U]nder the[se] facts and circumstances . . . the agents possessed . . . probable cause to arrest . . . because [there was] a ‘fair probability’ that he was undocumented and was required to have immigration papers on his person under 8 U.S.C. § 1304(e).”).

²³⁷ For a description of nationalist and federalist arguments in debates over subfederal immigration regulation, see Gulasekaram & Ramakrishnan, *supra* note 7, at 2092-93. See also Huntington, *supra* note 7, at 791-92 (contending that the “text and structure of the Constitution allow for shared authority” over immigration between states and federal government).

²³⁸ To bolster the claim of completeness, nationalists cite *Hines v. Davidowitz*, a Supreme Court case finding that a state registration law was preempted by the federal government’s comprehensive registration system and penned, appropriately enough, in 1941, after passage of the Alien Registration Act. See *Hines v. Davidowitz*, 312 U.S. 52, 70-74 (1941). Such arguments have been successful in a range of cases, most notably, in *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012) (describing federal registration law as “comprehensive” and citing *Hines*).

making the argument that state laws simply “mirror” federal law²³⁹ and as such pose no preemption problem.²⁴⁰

As this Article has made clear, all of these arguments are fundamentally mistaken. The 1940 scheme referenced in *Hines v. Davidowitz* was abandoned (as a statutory, regulatory, and administrative matter) decades ago.²⁴¹ Moreover, the United States has *never* had a registration scheme like the one envisioned by state immigration law architects — one that entails a uniform obligation to register and carry documents that reliably indicate immigration status.²⁴² States that claim to “mirror” such a system are not “redundantly” enforcing federal law; they are subjecting non-citizens to onerous new obligations.

Ultimately, the debate about state-level enforcement of alien registration laws has been misplaced. Rather than *who* should enforce federal registration laws, the real question is whether there exists a national registration system that in fact requires non-citizens to carry proof of registration and creates a presumption that any non-citizen without such a card is in violation of the law. Absent such a system, state officials could not enforce a carry requirement even if there were no issue of federal preemption; nor, for that matter, could federal border officers and prosecutors treat failure to carry such a registration document as grounds for arrest.

²³⁹ See, e.g., Brief for Petitioners, *supra* note 9, at 50-51, (stating law represented “parallel” enforcement of federal registration requirements, “overlapping precisely with federal direction in both its substantive elements and its penalty”); Kris Kobach, *supra* note 5, at A31 (“[S]ince 1940, it has been a federal crime for aliens to fail to keep such registration documents with them. The Arizona law simply adds a state penalty to what was already a federal crime.”); Governor Jan Brewer, Remarks on Support Our Law Enforcement and Safe Neighborhoods Act (Senate Bill 1070) (Apr. 23, 2010), available at <http://www.p2012.org/issues/brewer042310sp.html> (“[T]he new state misdemeanor crime of willful failure to complete or carry an alien registration document is adopted, verbatim, from the same offense found in [the] federal statute.”).

²⁴⁰ See, e.g., Cox, *supra* note 8 (finding Arizona’s registration law “redundant” of federal law and critiquing the Court’s rejection of the law on preemption grounds); see also Gulasekaram & Ramakrishnan, *supra* note 7, at 2075-77 (describing “mirror defense” theory and “claim[s] that recent federal legislative inaction on immigration creates a policy vacuum that invites subfederal participation”).

²⁴¹ See *supra* Part I.B (describing demise of 1940 system).

²⁴² See *infra* Part III.B (arguing that the current regime excludes EWIs from registration requirement, exempts many lawfully present non-citizens from the carry requirement, and fails to provide registrants with documents constituting evidence of registration, let alone immigration status).

Since *Arizona*, many surviving state immigration laws have been challenged on Fourth Amendment grounds.²⁴³ The nature of the federal registration scheme affects legal arguments on this front as well. While the Supreme Court has yet to resolve whether local police officers may detain or arrest an individual for suspected criminal immigration violations, it has held local officers generally lack authority to arrest individuals suspected of civil immigration violations.²⁴⁴ Lower federal courts have interpreted *Arizona* as precluding local law enforcement officers from arresting individuals solely based on known or suspected civil immigration violations.²⁴⁵ Because civil immigration violations do not constitute crimes, suspicion or knowledge that an individual has committed a civil immigration violation, by itself, does not give a law enforcement officer probable cause to believe that the individual is engaged in criminal activity.²⁴⁶ However, proponents of state enforcement maintain that distinction between civil and criminal infractions is irrelevant since virtually all undocumented aliens have committed criminal offenses by violating the registration laws.²⁴⁷

Were such claims to be accepted, states would essentially be able to use the registration laws to criminalize unlawful presence in contravention of decades of Congressional intent.²⁴⁸ Such claims, while

²⁴³ See *United States v. Alabama*, 813 F. Supp. 2d 1282 (N.D. Ala. 2011), *rev'd*, 691 F.3d 1269 (11th Cir. 2012); Brief for Petitioners, *supra* note 9, at 49.

²⁴⁴ *Arizona v. United States*, 132 S. Ct. 2492, 2505 (“As a general rule, it is not a crime for a removable alien to remain present in the United States. . . . If the police stop someone based on nothing more than possible removability, the usual predicate for arrest is absent.”).

²⁴⁵ See, e.g., *Santos v. Frederick Cnty. Bd. of Comm’rs*, 725 F.3d 451, 464-65 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1541 (2014) (“The rationale for this rule is straightforward. A law enforcement officer may arrest a suspect only if the officer has ‘probable cause’ to believe that the suspect is involved in criminal activity.” (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979))); *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) (“[M]ere unauthorized presence is not a criminal matter, [and] suspicion of unauthorized presence alone does not give rise to an inference that criminal activity is ‘afoot.’” (quoting *Terry v. Ohio*, 392 U.S. 1 (1968))); *Buquer v. City of Indianapolis*, No. 1:11-cv-00708-SEB-MJB, 2013 WL 1332158, at *10-11 (S.D. Ind. Mar. 28, 2013) (finding that under the Fourth Amendment, there must be probably cause to make an arrest).

²⁴⁶ See *Melendres*, 695 F.3d at 1000-01.

²⁴⁷ See *Petition for Writ of Certiorari*, *supra* note 231, at 7-8, 30-31.

²⁴⁸ The creation of a criminal dragnet for EWIs appears to have been the motivating purpose of state immigration laws, which were defended on the grounds that they exclusively targeted EWIs for criminal penalties. See, e.g., *Alabama*, 813 F. Supp. 2d at 1282 (noting Alabama’s law imposed criminal penalties for failure to register only upon “alien[s] . . . unlawfully present in the United States”); Brief for Petitioners, *supra* note 9, at 49 (noting Arizona’s law reached only those “unlawfully-present aliens” who

common, are unavailing. EWIs cannot be held criminally liable for failure to register or carry where compliance would be impossible.²⁴⁹ Moreover, to do so would essentially criminalize mere presence, an outcome which, though apparently sought in several states, does not comport with federal law — unlawful presence is not a federal crime in the United States.²⁵⁰ Although illegal entry constitutes a misdemeanor,²⁵¹ it is governed by the federal five-year statute of limitations.²⁵² That means that over ninety percent of unauthorized immigrants who entered before 2005 are not chargeable under this provision.²⁵³ Today, most EWIs, while subject to civil removal proceedings, are not subject to criminal penalties under the federal scheme.²⁵⁴ All legislative proposals to criminalize mere presence have failed; as recently as 2005, Congress considered, and rejected, a plan aimed at criminalizing “unlawful presence” in the United States.²⁵⁵

3. Political Discourse

Beyond the immigration federalism debate, which continues, the myth of comprehensive registration impacts discussions about national immigration reform. As Congress considers “comprehensive

violated federal registration laws).

²⁴⁹ See *supra* Part II.A (arguing regulatory changes made it impossible for EWIs to register).

²⁵⁰ See, e.g., Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1830 (2011) (noting mere “unlawful presence, without more, is not a federal crime”).

²⁵¹ See 8 U.S.C. § 1325(a) (2012) (making initial illegal entry subject to punishment of up to six months); 18 U.S.C. § 3581 (2012) (defining crimes that are subject to up to a year in prison as misdemeanors).

²⁵² See 18 U.S.C. § 3282(a) (2012).

²⁵³ See MICHAEL HOEFER, NANCY RYTINA & BRYAN C. BAKER, U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2010, at 3 (2011) (noting that as of 2010 over 90 percent of unauthorized immigrants entered the U.S. before 2005).

²⁵⁴ See Motomura, *supra* note 250, at 1837.

²⁵⁵ See H.R. 4437, 105th Cong. § 203 (2005) (imposing misdemeanor-level penalties on any alien “present in the United States in violation of the immigration laws”). Notably, when the Attorney General imposed a “special registration” requirement on particular groups in the wake of 9/11, it did not apply to EWIs. See, e.g., Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 2363, 2364 (Jan. 16, 2003) (codified as amended in scattered sections of 8 U.S.C.) (requiring registration of adult male nationals of certain nations, but applying only to those “inspected” and “admitted”); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 70,526, 70,526-27 (Nov. 22, 2002) (codified as amended in scattered sections of 8 U.S.C.) (applying only to those “inspected” and “admitted”).

immigration reform,” politicians have focused increased attention to the question of whether the executive branch is fully enforcing existing law. Many now question the authority of the federal government to choose not to enforce federal immigration laws, including the registration laws, and oppose comprehensive reform on the grounds that the Executive cannot be trusted to enforce immigration laws as written.²⁵⁶ Instead of reform, they have called upon the federal government to ratchet up its enforcement of registration laws.²⁵⁷ Although the popular critique over executive inaction sweeps more broadly than the registration laws, questioning the Executive’s enforcement of removal laws as well, the debate frequently turns on whether or not immigration enforcement is a question of criminal law. As discussed above, registration is critical to this discourse on criminality, as claimed violations of vestigial federal registration laws (which many non-citizens cannot comply with) provide a way to paint all undocumented immigrants as criminals,²⁵⁸

²⁵⁶ See Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 795 (2013) (critiquing Obama’s Deferred Action for Child Arrivals program as an unconstitutional exercise of executive power); Feere, *Rubio*, *supra* note 12 (“Sen. Rubio appears to have fallen into President Obama’s trap. The Obama administration refuses to enforce immigration laws and then points to the resulting illegal immigration as a reason for amnesty.”); Julia Preston, *Deportation Agents and Sheriffs Oppose Immigration Bill*, N.Y. TIMES CAUCUS BLOG (May 9, 2013, 6:13 PM), http://thecaucus.blogs.nytimes.com/2013/05/09/deportation-agents-and-sheriffs-oppose-immigration-bill/?_php=true&_type=blogs&r=0 (describing charges that the Obama Administration has broadly failed to enforce immigration laws); Penny Starr, *Sessions Calls for ICE Director to Resign: ‘Failed His Fundamental Duty to Enforce Law’*, CNS NEWS.COM (Feb. 13, 2013, 6:28 PM), <http://cnsnews.com/news/article/sessions-calls-ice-director-resign-failed-his-fundamental-duty-enforce-law>. Recently, ICE officers sued the federal government for telling them not to detain people whom they believe must be arrested under the law. See *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 U.S. Dist. LEXIS 57788, at *7 (N.D. Tex. April 23, 2013) (challenging the Deferred Action for Childhood Arrivals programs); David Nakamura & Ed O’Keefe, *Boehner: Immigration Reform Stalls Because GOP Has ‘Widespread Doubt’ About Obama*, WASH. POST (Feb. 6, 2014), http://www.washingtonpost.com/politics/boehner-immigration-reform-stalls-because-gop-has-widespread-doubt-about-obama/2014/02/06/233b497a-8f55-11e3-b46a-5a3d0d2130da_story.html.

²⁵⁷ See Feere, *Rubio*, *supra* note 12 (“Sen. Rubio could demand that the Obama administration enforce 8 U.S.C. § 1302, ‘Registration of Aliens[,]’ which makes it ‘the duty of every alien’ to register their presence in the United States if they remain here 30 days or longer.”).

²⁵⁸ See John Feere, *The Myth of the ‘Otherwise Law-Abiding’ Illegal Alien*, CTR. FOR IMMIGRATION STUDIES (Oct. 2013), <http://cis.org/myth-law-abiding-illegal-alien> (“If an illegal alien is unregistered and has been in the country for 30 days or longer . . . [he] is guilty of a misdemeanor and faces a . . . jail term of up to six months. Since failing to register is a continuing violation, the statute of limitations does not apply and the alien is liable for as long as he remains unregistered in the country. Interestingly, this

thereby inviting arrest by either state or federal officials. According to many commentators, the undocumented are criminals who should not be benefiting from the beneficence of the federal government to not enforce the law.²⁵⁹

While progress on comprehensive reform appears to be stalled indefinitely, there remains broad bipartisan consensus for increasing the number of federal officers on border patrol.²⁶⁰ This “solution” increases the importance of the myth of comprehensive alien registration, as USBP officers routinely arrest and detain individuals for supposed violations of the registration laws.²⁶¹

III. THE FUTURE OF REGISTRATION

Part III considers the future of registration in the United States. It begins by calling for an immediate moratorium on current enforcement practices, which result in wrongful arrests and racial profiling. It then explores possibilities for instituting a viable registration scheme in the United States. Ultimately, it concludes that the project of registration should be abandoned in light of its economic and social costs.

A. A Moratorium on Current Practices

In the short term, there must be a moratorium on current practices for enforcing registration laws, which result in the arrest of individuals believed to be non-citizens who are encountered without registration documents. Properly understood, existing registration laws at most require lawful permanent residents to carry their “green cards.” Only LPRs are reliably provided with a card that meets the carry requirement

provision could be applied to millions of illegal aliens today. . . . [T]he border-hopping portion of the illegal immigrant population is comprised largely of people who are violating this registration statute.” (citations omitted)).

²⁵⁹ See *id.*

²⁶⁰ The Senate, for example, has proposed funding for 3,500 additional border patrol officers. See Gomez, *supra* note 13.

²⁶¹ See SCHOENFELDER, SILBER & MORAWETZ, UNCOVERING USBP, *supra* note 14, at 1, 24-26. According to the agency’s internal documents, USBP enforcement practices results in hundreds of wrongful arrests of individuals with lawful status. There is clear documentation that those arrested for failure to carry registration documents were under no such obligation, including short-term visitors, visa-holders, and citizens. *Id.* The impact of expanding the presence of federal border officers would have wide-ranging effects. Border patrol officers generally operate within 100 miles of a land or sea border, where two thirds of Americans reside. See *Border Zone*, *supra* note 18 (analyzing demographic data to determine the proportion of the United States population that lives within 100 miles of a land or sea border).

under the statute. When an officer encounters a person who states that he or she is not a citizen of the United States, the chances are that the person is not under any obligation to carry a card, meaning that failure to carry such a card cannot properly serve as the basis for an arrest.

Enforcement guided by the legal fiction of comprehensive registration results in the wrongful arrest and detention of persons lawfully present in the United States.²⁶² According to the agency's own records, in just one USBP enforcement program in one station along the northern border, agents arrested and detained hundreds of lawfully present individuals between 2006 and 2011,²⁶³ including U.S. citizens, lawful permanent residents, tourists, student visa-holders, and persons with proper authorization to work in the United States.²⁶⁴ Some were detained for hours, in the middle of the night, while USBP verified their statuses.²⁶⁵ In over half of these cases, agents cited violation of the carry requirement (codified at 8 U.S.C. § 1304) as justification for the arrest.²⁶⁶

Evidence suggests that USBP is not, in fact, attempting to enforce the registration laws per se, but is instead relying upon the largely defunct federal registration scheme as a pretext for profiling foreign-born individuals in order to check their statuses.²⁶⁷ USBP agents lack understanding of the registration laws and regulations they purport to enforce. In many of the cases, arrestees presented valid registration documents, such as EADs, but USBP officials either ignored them or did not recognize them as evidence of registration.²⁶⁸ Even more

²⁶² See SCHOENFELDER, SILBER & MORAWETZ, UNCOVERING USBP, *supra* note 14, at 11-17 (describing study of hundreds of persons arrested by USBP on domestic transportation routes for failure to carry registration papers, even though they had lawful status).

²⁶³ See *id.* at 1 (noting actual number is probably higher because USBP did not formally instruct its agents to document these arrests until June 2010).

²⁶⁴ See *id.* at 12-18 (describing late-night arrests of lawfully present students, lawful permanent residents, tourists, and those with valid visas).

²⁶⁵ See *id.*

²⁶⁶ See *id.* at 24.

²⁶⁷ Officials very rarely refer arrestees to prosecution for their supposed violations of the registration laws. See *Statistic/Year/Type of Charge*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, <http://bjs.ojp.usdoj.gov/fjsrc/tsec.cfm> (last visited Aug. 18, 2014) (click "Number of defendants in cases filed" for the number of cases filed; select "Outcomes for defendants in cases closed" for case outcomes; then select year; click "Select by title and section within U.S.C."; select "8 — Aliens and Nationality"; select "8 1304 E"; note that the statute will not appear as an option if no cases fell under the statute in that year) (reporting virtually no federal prosecutions for registration violation).

²⁶⁸ See SCHOENFELDER, SILBER & MORAWETZ, UNCOVERING USBP, *supra* note 14, at 23

disturbingly, internal records suggest that such pretextual use of the registration represents part of the agency's attempt to increase its arrest rates,²⁶⁹ and thereby secure increased federal funding.²⁷⁰

Such practices have problematic consequences, particularly for people of color, people with accents, and people living on the border. Many who have documents feel a need to carry them even when not required to do so under the law and even when they run a risk of losing valuable proof of status.²⁷¹ In some cases, non-citizens are forced to carry documents that they are by regulation instructed to keep in a safe space.²⁷² Those who do not have documents face the choice of staying in their homes, where they are clear of any checkpoints, or venturing forth at the risk of being stopped, questioned, and potentially detained. Such consequences will only worsen as resources for border enforcement continue to increase.²⁷³ Proposed immigration reform legislation sets explicit congressional targets for immigration arrests at the border and makes target arrest rates a trigger for future legalizations.²⁷⁴ If this reform becomes law, one can expect both greater resources and greater attention to arrests in border regions of the United States, where large populations of American citizens and legal residents

n.60.

²⁶⁹ USBP uses three different bonus programs to reward its agents, cash bonuses, vacation awards, and distribution of gift cards of up to \$100. The amounts of the gift cards are likely based on arrest rates. Patrol stations do not keep regular statistics on any measure of performance besides arrest rates, which are maintained in meticulous detail. In the Buffalo Sector, arrest statistics from each station are sent to the "sector" office on a daily basis, which then sends summary arrest statistics out to each station in time for each "Patrol Agent in Charge" to review each morning. The national office of USBP tracks arrest statistics and distributes reports through mass emails on a twice-daily basis. Finally, annual arrests totals are recorded for each station. *See id.* at iv-v, 2-4, 8.

²⁷⁰ *See* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3(a) (as passed by Senate June 27, 2013).

²⁷¹ *See* Nina Bernstein, *Border Sweeps in North Reach Miles into U.S.*, N.Y. TIMES, Aug. 29, 2010, at A1, available at <http://www.nytimes.com/2010/08/30/nyregion/30border.html> (describing a naturalized citizen who carries her passport on domestic train trips for fear of arrest by the Border Patrol).

²⁷² Regulations for persons holding student visas advise students to "safekeep the initial I-20 ID bearing the admission number and any subsequent copies which have been issued to him or her." Special Requirements for Admission, extension and Maintenance of Status, 8 C.F.R. § 214.2(f)(2) (2014). But Border patrol officers will ask for those same documents and expect the individual to be carrying the document. *See* SCHOENFELDER, SILBER & MORAWETZ, UNCOVERING USBP, *supra* note 14, at 24-25.

²⁷³ *See* S. 744, § 1102(a) (requiring an increase of full-time active duty U.S. Border Patrol agents deployed to the Southern border to 38,405).

²⁷⁴ *See id.* § 3(a)(4) (basing "effectiveness rate" on number of apprehensions).

live and work.²⁷⁵ Even if it does not become law, current trends suggest that each year will see greater enforcement resources targeted to border communities.²⁷⁶

A moratorium on current practices would require immigration enforcement officials to return to the basics of policing. Instead of making easy arrests based upon foreign birth and non-possession of presumed registration documents, officers would have to engage in evidence gathering to find probable cause to arrest any particular individual. That would direct enforcement efforts away from resident populations and decrease the impact of USBP activities on ordinary people living in states near the border.

B. Models of Systemic Registration

While the current alien registration system serves no legitimate immigration or law enforcement purpose, policy makers might institute a new, functional alien registration scheme or a registration scheme that encompasses citizens as well.

1. Alien Registration

Historically, alien registration systems in the United States conformed to one of two conceptual models. “Status-based” systems were designed to identify the immigration status of non-citizens to facilitate the deportation process for those without status; they typically required that all non-citizens carry evidence of registration, a form of documentation that would indicate immigration status.²⁷⁷ “Inventory” systems, on the other hand, were designed to collect as much information as possible about non-citizens for national security purposes; because the objectives of these systems were more expansive than simply deporting those without status, such systems were designed

²⁷⁵ The Senate bill targets “Southern Border” states (California, Arizona, New Mexico and Texas). *Id.* § 3(a)(5), (6). These states have a combined population of over 72 million persons. See *State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov> (last updated July 8, 2014, 6:37 AM).

²⁷⁶ See DORIS MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 3 (2013), available at <http://www.migrationpolicy.org/sites/default/files/publications/enforcementpillars.pdf> (noting Border Patrol staffing doubled between 2004 and 2012).

²⁷⁷ See *supra* Part I.A (detailing historical regimes, some of which, like Chinese registration, were status-based, while others, like the WWII system, were inventory-based).

to encourage participation of those without status by providing some form of protection against deportation for registrants.²⁷⁸

Going forward, the federal government could implement an alien registration system along either of these lines. In order to implement a "status-based" system, federal agencies would have to dramatically expand the number, availability, and utility of the registration documents it provides non-citizens. This would obviously require a reversal of current policies designed to reduce the documentation available to non-citizens, as seen with the elimination of paper I-94s.²⁷⁹ Instead, the federal government would have to promptly provide every lawfully present non-citizen with a standard document (of a size appropriate for carrying) that would serve as evidence of registration and indicate one's immigration status. Such a status-based system could be limited to persons whose cases have been fully adjudicated (as it was with Chinese Exclusion), or it could include all those with pending applications for status, as the current regulations provide in the case of applicants for adjustment of status.²⁸⁰ Under such a paper-intensive system, officers on the ground would have substantially more luck deducing unlawful status from failure to carry. However, such a system would not provide a way for officers to determine who, as an initial matter, was a non-citizen subject to the registration requirements.

The federal government could also implement an inventory-based registration model. This sort of a system would require that every non-citizen appear to be registered and that a central database be created to log the identities, whereabouts, and any other relevant information pertaining to all registrants. It would then have to provide registrants with proof that they have complied with a stand-alone registration requirement. The key to such an inventory system would be to encourage all non-citizens, irrespective of immigration status, to participate. In order to encourage registration by all non-citizens, including those without lawful status, such a system would likely have to offer relief from deportations (as it did in 1940).²⁸¹ Such a system could in theory serve a variety of law enforcement and immigration-related purposes.²⁸² It would also be less expensive and more effective

²⁷⁸ See *supra* Part I.A.

²⁷⁹ See *supra* notes 216–24 and accompanying text (describing the "automation" of I-94s).

²⁸⁰ See *supra* notes 162–64.

²⁸¹ See *supra* Part I.A.4 (describing a provision in the 1940 legislation granting Attorney General broad authority to suspend deportation for registrants).

²⁸² See KERWIN & LAGARON, *supra* note 11, at 4 (noting "significant integration, national security, public safety" interests in registration).

than a system demanding up-to-date cards for all non-citizens. Computer systems can track entries and exits and include information about pending applications, extensions, and adjustments of status. Of course, this system would not facilitate the immediate, mass deportation of EWIs: the goal motivating current practices.

2. Universal Registration

Beyond the models common to America's past, policymakers might also consider the option of universal registration. Under a universal system, citizens and non-citizens would be compelled to register with one national database; they would then receive some sort of national identification card, demonstrating compliance with the registration laws and indicating their immigration status or status as citizen. Such a system could additionally require that identification cards be carried at all times. Universal registration with a carry requirement likely represents the most effective way to determine, on the spot, the immigration status of any given non-citizen and whether he or she is in compliance with the registration laws. In essence, such schemes circumvent the problem of differentiating citizens from non-citizens that exists with alien registration systems. Given these features, universal registration and national IDs have long been advocated as a means of enhancing national security and preventing unlawful immigration.²⁸³ Today, many countries around the world implement national ID systems, including most countries in Europe and many countries in Asia.²⁸⁴

Japan's recent implementation of such a regime is instructive. Prior to 2012, foreigners older than sixteen living in Japan were required to be fingerprinted and carry special identification cards at all times.²⁸⁵ That system came under increasing attack, with critics declaring it discriminatory and anachronistic.²⁸⁶ In 2012, Japan abolished its longstanding alien registration policy in favor of the new "residency

²⁸³ See ELEC. PRIVACY INFO. CTR., *REAL ID IMPLEMENTATION REVIEW: FEW BENEFITS, STAGGERING COSTS: ANALYSIS OF THE DEPARTMENT OF HOMELAND SECURITY'S NATIONAL ID PROGRAM 1* (2008), available at http://epic.org/privacy/id_cards/epic_realid_0508.pdf.

²⁸⁴ In many European countries, citizens carry a national ID card "as a matter of course." See DAVID LYON, *IDENTIFYING CITIZENS: ID CARDS AS SURVEILLANCE* 3 (2009).

²⁸⁵ See Ronald E. Yates, *Japan's Alien Policy Attacked: American Woman Fights Fingerprinting Law*, CHI. TRIB. (Apr. 9, 1985), http://articles.chicagotribune.com/1985-04-09/news/8501200461_1_fingerprinted-japanese-government-alien (explaining that under a 1952 law, all foreigners older than sixteen living in Japan were required to be fingerprinted and to carry special identification cards at all times).

²⁸⁶ See *id.*

management system.”²⁸⁷ Under the new system, foreigners and citizens report their place of residence to the same national database.²⁸⁸ Instead of the old alien registration cards, the government now issues “resident cards” containing portrait photos, basic personal information, resident status, and the period of time for which holders are allowed in the country.²⁸⁹ Whereas unlawful aliens could previously register and obtain a registration document, they can no longer obtain residence cards.²⁹⁰

While there are administrative and national security arguments for universal registration, Americans have historically rebuffed the idea of a national ID card.²⁹¹ In recent years, national identification cards have been proposed to deal with an array of national security and immigration-related issues,²⁹² all of which (including those made in the wake of 9/11) were rejected as threats to traditional values of liberty and freedom from undue government interference.²⁹³ The specter of a

²⁸⁷ IMMIGRATION BUREAU OF JAPAN, START OF A NEW RESIDENCY MANAGEMENT SYSTEM! 1 (2012), available at [http://www.immi-moj.go.jp/newimmiact_1/pdf/NewResidencyManagementSystem-\(EN\).pdf](http://www.immi-moj.go.jp/newimmiact_1/pdf/NewResidencyManagementSystem-(EN).pdf).

²⁸⁸ See *id.* at 10.

²⁸⁹ *Id.* at 3-4 (“While illegal residents can be registered under the present alien registration system, they cannot be registered under the new residency management system. Any foreign national illegally staying in Japan is advised to immediately visit the nearest Regional Immigration Office and follow the necessary procedures.”). Beginning in 2016, foreigners will also be assigned identification numbers, like citizens. See *All Japanese Citizens to Be Issued ID Number*, JAPAN TODAY (May 15, 2013, 6:58 AM), <http://www.japantoday.com/category/national/view/all-japanese-citizens-to-be-issued-id-number>.

²⁹⁰ See IMMIGRATION BUREAU OF JAPAN, *supra* note 287, at 3. Old alien registration cards can be used instead of a residence cards until they expire or until July 8, 2015, whichever comes first. See *Immigration*, JAPAN-GUIDE.COM, <http://www.japan-guide.com/e/e2221.html> (last updated July 9, 2012).

²⁹¹ See, e.g., ALISON M. SMITH, CONG. RESEARCH SERV., RS21137, NATIONAL IDENTIFICATION CARDS: LEGAL ISSUES (2003), available at <http://epic.org/events/id/resources/RS21137.pdf> (describing various failed attempts since the 1970s to institute a national ID).

²⁹² See *id.*

²⁹³ All such proposals were ultimately defeated. See Homeland Security Act of 2002, H.R. 5710, 107th Cong. § 1514 (2002) (barring any provision of the legislation from being interpreted as establishing a national ID system or card); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, H.R. 3610, 104th Cong. § 656(B)(1)(b) (1996) (excepting driver’s licenses from a provision mandating the inclusion of Social Security numbers on all federally acceptable identification documents); Immigration Reform and Control Act (IRCA) of 1986, Pub. L. 99-603, § 101, 100 Stat. 3359, 3363 (codified at 8 U.S.C. 1324a) (“Nothing in this section shall be construed to authorize, directly or indirectly, the issuance or use of national identification cards or the establishment of a national identification card.”).

national identification card has come up most recently in debates over comprehensive immigration reform. The reform bill that passed the Senate in the summer of 2013 includes a provision making use of the E-Verify program mandatory for employers,²⁹⁴ a proposition which requires the federal government to maintain an inventory of all those eligible to work in the United States, including citizens. Although a far cry from the creation of a national ID card that must be carried at all times, critics from both sides of the aisle have come out against E-Verify because they perceive it as leading to universal registration.²⁹⁵ Interestingly, in anticipation of such hostility, the bill's drafters explicitly bar the creation of a national ID card, even though the proposal de facto creates one.²⁹⁶

C. *Coming to Terms with Registration's Costs*

While the reforms described above are theoretically possible, the history of registration suggests that any such proposal would likely be doomed from the start. Although embraced under particular political circumstances, alien registration systems have not been politically sustainable in the United States. This section describes the "costs" (economic and social) typically involved in registration — costs that

²⁹⁴ See Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th Cong. § 6(a)(1)(E)(xv) (as passed by Senate, June 27, 2013). At present, E-Verify is a voluntary system whereby employers can check with the Department of Homeland Security to see if a prospective employee has authorization to work in the United States. See AM. CIVIL LIBERTIES UNION, PROVE YOURSELF TO WORK: THE 10 BIG PROBLEMS WITH E-VERIFY 1 (2013), available at http://www.aclu.org/files/assets/everify_white_paper.pdf.

²⁹⁵ See, e.g., Chris Calabrese, *Mandatory E-Verify: A Giant Plunge into a National ID System*, AM. CIVIL LIBERTIES UNION BLOG OF RIGHTS (Apr. 17, 2013, 12:23 PM), <https://www.aclu.org/blog/immigrants-rights-technology-and-liberty/mandatory-e-verify-giant-plunge-national-id-system> (decrying mandatory E-verify as "plunge" towards a national ID system); Rand Paul, *PAUL: Blocking the Pathway to a National ID: 'Your Papers, Please' Must Never Be Heard in America*, WASH. TIMES (May 24, 2013), <http://www.washingtontimes.com/news/2013/may/24/blocking-the-pathway-to-a-national-id/> ("I am against the idea that American citizens should be forced to carry around a National Identification Card as a condition of citizenship. I worry that the Senate is working to consider a series of little-noticed provisions in comprehensive immigration reform that may provide a pathway to a national ID card for all individuals present in the United States — citizens and noncitizens. These draconian ideas would simply give government too much power. Forcing Americans to carry around an identification card to affirmatively prove citizenship offends our basic concept of freedom.").

²⁹⁶ See S. 744, § 6(a)(1)(E)(xv) (contemplating a mandatory e-verify system, which would require the federal government to maintain an inventory of all those authorized to work in the United States, including citizens).

make registration both impracticable as a political matter and ill-advised as a matter of policy.

1. Economic Burdens

Registration laws require significant governmental resources and bureaucracy. While Americans may support investment of such resources during time of crisis, they typically do not during peacetime. This was precisely the pattern at work in the demise of the comprehensive 1940 system. During World War II, when registration was treated as a priority, the federal government paid for post offices to process special forms, made registration free of charge, and invested in public announcements to remind non-citizens of their duty to register.²⁹⁷ After the war, registration became less of a priority; accordingly, the post office system, as well the special registration forms and cards it involved, were largely eliminated.²⁹⁸ By 1944, registration became little more than a byproduct of other systems. Congress then repealed the annual registration requirements to save money, the INS stopped updating its list of registration documents, and the system lost any legitimate, functional value.²⁹⁹

The resources and bureaucracy that would be required to implement any sort of registration today would be far greater than during past failed registration efforts. An inventory system similar to the one created under the Alien Registration Act of 1940 would have to manage information from a much larger number of long-term and temporary U.S. residents. In 1940, the government registered 4.9 million persons.³⁰⁰ Today, there are 165 million nonimmigrant admissions a year;³⁰¹ that figure does not even include the thirteen million lawful permanent residents (who presumably would be treated as already registered under the current system)³⁰² or the estimated 11.5 million undocumented persons living in the United States.³⁰³ And, of course,

²⁹⁷ See *supra* Part I.A.4 (describing registration campaign of 1940-41).

²⁹⁸ See *supra* Part I.B (describing demise of 1940 registration system).

²⁹⁹ See *id.*

³⁰⁰ See *supra* note 99 and accompanying text.

³⁰¹ MONGER, *supra* note 195, at 3-4. In 2012, there were 42 million visitors for pleasure, 5.7 million visitors for business, 1.9 million temporary workers, 1.65 million students, 717,800 intracompany transferees, 475,000 exchange visitors, and 365,000 diplomats and other representatives. *Id.*

³⁰² See RYTINA, *supra* note 198, at 3.

³⁰³ HOEFER, RYTINA & BAKER, JANUARY 2011 UNAUTHORIZED IMMIGRANT POPULATION, *supra* note 197, at 1.

were the nation to go down the path of universal registration, all citizens would also have to be included in any such figure.

A status-based registration involving a carry requirement would likely require more resources. There is enormous complexity with respect to the adjudication of forms of immigration status today. In the past, this was not the case. During Chinese Exclusion, for example, there was a single question to be adjudicated to register: whether or not the person was a “laborer” who arrived in the United States prior to 1882.³⁰⁴ Likewise, under the 1944 status-based registration system, only a few questions were relevant, such as whether the person was a lawful permanent resident or a person granted one of the few limited forms of nonimmigrant status.³⁰⁵ Today, immigration status is a complex and fluid proposition. People can move from undocumented to documented status through asylum, Special Immigrant Juvenile (“SIJ”) petition, U, and T visas; from one nonimmigrant status to another; and from nonimmigrant to immigrant status. The vast majority of persons who immigrate on employment visas adjust their status from a nonimmigrant visa.³⁰⁶ During these transitions, non-citizens can be without status for months and then retroactively deemed to have been in lawful presence.³⁰⁷ It would be exceedingly difficult (and expensive) to develop a card suitable for carrying that would accommodate all of these shifting forms of status. It would be even more difficult to develop one that would be available promptly to identify those with status or incipient status.

2. Diplomatic Implications

The registration of non-citizens has implications for the role of the United States as part of the global economy. The many visa categories and methods for becoming an American flow from the country’s interest in recruiting talent from around the world, allowing companies to thrive in a world economy, and providing humanitarian relief to refugees and deserving persons in the United States. Registration laws

³⁰⁴ See *supra* note 36 and accompanying text.

³⁰⁵ See *supra* Part I.B.1 (discussing registration in 1944).

³⁰⁶ See Benson, *supra* note 159, at 210 (“[A]n individual rarely takes a direct path to immigration. Instead, most non-citizens first use some of the nineteen non-immigrant or temporary visa categories while completing the journey through the immigration process.” (footnote omitted)).

³⁰⁷ See FOREIGN AFFAIRS MANUAL, *supra* note 193, § 40.92 N1(b)(4) (describing “period of stay authorized by the Secretary of Homeland Security” as including time during pendency of an application for an extension or change of nonimmigrant classification, even if that time is after person’s authorized period of stay has expired).

are easier to impose in a country where the population is less fluid and there is less interest in recruiting and welcoming persons from abroad, either on a temporary or permanent basis. The experience of 1957 is instructive. The United States could have decided that its registration scheme was more important than having the Olympics in the United States or hearing orchestras from Eastern Europe. But that is not the choice that Congress made even in a time of difficult international relations. It is hard to believe that in today's climate a card-carrying scheme that was rejected in the 1950s would be embraced once the country experienced what that system would mean in terms of discouraging visits by tourists, employees, business people, students, and others.

3. The Problem of Differentiation

Alien registration campaigns have a significant effect on citizens and lawfully present aliens.³⁰⁸ Officials tasked with enforcing registration laws must determine, on the spot, who is a non-citizen, subject to obligation, and who is not — an impossible task in a diverse nation like the United States. In the past, this problem was addressed by limiting registration obligations to readily identifiable classes of aliens (e.g., the Chinese).³⁰⁹ Such a discriminatory approach, needless to say, would be unfathomable today; however, the problem of differentiation remains. Because anyone could be foreign born and therefore subject to the registration requirement, enforcement of broad-based registration laws demands that enforcement officials use proxies for alien-ness (race, ethnicity, language). Such profiling tactics expose citizens and lawfully present aliens to invasive questioning, wrongful arrest, and detention. As the United States becomes a more diverse nation, this situation becomes all the more intolerable.³¹⁰

Altogether, past experience and current debates show that there is little appetite for a universal registration system that would burden citizen and non-citizen alike. Any registration system is therefore doomed to have the fundamental problem of differentiation of who is and is not subject to the requirement. And that, in turn, will burden

³⁰⁸ See Ngai, *supra* note 61, at 80 (noting that the enforcement of alien registration laws has been historically stymied by the “problem of differentiating” citizens from non-citizens).

³⁰⁹ See *supra* Part I.A.2 (describing Chinese registration).

³¹⁰ See Kevin R. Johnson, *The Case Against Racial Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 708-09 (2000) (describing the impact of profiling based on “Hispanic appearance” on citizens and lawful permanent resident population).

those citizens profiled as non-citizens, as well as the very non-citizens this country seeks to attract through its complex immigration system. Registration schemes might be tried, but they will not be sustained, thereby making the initial effort hardly worth the time, resources, and hardship that it will cause.

4. Harm to Minority Populations

Finally, registration almost always imposes unique costs on minority populations. As social scientists describe the problem, “population data systems” often prove dangerous because they “permit the identification of vulnerable subpopulations within the larger population, or even the definition of entire populations as ‘outcasts’ and a threat to the overall health of the state.”³¹¹ Historical examples of population data systems being used as tools of oppression abound. In France, national identity cards emerged in 1940 when they were used by the Vichy government to identify more than 75,000 Jews for deportation during the Holocaust.³¹² In South Africa, the Population Registration Act of 1950 provided the foundation upon which the whole edifice of apartheid would be constructed, requiring that every South African be classified into one of a number of racial population groups.³¹³ In the United States, registration was the first step toward internment of the Japanese.³¹⁴

The Dominican Republic offers a modern-day, cautionary tale. In 2007, the nation approved a registration scheme designed to identify the children of foreigners.³¹⁵ Under the plan, all such children, even if born in the Dominican Republic, would receive “pink certificates” in

³¹¹ William Seltzer & Margo Anderson, *The Dark Side of Numbers: The Role of Population Data Systems in Human Rights Abuses*, 68 SOC. RES. 481, 482, 506 (2001) [hereinafter *The Dark Side of Numbers*] (discussing ways in which “data and data systems have been used to assist in planning and carrying out a wide range of serious human rights abuses throughout the world”).

³¹² See COLIN J. BENNETT & DAVID LYON, *PLAYING THE IDENTITY CARD* 201 (2008) (“[T]he Vichy card . . . served the . . . task of ‘cleansing’ the national community . . .”); SUSAN ZUCCOTTI, *THE HOLOCAUST, THE FRENCH AND THE JEWS* 280-81 (1993) (describing how 77,000 Jews died through Vichy policies); DONNA F. RYAN, *THE HOLOCAUST & THE JEWS OF MARSEILLE: THE ENFORCEMENT OF ANTI-SEMITIC POLICIES IN VICHY FRANCE* 41 (1996) (describing significant role of national ID systems in identifying Jews for deportation to death camps); cf. Seltzer & Anderson, *The Dark Side of Numbers*, *supra* 311, at 505 (noting France’s examination of its methods in furthering the Holocaust).

³¹³ See Seltzer & Anderson, *The Dark Side of Numbers*, *supra* note 311, at 501.

³¹⁴ See *id.* at 492.

³¹⁵ See Stacie Kosinski, Note, *State of Uncertainty: Citizenship, Statelessness, and Discrimination in the Dominican Republic*, 32 B.C. INT’L & COMP. L. REV. 377, 390-91 (2009).

lieu of the standard white ones required to obtain a national identification card.³¹⁶ Their identities would be catalogued in a so-called “pink book.”³¹⁷ Many international observers believed that the registry only served to brand children born to women of Haitian descent “with a modern-day scarlet letter of statelessness.”³¹⁸ They appear to have been right: in October of 2013, the Dominican Republic’s highest court revoked the citizenship rights of more than 210,000 children of Haitian migrants born after 1929.³¹⁹ Their names are catalogued, conveniently enough, in the “Pink Book.”³²⁰

CONCLUSION

This Article has identified an insidious misconception underlying much of today’s immigration law, policy, and discourse: the “myth of comprehensive registration.” Proponents of the myth (a group which includes members of the Supreme Court, federal and state officials, as well as many members of the public) presume the existence of: (1) a uniform obligation for non-citizens to register with the federal government; (2) an efficient and reliable system for providing registration documents to registrants; and (3) a universal carry requirement.

Not only are none of these premises supported by today’s registration scheme, but the United States has never had such registration schemes. America’s registration campaigns have almost always been crisis-driven and targeted in nature, subjecting only a subset of the non-citizen population (usually based on race or ethnicity) to onerous registration requirements. While a broad-based system was put into effect prior to World War II, that system was abandoned shortly after the war.

All that remains today are vestigial provisions in the U.S. Code and a haphazard set of regulations, none of which enable or require all aliens to register and carry proof of registration. Properly understood, existing registration laws at most require lawful permanent residents to carry

³¹⁶ See *id.* (describing cards as necessary to obtain rights and governmental services).

³¹⁷ See *id.* (explaining names were placed into the so-called “Pink Book” of foreigners).

³¹⁸ *Id.*

³¹⁹ See Allyn Gaestel, *Dominican Republic Citizenship Law Ends Limbo for Haitian Descendants*, THE GUARDIAN (May 23, 2014, 8:25 AM), <http://www.theguardian.com/global-development/2014/may/23/dominican-republic-citizenship-haiti-descendants>; *UN Urges Dominican Republic to Ensure Citizens of Haitian Origin Do Not Lose Nationality*, UN NEWS CTR. (Oct. 1, 2013), <http://www.un.org/apps/news/story.asp?NewsID=46152#.U9c4x41dXZA>.

³²⁰ See Kosinski, *supra* note 315, at 390-91 (describing the “Pink Book”).

their “green cards” at all times. In short, there exists no functional alien registration scheme. When the federal government really does perceive a need to register non-citizens, it must do so via special registration procedures. Outside of these procedures, alien registration fails to create a comprehensive inventory of all non-citizens in the United States or to reliably provide answers regarding particular individual’s immigration statuses.

This reality, however, has not stopped state and federal officials from policing under the myth of comprehensive registration. States perpetuate the myth of criminalizing unlawful presence in contravention of decades of Congressional intent. Federal agencies perpetuate the myth to bolster arrest and deportation statistics. And many commentators have sanctioned the use of vestigial registration laws as a pretext for checking individuals’ immigration status. This practice has resulted in racial profiling, harassment, and mistaken arrests and detentions.

Arrests based on nothing more than failure to carry proof of status, whether perpetrated by the states or the federal government, are improper and should be stopped. The registration laws cannot and should not be used to arrest or detain non-citizens, and certainly not as the bases for criminal prosecutions. Going forward, policy makers might consider implementing a revamped registration system. However, history shows that registration schemes impose tremendous costs, both economic and social. Ultimately, the project of comprehensive registration, which is both politically impracticable and ill advised as a matter of policy, should be abandoned.