

Proving Identity

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Abstract

United States law, over the past two hundred years or so, has subjected people whose race rendered them noncitizens or of dubious citizenship to a variety of rules requiring that they carry identification documents at all times. Those laws fill a gap in the policing authority of the state, by connecting the individual's physical body with information the government has on file about him; they also can entail humiliation and subordination. Accordingly, it is not surprising that U.S. law has almost always imposed these requirements on people outside our circle of citizenship—African Americans in the antebellum South, Chinese immigrants, legally resident aliens. Today, though, there's reason to think that we're moving closer to a universal identity-papers regime.

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We've all been displaying identification documents a lot lately. You have to show ID to vote, in most states.¹ Federal law requires that you show ID to accept employment, and there are some in Congress who would go further—requiring anyone in the United States to display a new national ID card before taking any job.² More and more, we're getting used to demands that we verify our identity at different moments in our daily lives.³

And the nature of the documents that we need to show is changing. Visitors to U.S. military bases need to identify themselves to be admitted; until recently, a state driver's license sufficed.⁴ If you live in Chicago, though, and display your Illinois driver's license at the gate of the naval training center there, you'll be turned away now.⁵ The U.S. government ruled last year that it won't accept an Illinois driver's license for that purpose because, it says, Illinois driver's licenses don't satisfy federal security standards.⁶ The federal government has announced that in the future it will disqualify residents of certain states from using their driver's licenses to pass through airport security.⁷ So it's not merely that the law requires us at various moments in our lives to show identification documents. The federal government increasingly is seeking to dictate the manner in which those documents are issued.⁸

If you're not a U.S. citizen, but you are physically present in this country, federal law is stark: it requires you to carry, at all times, in your

1. See Wendy Underhill, *Voter Identification Requirements: Voter ID Laws*, NAT'L CONF. ST. LEGISLATURES (Sept. 26, 2016), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>. In some of those states, though, would-be voters without ID can be found eligible through other means. See *id.*; see also *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (striking down North Carolina's voter ID law as violative of the Equal Protection Clause).

2. See A. Michael Froomkin & Jonathan Weinberg, *Hard to BELIEVE: The High Cost of a Biometric Identity Card 2* (2012), http://www.law.berkeley.edu/files/Believe_Report_Final.pdf.

3. See *infra* notes 375–84 and accompanying text.

4. See Jim Garamone, *Licenses from 5 States Banned at DoD Bases*, DEP'T DEF. NEWS (Jan. 20, 2016), <http://www.defense.gov/News/Article/Article/643615/licenses-from-5-states-banned-at-dod=bases>.

5. See *id.*

6. See *id.*; see also *Information on Real ID and IL Licenses*, ST. REPRESENTATIVE BOB PRITCHARD (Jan. 13, 2016), <http://www.pritchardstaterep.org/2016/01/information-on-real-id-and-il-licenses.html>.

7. See Jad Mouawad, *U.S. Gives States 2 More Years to Meet Driver's License Standards*, N.Y. TIMES (Jan. 8, 2016), <http://mobile.nytimes.com/2016/01/09/business/us-gives-states-2-more-years-to-meet-driver's-license-standards.html>; Allissa Wickham, *DHS Sets 2018 Deadline for REAL ID Travel Requirements*, LAW360 (Jan. 8, 2016, 11:13 PM), <http://www.law360.com/articles/744772/>.

8. See, e.g., Mouawad, *supra* note 7.

personal possession, federally issued documents establishing your identity and your immigration status.⁹ This isn't at all new. Looking back through United States history, people whose race rendered them noncitizens or of dubious citizenship have been subject to similar rules requiring that they carry identification documents: free blacks in the antebellum period,¹⁰ and Chinese immigrants beginning in 1892.¹¹ The current law requiring noncitizens to carry ID can be traced to a 1952 effort to save the country from Communism.¹² White U.S. citizens have also sometimes been subject to legal sanction if found without ID, including men of draft age during World War I and (nominally) from 1940 to 1975, and the disreputable poor in some jurisdictions during the 1970s and early 1980s.¹³

Current pushes for new ID requirements, like the older ones, tend to be

9. The Immigration and Nationality Act directs “every alien now or hereafter in the United States” to “apply for registration and to be fingerprinted.” 8 U.S.C. § 1302(a) (1994); *see* 8 U.S.C. § 1306(a) (1996). It directs the United States, following that registration, to issue the alien a “certificate of alien registration or an alien registration receipt card.” 8 U.S.C. § 1304(d). And it directs “every alien, eighteen years of age and over, [to] at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him.” *Id.*

These provisions are a little less sweeping than they look. I’ve argued elsewhere that the statute’s registration requirement doesn’t apply to people who have entered the United States illegally. *See* Jonathan Weinberg, *Demanding Identity Papers*, 55 WASHBURN L.J. 197 (2016). And it seems plain to me (although not everyone agrees) that the law doesn’t require a noncitizen to carry an immigration document that was never issued to her. *Id.* Many noncitizens in the United States—illegal entrants in particular—have never received documents that count under the statute as a “certificate of alien registration or alien registration receipt card.” *Id.* at 210. Those persons aren’t properly subject to the carry requirement. *See id.* at 213–14.

There is substantial judicial consensus, though, that § 1304(e) does require *legal* entrants to carry their papers at all times. *See, e.g.,* *United States v. Ritter*, 752 F.2d 435, 437 (5th Cir. 1985) (explaining that Section 1304(e) “makes it a criminal offense for a documented alien to fail to carry his or her alien registration card or other immigration documents”); *Katris v. Immigration & Naturalization Serv.*, 562 F.2d 866, 869 (2d Cir. 1977) (failing to carry a registration card is “a criminal offense for a lawfully admitted alien”); *see also Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (“Once here, aliens are required to register with the Federal Government and to carry proof of status on their person.”).

10. *See infra* Part I. The Supreme Court in *Dred Scott v. Sandford* declared that persons of African descent were not and could not be U.S. citizens, even if they had been born in the United States. 60 U.S. 393 (1857). Prior to *Dred Scott*, the citizenship status of free blacks was contested. *See* JAMES KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, at 311–24 (1978).

11. *See infra* Part II. Chinese immigrants were excluded from American citizenship until 1943. *See infra* note 62 and accompanying text.

12. *See infra* Part IV.

13. *See infra* Parts III & V.

attached to immigration and national security initiatives, and to be heavily rooted in race. Arizona's 2010 Support Our Law Enforcement and Safe Neighborhoods Act is exemplary.¹⁴ Enacted in an environment of widespread police racial profiling and unlawful stops, detentions, and arrests of Latinos,¹⁵ it made it a state crime for any non-U.S. citizen to fail to carry federal immigration documentation.¹⁶ Current U.S. Border Patrol enforcement can be seen through the same lens. Agents understand themselves to have the authority to detain and demand papers from anyone they encounter within one hundred miles of a border who appears to be foreign-born; unsurprisingly, their enforcement targets skew brown.¹⁷

How should we understand these mandates? Historically, we have most commonly used identity-papers requirements to control those outside our legal circle of citizenship—African Americans in the antebellum South, Chinese immigrants, and legally resident aliens. All of these groups have been perceived as including members who were subversive, encroaching, or illegal, but who would be too hard to identify and classify without the aid of forced identification. In the military draft context, we sought to use a less problematic version of the same technique to identify citizen “slackers”—to avoid a feared splintering of citizenship by means of (perceived) shirking from crucial national obligation and sacrifice. We've thus used identity-document controls to maintain a hold over *noncitizens*, and to cleave those whom the majority perceived to be *unreliable* citizens.

But there's more going on. ID requirements are threatening, on multiple fronts, to those forced to identify themselves. From one perspective, the foundational aspect of identity cards is that they connect one's physical body with a government database. Without a requirement that persons carry identity papers, a law enforcement officer encountering an anonymous citizen has no access to the database-stored information that would provide a basis for arrest. With such a requirement, that information is visible to the officer, and it puts the holder's body at risk.

14. See S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

15. See Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, to Bill Montgomery, Cty. Attorney, Maricopa Cty., Ariz. (Dec. 15, 2011), http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf.

16. See *Arizona v. United States*, 132 S. Ct. 2492, 2501–03 (2012). The United States Supreme Court struck down most of the statute's provisions as preempted by federal immigration law. *Id.*

17. See Weinberg, *supra* note 9, at 202; see also Kevin Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1013 (2010).

From another perspective, law enforcement's ability to demand identity cards relates to issues of dominance and hierarchy. American ideology assures us that free persons can move about without having their bona fides questioned, without having a police officer able to demonstrate his authority and their subordination by forcing them to display identification. That understanding, indeed, is reflected in Supreme Court case law.

Either way, it's unsurprising that we've been much more willing throughout our history to impose identification requirements on minorities—on those outside our circle of citizenship—than on ourselves. A few years ago, the Senate drafters of a comprehensive immigration-reform bill urged that *every* person who sought to work in the United States—citizen and noncitizen alike—should have to get a new machine-readable ID card bearing his biometric information and establishing his legal authorization to work.¹⁸ But while the larger bill in which that proposal was embedded passed the Senate, the ID-card proposal did not; it was dropped.¹⁹ Similarly, aspects of the 2005 REAL ID law, seen as tending to create a national ID card, have seen continuing resistance and pushback in some states and local communities.²⁰

And yet it's still fair to say that we're seeing a drift towards greater acceptance of ID requirements for all; indeed, those challenged REAL ID provisions are still on track to be implemented. How should we understand that development? In this Article, I tell the story of identity-papers rules in the United States and draw some conclusions.

Part I begins by examining the pre-Civil War rules imposed on many free blacks requiring that they carry documentation. Part II considers the more encompassing identity-papers requirement applied to Chinese migrants

18. See HARRY REID ET AL., REAL ENFORCEMENT WITH PRACTICAL ANSWERS FOR IMMIGRATION REFORM (REPAIR) PROPOSAL (Apr. 29, 2010), <http://www.aila.org/infonet/practical-answers-for-immigration-reform-proposal>; see also Margaret Hu, *Biometric ID Cybersurveillance*, 88 IND. L.J. 1475, 1509–16 (2013).

The Senators reasoned that if only noncitizens had to produce a card, then noncitizens could circumvent the card requirement by pretending to be citizens. See REID ET AL., *supra*. Accordingly, their plan provided that citizens and noncitizens alike would have to present the high-tech identification cards when they were hired. See Froomkin & Weinberg, *supra* note 2, at 4.

19. See Michael D. Shear & Ashley Parker, *A Senate Plan Alters Waiting Periods for Immigration*, N.Y. TIMES (Mar. 18, 2013), <http://www.nytimes.com/2013/03/18/us/politics/senate-groups-immigration-plan-would-alter-waiting-periods.html>.

20. See Trevor Gardner, *Resurrecting Criminal Justice Localism: Toward a Theory of Decriminalization* (2017) (unpublished manuscript) (on file with author).

starting in 1892. Part III shifts to World War I, and a regulation providing that all men of draft age carry draft registration certificates at all times. Part IV looks to the requirement, dating from the McCarthy era and still in force, that noncitizens register with the U.S. government and carry their registration cards at all times. Part V considers the Vietnam-era draft-card controversy, and a set of state and local laws in force roughly contemporaneously requiring vagrants and undesirables to provide identification on demand. Part VI, finally, considers REAL ID and identity demands in the modern context.

I.

The United States' practice of requiring certain disfavored people to carry identification papers began in the seventeenth century. It shouldn't be surprising that the movement of slaves was highly restricted in the antebellum South. After all, a slave travelling alone might be seeking to escape his bondage, or worse—lawmakers feared—might be joining with others for insurrection. Virginia, thus, enacted a 1680 statute directed at the dangerous “meeting of considerable numbers of Negro slaves under pretense of feasts and burials.”²¹ Besides making it punishable by thirty lashes for the slave to “presume to lift up his hand in opposition against any Christian,”²² it prohibited “any Negro or slave . . . to go or depart from his owner's plantation without a certificate.”²³

South Carolina followed in 1687, making it illegal for “any negro or negroes, or other slave, upon any pretense whatsoever, to travel or goe abroad, from his or their master or mistresses house in the night time, or in the day time, without a note from his or their master or mistresse or overseer.”²⁴ Other states, including North Carolina and Kentucky, followed

21. See JUNE P. GUILD, *BLACK LAWS OF VIRGINIA* 45–46 (1936); see also ANITA WILLS, *NOTES AND DOCUMENTS OF FREE PERSONS OF COLOR* 228 (rev. ed. 2004); JOHN CODMAN HURD, *THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES* 234 (D. Van Norstrand 1858).

22. See sources cited *supra* note 21.

23. See sources cited *supra* note 21. The first such law in the Western Hemisphere appears to have been a Barbados rule, enacted in response to an aborted 1649 rebellion, that required slaves to carry a pass whenever away from their home plantations. See SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 11 (2001).

24. 2 *THE STATUTES AT LARGE OF SOUTH CAROLINA* 23 (Thomas Cooper ed., 1837); see also HADDEN, *supra* note 23, at 16; see also A. LEON HIGGENBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 170–72* (1978); HARLAN GREENE ET AL., *SLAVE BADGES AND THE SLAVE-HIRE SYSTEM IN CHARLESTON, SOUTH CAROLINA,*

with their own versions of the slave pass system.²⁵

Things were potentially more complicated, though, in slaveholding jurisdictions that admitted the possibility that a black person might *not* be a slave.²⁶ What then? Free black people were seen as by their nature subversive.²⁷ They were suspected of helping slaves escape. They too might seek to organize rebellion. By their very existence and presence they undermined slave morale, “lessening the[ir] due subordination.”²⁸ Moreover, the fact that white folks could not easily tell the difference on sight between a slave and a free person of color was a cause of “great inconvenience.”²⁹ Some slave owners allowed slaves to hire themselves out as if they were free persons in return for all or part of their earnings, but the resultant mingling and blurring of boundaries undermined enforcement of the slave laws; moreover, said some, it was “a great Inlet to Idleness, Drunkenness and other Enormities.”³⁰

1783–1865, at 15 (2004). South Carolina reenacted this provision in later iterations of its laws. Hurd quotes a 1740 South Carolina law prohibiting slaves from being absent from home without a ticket, and adding that if such a slave “shall refuse to submit to the examination of any white person, it shall be lawful for any such white person to apprehend and moderately correct [beat] such slave, and if any such slave shall assault and strike such white person, such slave may be lawfully killed.” HURD, *supra* note 21, at 304; *see also* HADDEN, *supra* note 23, at 18. A 1764 law required slaves away from home at the master’s direction and working for hire to “wear,” rather than merely carry, a badge or ticket. *See* GREENE ET AL., *supra* note 24, at 18. The laws, however, were not fully enforced. *See id.* at 16–25.

25. *See* Elizabeth Anne Pryor, ‘Jim Crow’ Cars, Passport Denials and Atlantic Crossings: African American Travel, Protest and Citizenship at Home and Abroad, 1827–1865, at 92–93 (2008) (unpublished Ph.D dissertation, University of California, Santa Barbara); *see also* JOHN HOPE FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA, 1790–1860, at 59 (1943).

26. *See* JOHN HENDERSON RUSSELL, THE FREE NEGRO IN VIRGINIA, 1619–1865, at 135 (1913).

27. *See id.*

28. FRANKLIN, *supra* note 25, at 75 (quoting LAWS OF THE STATE OF NORTH CAROLINA, PASSED BY THE GENERAL ASSEMBLY AT THE SESSION OF 1846–47, at 109 (1847)).

29. LETITIA W. BROWN, FREE NEGROES IN THE DISTRICT OF COLUMBIA, 1790–1846, at 56 (1972) (quoting SAMUEL SHEPHERD, THE STATUTES AT LARGE OF VIRGINIA, FROM OCTOBER SESSION 1792, TO DECEMBER SESSION 1806, INCLUSIVE, IN THREE VOLUMES (NEW SERIES) BEING A CONTINUATION OF HENING 238 (1835–36)).

30. GREENE ET AL., *supra* note 24, at 16. Charleston, South Carolina in 1783 responded to that problem by requiring every free black person in the city, after registering with the city clerk, “to obtain a badge from the Corporation of the City . . . and . . . wear it suspended by a string or ribband, and exposed to view on his breast.” *Id.* at 23. It appears that the rule was abandoned in 1789. *See id.* at 27–28, 153. *But see* Pryor, *supra* note 25, at 93–94 (reporting a statement in an 1823 abolitionist book that free men of color found after dark in Charleston without a pass were “taken up and punished”) (quoting ZACHARY MACAULAY, NEGRO SLAVERY, OR, A VIEW OF SOME OF THE MORE PROMINENT FEATURES OF THAT STATE OF SOCIETY AS IT EXISTS IN THE UNITED STATES OF

Virginia addressed these issues in 1793 by requiring free persons of color periodically to register their identifying information and claim to freedom with the county clerk, receiving a registration certificate (“freedom papers”) in return.³¹ It was an offense to employ a free black person without a certificate issued in the employer’s county, and one who sought to work without papers was subject to incarceration.³² Free persons of color working on boats (who by necessity traveled from place to place) were required by law to carry their freedom papers at all times.³³ Similar registration statutes became common throughout the South.³⁴

North Carolina was exemplary: The state in 1785 required all free persons of color living in certain towns to appear for registration, where they would receive a cloth badge to wear on the left shoulder with the word FREE.³⁵ This rule persisted and was expanded. A rule applicable in Raleigh, N.C., required all free persons of color within city limits to register and provide “satisfactory testimonials of good character”; they received residence permits in return.³⁶ Once the registration deadline was passed, those who claimed “to be free persons of color and ha[d] no permits, [were] rigorously dealt with.”³⁷ Later North Carolina laws efficaciously combined

AMERICA AND IN THE COLONIES OF THE WEST INDIES, ESPECIALLY IN JAMAICA 4 (1823)).

31. See CHRISTOPHER G. BATES, *THE EARLY REPUBLIC AND ANTEBELLUM AMERICA: AN ENCYCLOPEDIA OF SOCIAL, POLITICAL, CULTURAL, AND ECONOMIC HISTORY* 379 (2015); IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 93 (Vintage Books 1976); BROWN, *supra* note 29, at 56, 190–91 n.57; GUILD, *supra* note 21, at 95; A. Leon Higginbotham & Greer C. Bosworth, *Rather than the Free: Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. REV. 17, 28–29 (1991); see also Linda K. Kerber, *The Meanings of Citizenship*, 84 J. AM. HIST. 833, 842 (1997); WILLS, *supra* note 21, at 113–14.

32. See sources cited *supra* note 31.

33. See GUILD, *supra* note 21, at 85; Higginbotham & Bosworth, *supra* note 31, at 46. Kerber and Wills, indeed, describe free blacks in Virginia as required to carry freedom certificates at all times. See Kerber, *supra* note 31, at 842; WILLS, *supra* note 21, at 113–14. Because black sailors were seen as a source of political contagion, at least a half-dozen southern states restricted their movement when in port, either requiring them to carry locally issued passports or actually incarcerating them for the duration of their stays. See Pryor, *supra* note 25, at 94–96.

34. See BERLIN, *supra* note 31, at 93–94; Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1871 (1993); WAYNE A. LOGAN, *KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA* 17 (2009). Building on the registration statutes, the law called on county clerks to maintain detailed lists of all free blacks in their jurisdictions. See BERLIN, *supra* note 31, at 53.

35. See FRANKLIN, *supra* note 25, at 59–60.

36. *Id.* at 62.

37. *Id.* at 62; see also *id.* at 75–76.

the registration and slave pass systems.³⁸

An 1847 statute, thus, set up rules for free blacks working in a location called the Dismal Swamp.³⁹ Its text suggests that those individuals were required not only to register and receive certificates, but to carry them:

That no free person of color shall work . . . in the said swamp without . . . keeping and having ready to produce the copy of [identification papers] certified by the [court] clerk . . . and any free person of color found employed . . . in the said swamp without such copy, shall be deemed guilty of a misdemeanor, may be arrested and committed, or bound over to the next court of the county . . . and on conviction may be punished by fine, imprisonment and whipping, all or any of them at the discretion of the court.⁴⁰

Those registration certificates recited the worker's name and employer, and incorporated the mid-Nineteenth Century's version of biometrics. That is, they gave information about the worker's physical characteristics, so that a person examining the card could determine whether the person presenting the card was the person to whom it had been issued.⁴¹ We use photographs (or fingerprints, or more high-tech technology, such as iris scans) today for that purpose; a certificate in the 1840s addressed that need by describing the holder verbally.⁴² One such certificate thus included this text: "about forty-eight years of age, of black complexion, . . . stoutly built, [with] a scar on his right hand, one on his breast, one on the left side of his face below the eye, and stand[ing] without shoes five feet eight inches high."⁴³

Many jurisdictions explicitly required free persons of color to carry their papers at all times.⁴⁴ Even where the registration laws were less explicit, though, free blacks were often required to prove their registered status.⁴⁵

38. *See id.* at 74.

39. *See id.*

40. *Id.* at 74.

41. *See id.* at 75.

42. *See* Jonathan Weinberg, *Biometric Identity*, 59 COMMS. ACM No. 1, at 30–32 (Jan. 2016).

43. FRANKLIN, *supra* note 25, at 75. Virginia registration certificates, described in text accompanying note 33, *supra*, appear to have been similar but less detailed. *See* WILLS, *supra* note 21, at 81, 83, 102. Compare the treatment of the biometrics issue in connection with certificates issued to Chinese persons under the Geary Act. *See infra* notes 84–87 and accompanying text.

44. *See* BERLIN, *supra* note 31, at 317, 319.

45. *See* Neuman, *supra* note 34, at 1871.

The very structure of antebellum law ensured that a free person of color who did not carry freedom papers could be imprisoned or enslaved. The law in Mississippi made the situation most clear: “[E]very negro or mulatto found within the State, and not having the ability to show himself entitled to freedom, may be sold, by order of the Court, as a slave.”⁴⁶ This general principle—that a person of color was presumed to be a slave unless he could prove otherwise—was the law throughout the South.⁴⁷ Having identification documents establishing one’s free status ready to hand, thus, had obvious value.⁴⁸ Whatever the details of a particular state or city’s law, free persons of color in the southern states found themselves in a position where any white person, at any time, could demand proof of their status, and the consequences of not providing that proof could be dire.⁴⁹

To a lesser degree, this state of affairs could be seen in the northern states as well. Those states had their own registration statutes.⁵⁰ Midwestern laws that required all free black persons to register their court-provided certificates of freedom were not always well enforced,⁵¹ but nonetheless provided tools for the harassment of black residents.⁵² In general, free blacks in the North could travel without passes or freedom papers.⁵³ Nonetheless, Chief Justice Roger B. Taney in his *Dred Scott* opinion took pains to note that under a 1774 Connecticut law, “any free negro [traveling] without [a written] pass” was subject to arrest.⁵⁴

46. WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURE SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS* 276 (1853).

47. *See id.* at 276–77 (referencing North Carolina, South Carolina, Georgia, and Virginia); *see also id.* at 227 (free blacks in Maryland arrested for traveling beyond their home counties without a pass were subject to enslavement for failure to pay six dollars in costs).

48. *See Pryor, supra* note 25, at 96–100.

49. *See BERLIN, supra* note 33, at 95, 317.

50. *See* Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 *RUTGERS L.J.* 415, 433 (1986).

51. *See id.* at 435.

52. *See* Edgar F. Love, George C. Mendenhall, & C.F. Lowe, *Registration of Free Blacks in Ohio: The Slaves of George C. Mendenhall*, 69 *J. NEGRO HIST.* 38, 39 (1984) (quoting DAVID A. GERBER, *BLACK OHIO AND THE COLOR LINE, 1860–1919*, at 4 (1976)); *see also* Neuman, *supra* note 34, at 1871.

53. *See* Finkelman, *supra* note 50, at 476.

54. *See* *Scott v. Sandford*, 60 U.S. 393, 414 (1857). There is some evidence that free blacks in eighteenth century Pennsylvania were required to carry passes when traveling. *See* Higginbotham & Bosworth, *supra* note 31, at 276–77; EDWARD RAYMOND TURNER, *THE NEGRO IN PENNSYLVANIA: SLAVERY–SERVITUDE–FREEDOM, 1639–1861*, at 113–14 (1911). Pennsylvania, however, appears to

Even in the South, compliance with the registration and documentation laws was only partial.⁵⁵ Many free persons of color did not register, possibly because they saw the brush with officialdom involved in registration as itself dangerous.⁵⁶ There were too many non-registrants for the law to be enforced against all of them.⁵⁷ Antebellum southern police forces didn't have the resources to enforce the laws systematically; not all city watchmen were literate and capable of reading purported freedom papers.⁵⁸ Nonetheless, a free person of color in the South lived with the specter of arbitrary or random law enforcement. At any time, any white person might contest his liberty by demanding his documents.⁵⁹

II.

The end of the Civil War, the abolition of slavery, and the enactment of the Fourteenth Amendment profoundly changed the rules I've just described. After those events, the Constitution limited the power of government to enact identity-papers requirements directed at African American citizens.⁶⁰

have imposed the same requirement on white servants. *See* Higginbotham & Bosworth, *supra* note 33, at 272–73, 280.

55. *See infra* notes 56–57 and accompanying text.

56. *See* BERLIN, *supra* note 31, at 327–31.

57. *See id.*

58. *See id.* at 331.

59. *See id.* at 332.

60. This statement should be taken with appropriate caveats. The South, after reconstruction, reconfigured its legal system to support the continued forced labor of African American men. *See generally* DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME* (Icon Books 2008). Southern states began by enacting statutes making it illegal for a freedman to be without a labor contract with a white farmer, or to be hired for work without a discharge paper from his former employer, or otherwise to change employers without permission. *Id.* Those found in violation of the law could be sold into forced labor: convicted of a criminal offense, they would be sent to private employers to work in a forced-labor system that effectively reduplicated slavery. *Id.* Almost any African American man travelling alone in the South was subject to being charged with the common-law criminal offense of vagrancy—the crime of appearing to be indigent and unemployed—and disappearing into the forced-labor system. *See id.* at 12, 53–57, 124.

The Supreme Court struck down the most egregious versions of these laws in *Bailey v. Alabama*, 219 U.S. 219 (1911) and *United States v. Reynolds*, 235 U.S. 133 (1914), but the vagrancy offense and the practice of convict leasing persisted. Versions of the peonage system survived in some southern states until the 1920s and even beyond. *See* BLACKMON, *supra*, at 338–70. Florida did not ban employers from using the whip on prisoner-laborers until 1923. *See id.* at 367. Alabama did not stop sending prisoners to privately owned slave mines until 1928. *See id.* at 369. As late as 1932, Mississippi sheriffs still responded to labor shortages by rounding up African American men off the streets, charging them with vagrancy, and turning them over to local

Yet it was not long before we enacted a new set of rules requiring a new racially defined class of people to carry documents for police examination.

This piece of the story begins with Chinese immigration to California and the Pacific Northwest. Chinese migrants first came to the United States drawn by the economic boom of the 1848 California Gold Rush; at the outset, most of them worked in the mines or on the railroads.⁶¹ The new immigrants were ineligible to become U.S. citizens no matter how long their residence here,⁶² and they immediately encountered hostility and prejudice.⁶³ That prejudice was heightened by the recession of the 1870s, which exacerbated fears that Chinese immigrants were taking American jobs.⁶⁴ Some saw Chinese immigrants as subject to the control of the contractors who had paid their fares, bringing to the United States a new system of slavery.⁶⁵ Doctors characterized Chinese immigrants as vectors of disease.⁶⁶

plantation owners. *See id.* at 375–76.

61. *See* LUCY E. SALYER, *LAWS HARSH AS TIGERS* 7–8 (1995).

62. United States law then limited naturalization to “free white person[s].” *See* Naturalization Act of 1790, ch. 3, 1 Stat. 103 (1790). Congress in 1870 extended naturalization to persons of “African nativity” or “African descent.” *See* Naturalization Act of 1870, § 7, 16 Stat. 254, 256 (1870). This categorization barred the naturalization of all persons of Asian descent unless they could convince a court that they were “white”—which the Chinese, by law, were not. *See In re Ah Yup*, 1 F.Cas. 223, (Cal. 1878); IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 163–64 (rev. ed. 2006). By contrast, case law established Mexicans as eligible for citizenship in 1897. *See generally* *In re Rodriguez*, 81 F. 337 (W.D. Tex. 1897). American Indians were largely excluded from citizenship until the Immigration Act of 1924 and the Nationality Act of 1940. *See* Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (1924); Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137 (1940).

63. *See* SALYER, *supra* note 61, at 8. Thus, the California Supreme Court ruled in 1854 that Chinese—like African Americans and Indians—could not testify against whites in court. California’s witness-qualification rules, the court explained, should not be read to subject white litigants to China’s “degraded tribes.” *People v. Hall*, 4 Cal. 399, 403 (1854). Whites in California deserved protection from these

distinct people . . . recognizing no laws of this State, except through necessity . . . ; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point . . . between whom and ourselves nature has placed an impassable difference.

Id. at 404–05.

64. *See* SALYER, *supra* note 61, at 10. The Chinese in California were numerous enough to be blamed; they held steady at about 10% of the state population from 1860 through 1880. Nationally, they went from 0.1 to 0.2 of one percent of the population during the same time period. *See* UNITED STATES CENSUS BUREAU, *POPULATION, BY RACE, SEX, AND NATIVITY* (1880), http://www2.census.gov/prod/2/decennial/documents/1880a_v1-13.pdf.

65. *See* *Chew Heong v. United States*, 112 U.S. 536, 568 (1884) (Field, J., dissenting); SALYER, *supra* note 61, at 10; *see also* Kitty Calavita, *The Paradoxes of Race, Class, Identity, and “Passing”*: *Enforcing the Chinese Exclusion Acts, 1882–1910*, 25 *LAW & SOC. INQUIRY* 1, 4 n.1

All this fueled the rise of California's Workingmen's party, with its slogan "The Chinese must go!" and the enactment of virulently anti-Chinese laws on the state and local level.⁶⁷

The United States Congress, after a legislative debate in which proponents of new legislation urged that the Chinese were unassimilable, "utterly unfit for and incapable of . . . self-government," and engaged in an economic competition that would reduce American workers to "misery, want, self-denial, ignorance, and dumb slavery,"⁶⁸ took its first steps to end Chinese migration to the United States by enacting the Chinese Exclusion Act of 1882.⁶⁹ That statute barred the migration of Chinese laborers to the United States for the next ten years, and backed up that ban by providing in general terms for the removal of "any Chinese person found unlawfully within the United States."⁷⁰ The 1882 Act was both the first large-scale immigration restriction in United States history⁷¹ and—with one controversial and short-lived exception—the first provision for peacetime deportation.⁷² In order to accommodate United States treaty obligations,

(2000). The Chinese thus acquired in the public mind negative racial characteristics that earlier had been assigned to blacks. See LOPEZ, *supra* note 62, at 36. Some believed that exclusion of the Chinese would complete the work done by the abolition of slavery. See Moon-Ho Jung, *Outlawing "Coolies": Race, Nation, and Empire in the Age of Emancipation*, 57 AM. Q. 677 (2005).

66. See SALYER, *supra* note 61, at 11–12.

67. See ESTELLE T. LAU, *PAPER FAMILIES: IDENTITY, IMMIGRATION ADMINISTRATION, AND CHINESE EXCLUSION* 35 (Duke Univ. Press Books 2007). Most of these laws were struck down by the courts. They included California statutes forbidding Chinese from securing business licenses, working for corporations, or fishing in public waters, and authorizing local governments to take "all necessary measures to remove Chinese from their borders." See SALYER, *supra* note 61, at 260 n.72. The courts had similarly struck down an 1858 California law barring "any person or persons of the Chinese or Mongolian races" from entering the state. See THE STATE REGISTER [OF CALIFORNIA] AND YEAR BOOK OF FACTS: FOR THE YEAR 1857–59, at 219 (1859). See, e.g., OR. CONST. OF 1857, art. I, § 31 (stating that "the Legislative Assembly shall have the power to restrain, and regulate the immigration to this State of persons not qualified to become Citizens of the United States"); *id.* art. XV, § 8 ("No Chinaman, not a resident of the state at the adoption of this constitution, shall ever hold any real estate, or mining claim, or work any mining claim therein.").

68. SALYER, *supra* note 61, at 15–16; see also Calavita, *supra* note 65, at 11–13.

69. See Chinese Exclusion Act of 1882, Pub. L. No. 47-126, ch. 126, 22 Stat. 58 (repealed 1943).

70. *Id.* §§ 1, 12.

71. See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 40 (2006). Earlier, smaller-scale restrictions aimed at evils thought to be associated with Chinese migration had included the Coolie Trade Act of 1862, ch. 27, 12 Stat. 340, and the Page Act of 1875, ch. 141, 18 Stat. 477 (barring the importation of women for purposes of prostitution).

72. See generally MOTOMURA, *supra* note 71. The earlier law was the Alien Friends Act, which was enacted in 1798 as part of the Alien and Sedition Acts package and expired in 1800. See James

however, it allowed Chinese then living in the United States to leave and return, and it allowed the entry of non-laborers—merchants, teachers, students, and (wealthy) travelers.⁷³ This posed some practical enforcement problems.

First of all, in a largely pre-bureaucratic age in which few people had government-issued identity documents,⁷⁴ how were inspectors to know whether a Chinese person seeking to enter the United States was a (permitted) returning resident or a (prohibited) new entrant? The congressional drafters gave this extensive thought. They devised a scheme under which a government inspector was to board each departing vessel and make a list of all Chinese laborers leaving the United States, “in which shall be stated the name, age, occupation, last place of residence, physical marks or peculiarities, and all facts necessary for the identification of each.”⁷⁵ Inspectors were to ensure that registry books containing those lists were securely kept in the customhouse.⁷⁶ The departing laborers, for their parts, were entitled to reentry certificates “corresponding with the said list and registry in all particulars.”⁷⁷

How were inspectors to identify the *non*-laborers whose right to entry was preserved by the 1882 Act? Here the statute pushed the bureaucratic burden onto the Chinese government. That government was to issue every person an English-language certificate (the “section six certificate”) stating the person’s name, title, and bona fides, along with “age, height, and all physical peculiarities, former and present occupation or profession, and place of residence in China.”⁷⁸

While the sort of bureaucratic mechanisms I’ve described seem

Morton Smith, *The Enforcement of the Alien Friends Act of 1798*, 41 MISS. VALLEY HIST. REV. 85 (1954).

73. See Chinese Exclusion Act §§ 3, 6.

74. Driver’s licenses and Social Security cards, of course, were not yet with us, and birth certificates were rare. See *infra* note 149. Although the United States government had long issued passports to citizens requesting them, not until after World War II would it require citizens to have passports for peacetime foreign travel. See *Passport Applications*, NAT’L ARCHIVES, <http://www.archives.gov/research/passport/index.html> (last updated Oct. 27, 2016). Not until after World War I would it require peacetime noncitizen visitors and migrants (other than the Chinese) to present passports for entry. See CRAIG ROBERTSON, *THE PASSPORT IN AMERICA: THE HISTORY OF A DOCUMENT* 257–58 (2010).

75. Chinese Exclusion Act § 4.

76. See *id.*

77. *Id.*

78. Chinese Exclusion Act § 6.

commonplace today, they were novelties at the time. Chinese exclusion under the 1882 Act was the first large-scale peacetime exercise of United States federal administrative authority over individuals, and it necessitated the development of a wide range of new administrative mechanisms.⁷⁹

Those mechanisms faced a key problem: How was government reliably to identify individuals entering and leaving the country, especially given its limited ability to capture and record biometrics? Oral testimony had its limitations in establishing individuals' identities and bona fides. Sometimes Chinese seeking entry to the United States claimed good reason for lacking documents; they said that they had left the United States shortly before the reentry certificates became available, or that they were merchants who had resided in third countries since before section six certificates were available.⁸⁰ The courts were sympathetic to such claims, but legislators and administrators were not. Their core assumption, rather, was that almost all Chinese lied in order to enter this country.⁸¹ Indeed, Congress amended the statute almost immediately to provide that reentry certificates and section six certificates were the "sole" evidence permissible to establish a right of entry into the United States.⁸²

But documents had their own limitations. As of 1882, photographs were not yet widely used for identification; thus the statute's direction, as in 1847 North Carolina,⁸³ was that inspectors note "physical marks or peculiarities."⁸⁴ Kitty Calavita quotes the following descriptions from

79. See Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1 (2002); see also ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943*, at 46-47 (2003). See generally MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 57-90, 63 (2004) (detailing the development of administrative and legal structures during the twentieth century to address the "problem of differentiating illegal immigrants from citizens and legal immigrants"); Craig Robertson, *A Documentary Regime of Verification: The Emergence of the U.S. Passport and the Archival Problematization of Identity*, 23 CULTURAL STUD. 329 (2009) (describing the development of new bureaucratic methods to support the new "documentary regime of verification" in the late nineteenth century).

80. See generally *In re Chin A. On*, 18 F. 506 (D. Cal. 1883); *The Chinese Merchant's Case* [*In re Low Yam Chow*], 13 F. 605 (C.C.D. Cal. 1882).

81. See SALYER, *supra* note 61, at 44.

82. See Act of July 5, 1884, ch. 220, 23 Stat. 115 (1884); see also *United States v. Jung Ah Lung*, 124 U.S. 621 (1888) (holding that a Chinese person who left the United States before 1884 and whose reentry certificate was stolen could rely on San Francisco registry records to prove his right to return); SALYER, *supra* note 61, at 19-20.

83. See *supra* note 43 and accompanying text.

84. See Calavita, *supra* note 65, at 8; MOTOMURA, *supra* note 71, at 26.

reentry certificates of the mid-1880s:

Cook. Large ragged scar left side neck. Both ears bored. Very dark complexion. Bright eyes. Small hard white mole front right ear.

Porter in store. Small brown spot left corner left eye. Small pock pit right corner right eye. Small pit near each corner mouth. Pit near right side nose.

Barber. Large ragged scar like burn right side head in hair. Small pock pit center of chin. Scar over right eyelid.⁸⁵

Inspectors and other observers commonly found those descriptions inadequate.⁸⁶ As one official put it, “it is almost impossible . . . to tell with any degree of certainty whether the Chinese who hold the certificates are the persons described therein”: a simple notation of “mole on left wrist” is “rather an indefinite means of identification.”⁸⁷

The Treasury Department, in charge of this administrative apparatus, investigated other technologies of identification, including, for a time, the nascent art of fingerprinting.⁸⁸ For a time later on, the agency came to rely on Bertillon measurements, a system of rigorous body measurement developed by the French criminologist Alphonse Bertillon to identify criminals for police files.⁸⁹ Photography had by then been invented; it, too, had been used by governments to identify criminals for police files.⁹⁰ At the

85. Calavita, *supra* note 65, at 21.

86. *See id.* at 23.

87. SIMON A. COLE, SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION 122–23 (2001) (quoting Deputy Collection E.E. Penn of Port Townsend, Washington).

88. *See id.* at 124–26. The agency abandoned this investigation after enactment of the Scott Act. *See infra* text accompanying notes 100–01. The United States first imposed fingerprinting on a noncriminal population in 1918, as part of its World War I-era registration of German-Americans. *See* LOGAN, *supra* note 34, at 14; *infra* note 200.

89. *See* COLE, *supra* note 87, at 32–59; Calavita, *supra* note 65, at 22–23. Bertillon identification had been implemented in major United States prisons in the 1880s. *See* LOGAN, *supra* note 34, at 10. Congress in 1903 appropriated funds for Bertillon measurement of returning Chinese laborers. *See* 57 Pub. L. No. 157, 32 Stat. 1083, 1112 (1903). After 1910, however, Bertillon measurement lost ground to fingerprinting, which was seen as a superior technology. *See* LOGAN, *supra* note 34, at 13.

90. *See* ANNA PEGLER-GORDON, IN SIGHT OF AMERICA: PHOTOGRAPHY AND THE

outset, though, the agency was skeptical about requiring photographs for reentry certificates, an experiment one Treasury official characterized as “doubtful and expensive.”⁹¹ The costs of such a plan were self-evident, and, some wondered, would it even be effective? After all, one Seattle resident told an 1890 congressional hearing, “even with both . . . the photograph and the Chinaman [before you], you sometimes find it very hard to tell whether a certain photograph belongs to a certain Chinaman or not.”⁹²

A further complication soon arose.⁹³ Ethnically Chinese persons born in the United States, the courts ruled, were United States citizens and could not be deported or refused entry.⁹⁴ Whether born before or after 1882, they could take trips abroad and had the right to return to the United States.⁹⁵ Moreover, if they were male, the law allowed their wives and children who had been born in China to enter the United States as well.⁹⁶ Chinese merchants, by statute, had the same ability to bring their China-born family members into the United States.⁹⁷ This raised the possibility of fraud on the part of Chinese persons lacking either reentry permits or section six

DEVELOPMENT OF U.S. IMMIGRATION POLICY, 1880–1930, at 38–39 (Univ. of Cal. Press 2009).

91. See COLE, *supra* note 87, at 126 (quoting an 1885 report from Special Agent O.L. Spaulding, who was tasked with investigating illegal Chinese migration, to the Secretary of the Treasury). But see PEGLER-GORDON, *supra* note 90, at 31 (some immigration officials in 1885 “seemed confident in the empirical power of photography”).

92. Calavita, *supra* note 65, at 23 (quoting *Immigration Investigation—Part II: Before the Subcommittee of the Committee on Immigration of the Senate and the Select Committee on Immigration and Naturalization of the House of Representatives*, 51st Cong. 138 (1890) (statement of W.R. Forrest)). This understanding was widely held. See Calavita, *supra* note 65, at 23 (quoting an immigration inspector explaining that the Chinese “look much alike”).

93. I’m leaving out a variety of other challenges that arose in the enforcement of the Act. Most importantly, were the Chinese government’s section six certificates to be trusted? If not, how should they be controverted? The question of who qualified as a merchant or a laborer posed “difficulties most insuperable.” In re Tung Yeong, 19 F. 184, 187 (D. Cal. 1884); see also Calavita, *supra* note 65, at 15–20.

94. See *United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1898); *Ex parte Chin King*, 35 F. 354, 355–56 (C.C.D. Or. 1888); *In re Look Tin Sing*, 21 F. 905, 910–11 (C.C.D. Cal. 1884). But see *United States v. Ju Toy*, 198 U.S. 253, 263 (1905) (holding that persons of Chinese descent seeking entry to the United States and claiming United States citizenship had no right to judicial hearing).

95. See *Wong Kim Ark*, 169 U.S. at 705.

96. See *Tsoi Sim v. United States*, 116 F. 920 (9th Cir. 1902); LAU, *supra* note 67. The rule allowing the entry of United States citizens’ Chinese wives and children was undone by *Chang Chan v. Nagle*, 268 U.S. 346, 352–53 (1925) (interpreting the 1924 Quota Act, which forbade entry of any person ineligible for citizenship). A 1930 statute allowed entry of Chinese women who had married United States citizens before 1924. See *Haff v. Tom Tang Shee*, 63 F.2d 191, 192 (9th Cir. 1933).

97. See *United States v. Gue Lim*, 176 U.S. 459, 468–69 (1900).

certificates seeking entry and claiming to be the children of United States citizens or Chinese merchants.⁹⁸

None of this was happening in a vacuum. The Chinese were the targets of pogroms and mass violence throughout the Pacific Northwest in the late Nineteenth Century, in cases too numerous to mention; the burning of Seattle's Chinatown in 1885 and the consequent expulsion of Chinese from Seattle and Tacoma provides only a single example.⁹⁹

In 1888, Congress enacted the Scott Act, voiding existing reentry certificates and thus eliminating the ability of most pre-1882 Chinese immigrants returning from temporary trips abroad to enter the United States.¹⁰⁰ United States residents who had immigrated from China and who were outside of the United States on the day the new law went into effect found themselves locked out; they had no way to return, notwithstanding the guarantee their reentry certificates had been supposed to provide.¹⁰¹ The Scott Act responded to the concern that reentry certificates had been insecure or unreliable, but it neither assuaged the hostility of West Coast whites nor did it end the problems of administering the exclusion laws.

In fact, immigrants had discovered a variety of ways to evade restrictions on Chinese migration.¹⁰² Some came over the unpatrolled Canadian or Mexican borders;¹⁰³ others used forged documents purporting to establish their birth in the United States.¹⁰⁴ Some fraudulently posed as merchants entitled to entry; many were able to pose as the children of United States citizens.¹⁰⁵ United States policymakers, for their part, were preoccupied with the possibility of fraud.¹⁰⁶ Senator Sanders of Montana explained in 1892 that in his view the Scott Act had been wholly ineffective

98. See Calavita, *supra* note 65, at 27.

99. See JEAN PFAELZER, *DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS* 215–23 (2007).

100. See Scott Act, ch. 1064, 25 Stat. 504 (1888).

101. See *Chae Chan Ping v. United States*, 130 U.S. 581, 581–83 (1889) (rejecting a multipronged challenge to this provision).

102. See *FACTS CONCERNING THE ENFORCEMENT OF THE CHINESE-EXCLUSION LAWS*, H.R. DOC. NO. 847, at 71–78 (1906).

103. See LAU, *supra* note 67, at 33–34. The United States Border Patrol was not founded until 1924, although there were occasional, irregular Immigration Service patrols seeking out unauthorized Chinese border-crossers as early as 1904. See *Border Patrol History*, U.S. CUSTOMS & BORDER PROTECTION (Apr. 3, 2014), <http://www.cbp.gov/border-security/along-us-borders/history>.

104. See LAU, *supra* note 67, at 34–36.

105. See *id.* at 34–41.

106. See Calavita, *supra* note 65, at 26.

because of fraud and other evasions,¹⁰⁷ coupled with the fact that the Chinese were “[physically] incapable of identification almost.”¹⁰⁸ The upshot of law enforcement to date? “[W]e have been mocked.”¹⁰⁹

Proponents of greater restriction urged that meaningful enforcement was impossible under the then-existing regime.¹¹⁰ Their argument, as Representative Geary of California put it the following year, was that there was no means of “identifying a Chinaman once he got within the borders of the Union. On arrival, he went immediately amongst his fellows, mixed up and associated with them; the next day no white man could identify him from other Chinamen who had been here sometime.”¹¹¹ It was impossible, he said, for the government as a practical matter to prove the date an individual Chinese person mingled among the population had arrived in the country.¹¹²

Moreover, Geary continued, the system of verbal description had failed.¹¹³ “All Chinamen look alike, all dress alike, all have the same kind of eyes, all are beardless, all wear their hair in the same manner.”¹¹⁴ Thus, he continued:

[Y]ou sit down and write out a description of a Chinaman, give his height, weight, the color of his skin and the shape of his eyes, and after you have done it, what have you got? You have a description that will fit any other Chinaman that you happen to run up against.¹¹⁵

By contrast, “the photograph is the only effective method, unattended with inconvenience, that can be adopted for the purposes of identification,” because it can capture “whatever slight facial difference there may be.”¹¹⁶

107. See MARTIN GOLD, *FORBIDDEN CITIZENS: CHINESE EXCLUSION AND THE U.S. CONGRESS* 300 (2012).

108. 23 CONG. REC. 3555, 3568 (1892) (statement of Sen. Sanders).

109. *Id.*

110. 23 CONG. REC. 3901, 3924 (1892) (Rep. Geary, stating that “we tried for ten years to enforce [existing] law, and our experience . . . proves how defective it is and what radical changes are necessary”).

111. 25 CONG. REC. 230, 230 (1893) (statement of Rep. Geary).

112. See *id.* at 230–31.

113. See *id.* at 231.

114. *Id.*

115. *Id.*

116. *Id.*

Representative Geary introduced the legislation that became known as the Geary Act in 1892.¹¹⁷ As enacted, the bill extended restrictions on Chinese migration for an additional ten years.¹¹⁸ More controversially, it provided that any person of Chinese descent arrested under the exclusion laws would be found to be unlawfully within the United States, and subject to imprisonment at hard labor followed by deportation, unless he “establish[ed], by affirmative proof . . . his lawful right to remain in the United States.”¹¹⁹ Where could that affirmative proof be found? The law went on to provide that every Chinese laborer then lawfully within the United States had the obligation within one year to apply for a “certificate of residence” evidencing his lawful status.¹²⁰ That certificate would include a photograph, according to a follow-up 1893 law, so that it would be better tied to the person to whom it was issued.¹²¹ Once the year had passed, “any Chinese laborer . . . found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested” by any U.S. marshal or customs or internal revenue agent.¹²²

Enactment of the Geary Act brought back into the law, with great force, a rule that members of a suspect or disfavored racial group would face legal jeopardy if found without their identity papers. The law was controversial.

117. *See supra* note 111.

118. *See generally* Geary Act, H.R. 6185, 52d Cong. (1892) (enacted).

119. *Id.* § 34. The courts divided on the placement of the burden of proof when an ethnically Chinese person claiming birth in the United States (and thus United States citizenship) was arrested under the Act. *Compare* *Moy Suey v. United States*, 147 F. 697 (7th Cir. 1906) (holding that a Chinese person in this country cannot be forced to shoulder the burden of proving his citizenship), *with* *United States v. Too Toy*, 185 F. 838 (S.D.N.Y. 1911) (imposing the burden on the detainee to show his birth within the United States). *See also* SALYER, *supra* note 61, at 208–12.

120. H.R. 6185, at § 6. Registration was theoretically optional for non-laborers, but the presumption of unlawful presence made it effectively mandatory for them as well. *Id.*

121. After passage of the Geary Act, Treasury Secretary Charles Foster had promulgated a regulation requiring photographs in certificates of residence. *Id.* In April 1893, however, his successor rescinded that requirement, a step that the *San Francisco Call* newspaper described as dealing the Geary Act “an almost vital blow.” *Bars Are Down*, S.F. CALL, Apr. 9, 1893; SALYER, *supra* note 61, at 47. Congress re-imposed the photograph requirement that same year. McCreary Act of Nov. 3, 1893, ch.14, 28 Stat. 7 (1893); *see also* PEGLER-GORDON, *supra* note 90, at 32–41.

122. H.R. 6185, at § 6. The only escape from deportation in that event was the arrested person’s opportunity to “establish clearly” to the satisfaction of a federal judge, through the testimony of “at least one credible white witness,” that he was a lawful resident of the United States in 1892 and that his failure to procure a certificate had been “by reason of accident, sickness or other unavoidable cause.” *Id.*

Here is Chinese vice consul Qing Ow Yang:

Do you know what the Geary bill means to the laboring Chinese in this country? It means, sir, that they are placed on the level with your dogs. If you have a dog, . . . you buy a license tag for it and fasten it to the dog's collar, and the number in the dog's tag is its immunity from arrest by the poundman. Under the Geary bill the laboring Chinese carry their number in their pocket and any man who so desires may stop them and demand to see their "tag."¹²³

Representative Hitt of Pennsylvania saw matters the same way:

It compels every man in this country who is a Chinese laborer to go to the collector of internal revenue, prove his title to remain in the country, and apply for a certificate—a pass, a sort of ticket of leave. To obtain it he must himself prove his whole case; he is assumed to be not entitled to it; the burden of proof is all upon him. The rule of all free countries and all civil laws is reversed. He must prove residence here through a long series of years, back to the date of enactment of the whole series of stringent laws since the treaty of 1880. . . . If he obtains [a certificate] he must carry it around with him or be liable instantly and always to arrest, imprisonment, and deportation like a convict. It is proposed to have 100,000, or, some gentlemen assert, 200,000, men in our country ticketed, tagged, almost branded—the old slavery days returned.

Never before in a free country was there such a system of tagging a man, like a dog to be caught by the police and examined, and if his tag or collar is not all right taken to the pound or drowned or shot. Never before was it applied by a free people to a human being, with the exception (which we can never refer to with pride) of the sad days of slavery and the ticket of leave given to convicts allowed to go out awhile from the penitentiary, and the deported convicts at Botany Bay, who had to have a ticket of leave. But here are more than 100,000 men, innocent of offense, who must obtain this certificate, this ticket of leave, and carry it around with them in a

123. *It May Lead to War*, S.F. CALL, Sept. 20, 1892, at 8; see PFAELZER *supra* note 99, at 296.

free country!¹²⁴

The rule was seen as especially problematic because of the requirement of photographic identification. Photographic identification was associated with criminality: It had up until then been used to identify suspected and convicted criminals. When English law established increased penalties for recidivism in 1869, law enforcers faced the problem of linking criminals to their past crimes; the answer they adopted was photographic identification.¹²⁵ Police in San Francisco and elsewhere in the United States maintained rogues' galleries of photographs of criminal suspects.¹²⁶ To photograph the Chinese laborer, thus, was to treat him as if he were a criminal or criminal suspect.¹²⁷

As the story of Bertillon identification—August Bertillon's meticulous system of body measurement, similarly developed to identify criminals but later pressed into service to identify Chinese¹²⁸—helps illustrate, government attempts to develop scientific means of biometric identification in the late nineteenth century had been all about criminality. Bertillonism was the first modern system of criminal identification, designed to keep tabs on individual criminals via the files of a modern state bureaucracy.¹²⁹ The state had never tried, or wanted, to do that sort of tracking of law-abiding residents—until now.¹³⁰ The papers imposed on slaves or free blacks had not been associated with complex bureaucratic structures.¹³¹ The new documents, by contrast, were intended to provide records tied to individual

124. 23 CONG. REC. 3, at 3923 (1892) (statement of Rep. Hitt); *see also id.* at 3924; 25 CONG. REC. H2450 (1893) (statement of Rep. Hooker); *id.* at 2495 (1893) (statement of Rep. Morse) (stating that the law “proposes to collar, and label, and number like dogs, 85,000 Chinese residents of this country”).

125. *See* COLE, *supra* note 87, at 19–20.

126. *See id.* 20–22; PEGLER-GORDON, *supra* note 90, at 38–39.

127. *See* PEGLER-GORDON, *supra* note 90, at 37–41.

128. *See supra* note 89 and accompanying text.

129. *See* COLE, *supra* note 87, at 32. It faced some opposition at the outset on the ground that that it was unfair and undesirable for the government to keep biometric records that could shadow criminals for the rest of their lives. *See* LOGAN, *supra* note 34, at 12.

130. That history provides some context for Representative Hitt's and Representative Hooker's characterizations of Geary Act certificates as being like “tickets of leave,” which were issued to convicted criminals. *See supra* note 124 and accompanying text. It also helps explain Representative Geary's counterargument that photographs could not be so bad as all that, because they had recently been used on World's Fair concessionaire tickets. *See also* 25 CONG. REC. 2552 (1893) (statement of Rep. Geary).

131. *See supra* text accompanying note 58.

identities suitable for the administrative systems of the modern state.

Chinese residents responded with civil disobedience.¹³² The Chinese Six Companies, an umbrella group of Chinese district associations led by the merchant elite, called on community members to boycott the registration process.¹³³ That boycott was effective: Of the more than 100,000 Chinese migrants then in the country, only 13,242 people registered before the statutory deadline.¹³⁴

The Six Companies' legal challenge reached the Supreme Court shortly afterwards, as *Fong Yue Ting v. United States*.¹³⁵ Counsel—prestigious members of the Washington, D.C. appellate bar—urged that Congress had no peacetime authority to deport immigrants who had been absorbed into the population and had committed no crime.¹³⁶ Moreover, they continued, the Act's procedures were arbitrary and inconsistent with due process.¹³⁷ The Court rejected all of those claims, finding that Congress had plenary power “to expel aliens of a particular class” by any means it chose, and *a fortiori* could “provide a system of registration and identification of the members of that class within the country.”¹³⁸

The ruling posed a dilemma similar to that facing immigration enforcers today.¹³⁹ Few Chinese had registered, and the statutory deadline had expired.¹⁴⁰ Some 85,000 people, the government estimated, were out of compliance and subject to deportation.¹⁴¹ The administration estimated that

132. See SALYER, *supra* note 61, at 46–47.

133. See *id.*

134. See 25 CONG. REC. 2521 (1893) (statement of Rep. McCreary); SALYER, *supra* note 61, at 46–47. As of July 1885, with one month left in the statutory period, only 439 San Francisco residents (of 26,000 eligible) had applied. See PEGLER-GORDON, *supra* note 90, at 33.

135. 149 U.S. 698 (1893).

136. It's commonplace today that the United States government has plenary authority to deport any noncitizen at any time. See generally *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). But United States law did not contemplate deportation at all between 1800 and 1882, and it wasn't until 1907 that the law provided for the deportation of any white person who had entered legally. See MOTOMURA, *supra* note 71, at 40. Before the Chinese Exclusion Acts, long-term noncitizen residents had security of tenure.

137. SALYER, *supra* note 61, at 48–50.

138. See *Fong Yue Ting*, 149 U.S. at 714. The Court invalidated the Act's imposition of criminal penalties in *Wong Wing v. United States*, 163 U.S. 228 (1896).

139. See Gabriel J. Chin & Daniel K. Tu, *Comprehensive Immigration Reform in the Jim Crow Era: Chinese Exclusion and the McCreary Act of 1893*, 23 ASIAN AM. L.J. 39 (2016).

140. See *id.* at 45.

141. See *id.* at 51.

deporting all of them would cost over \$7,000,000; the agency's budget was \$25,000.¹⁴² The government chose at the outset to take no action, and was met by protests including calls for President Cleveland's impeachment.¹⁴³ Congress ultimately passed the McCreary Act,¹⁴⁴ extending the registration deadline to six months after that provision's enactment.¹⁴⁵

Federal authorities for the next three years wielded their authority lightly, seeking to deport only a relatively small number of Chinese without certificates, nearly all of them felons.¹⁴⁶ By 1896, the Department of the Treasury began to cast its net somewhat more widely, arresting a more diverse group of Chinese residents deemed to lack proper documents.¹⁴⁷ By that time, though, the registration and deportation of Chinese laborers had become well settled.¹⁴⁸

III.

It would be easy to draw the conclusion, at this point in our narrative, that governments in the United States have aimed their papers-carrying requirements only at disfavored racial minorities—certainly that describes our history up until 1900. But in 1917, something happened to muddle that story, and it involved the first government-issued identification document to be held by a substantial fraction of the American population—the draft card.¹⁴⁹

142. SALYER, *supra* note 61, at 55; *see also* Chin & Tu, *supra* note 140, at 48.

143. SALYER, *supra* note 61, at 55; Chin & Tu, *supra* note 140, at 47.

144. McCreary Act, ch. 13, 28 Stat. 7 (1893).

145. *See* Chin & Tu, *supra* note 140.

146. *See* SALYER, *supra* note 61, at 88–90.

147. *See id.* at 90–91.

148. *See id.* at 57. After the United States' acquisition of Hawaii and the Philippines, Congress extended the Geary Act's exclusion and registration rules to Chinese laborers in all U.S. territories. *See id.* at 103–05. The Act was finally repealed in 1943 by the Magnuson Act, enacted in recognition of our World War II alliance with China. *See* Magnuson Act, Pub L. No. 78–199, 57 Stat. 600 (1943).

149. Today, the most ubiquitous government-issued identification is the driver's license. At the beginning of the twentieth century, though, it was unclear whether state-mandated driver's licenses were even constitutional. *See* *Chicago v. Banker*, 112 Ill. App. 94, 99–100 (Ill. App. Ct. 1904) (striking down Chicago's driver's licensing requirement, because “to compel one who uses his automobile for his private business and pleasure only, to submit to an examination and to take out a license (if the examining board see fit to grant it) is imposing a burden upon one class of citizens in the use of the streets, not imposed upon the others”); Roger I. Roots, *The Orphaned Right: The Right to Travel by Automobile, 1890–1950*, 30 OKLA. CITY U. L. REV. 245 (2005). As of 1935, only

It hadn't been a foregone conclusion that the United States military in World War I would be raised via a draft at all.¹⁵⁰ There were powerful concerns pushing in the direction of a volunteer force, not least of which was the Union's poor experience with conscription during the Civil War.¹⁵¹ More fundamentally, the proposed World War I draft—like our entry into that war—drew strong opposition from folks in the agrarian South and Middle West, drawing on localist, voluntarist, and isolationist modes of thought.¹⁵² One newspaper report in April 1917 suggested that “[i]f a vote were taken today and every man in the House were to vote the way he was talking, the majority against [a] conscription plan would be tremendous.”¹⁵³

Military leaders, however, saw the draft as necessary. A volunteer army, in their view, could not “produce anything like the number of men required”; it would be “undemocratic, unreliable, inefficient and extravagant.”¹⁵⁴ Conscription, empowering the federal government to choose which workers would be drafted and which would remain on the job,

thirty-nine states required driver's licenses. See *Licensing Cars and Drivers*, AM. ON MOVE (last visited Mar. 20, 2017), http://amhistory.si.edu/onthemove/exhibition/exhibition_8_2.html.

The birth certificate also gained steam during the early twentieth century. *Id.* Birth registration was sporadic in the antebellum United States, outside of two states and a handful of cities. A key shift came in 1907 when the American Public Health Association and other organizations submitted a model birth registration bill to the states; uniform state legislation advanced rapidly between then and 1930. See NAT'L CTR. FOR HEALTH STATISTICS, U.S. VITAL STATISTICS SYSTEM MAJOR ACTIVITIES AND DEVELOPMENTS, 1950–95, at 44–53 (1997), <http://www.cdc.gov/nchs/data/misc/usvss.pdf>. Nonetheless, most births went unregistered before 1935. See William Seltzer & Margo Anderson, *After Pearl Harbor: The Proper Role of Population Data Systems in Time of War* 31 (Mar. 28, 2000) (unpublished draft) (on file at <https://pantherfile.uwm.edu/margo/www/govstat/newpaa.pdf>).

Voter registration predated World War I, and voters pre-World War II might have had to present poll tax receipts (in the South) or registration certificates (if they were voting in a county other than their own). See *Hearings Relative to the Dillingham Bill, S. 3175, Before the H. Comm. on Immigration and Naturalization*, 62d Cong., 2d Sess. 49, 82 (1912) [hereinafter *Dillingham Hearings*]. Neither of these, though, were identification documents as such.

150. See JENNIFER D. KEENE, *DOUGHBOYS, THE GREAT WAR, AND THE REMAKING OF AMERICA* 9 (2001).

151. See *id.* at 10. See also JOHN WHITECLAY CHAMBERS II, *TO RAISE AN ARMY: THE DRAFT COMES TO MODERN AMERICA* 41–65, 111–12, 133–34, 153–77 (1987); JOAN M. JENSEN, *THE PRICE OF VIGILANCE* 34–39 (1968).

152. See CHAMBERS, *supra* note 151, at 176–77.

153. H.C. PETERSON & GILBERT C. FITE, *OPONENTS OF WAR, 1917–1918*, at 23 (1957).

154. EDWARD M. COFFMAN, *THE WAR TO END ALL WARS: THE AMERICAN MILITARY EXPERIENCE IN WORLD WAR I*, at 24 (1998) (quoting a War College Division memorandum).

would protect domestic industries from undue disruption.¹⁵⁵ Congress ultimately approved the draft, in important part because Congress members saw it as spreading the burden more equally, so that “our good men [did not] go to war [while] our slackers stay[ed] at home.”¹⁵⁶

Before setting out the mechanics of the draft plan, it’s worth noting here Senator Hiram Johnson’s 1918 reflection that “a peculiar sort of mental hysteria . . . comes when people are forced to face great struggles and great attacks.”¹⁵⁷ Many of the events of the World War I years seem irrational in retrospect.¹⁵⁸ It was a time when dissent was suppressed: as President Wilson explained, “there could be no such thing” as free speech during a war.¹⁵⁹ The Justice Department secured more than a thousand convictions for antiwar speech, much of which contained but the barest suggestion of criticism.¹⁶⁰ One case was that of Rose Pastor Stokes, who received a ten-year prison sentence for a speech notable only for her statement that “[n]o government [that] is for the profiteers can also be for the people, and I am for the people, while the government is for the profiteers.”¹⁶¹

State “councils of defense” enthusiastically took on the jobs of ferreting out disloyalty, sometimes jailing or interning those found to be disloyal, sometimes merely warning them that they were under surveillance.¹⁶² They urged citizens to report anybody who criticized the government, questioned

155. See CHRISTOPHER CAPOZZOLA, UNCLE SAM WANTS YOU: WORLD WAR I AND THE MAKING OF THE MODERN AMERICAN CITIZEN 24 (2008); GARY MEAD, THE DOUGHBOYS: AMERICA AND THE FIRST WORLD WAR 69–70 (2000).

156. CHAMBERS, *supra* note 151, at 164 (quoting Rep. William C. Adamson). Conscription also served more specific purposes of President Wilson’s by preempting a plan by former President Teddy Roosevelt to organize volunteer divisions of his own and to lead them in France outside of the regular command structure. See *id.* at 136–41.

157. PETERSON & FITE, *supra* note 153, at 218. Senator Johnson was speaking in (unsuccessful) opposition to the Sedition Act of 1918. *Id.*

158. See CAPOZZOLA, *supra* note 155, at 10.

159. FRANCES H. EARLY, A WORLD WITHOUT WAR: HOW U.S. FEMINISTS AND PACIFISTS RESISTED WORLD WAR I, at 24 (1997).

160. See RONALD SCHAFFER, AMERICA IN THE GREAT WAR: THE RISE OF THE WAR WELFARE STATE 15–17 (1991).

161. *Stokes v. United States*, 264 F. 18, 20 (8th Cir. 1920). The Eighth Circuit ultimately reversed Stokes’s conviction, pointing to errors in the jury instructions. *Id.* Convictions were upheld, though, in many similar cases. See SCHAFFER, *supra* note 160, at 15–17. The Supreme Court did not see the First Amendment as a meaningful impediment to such prosecutions before *De Jonge v. Oregon*, 299 U.S. 353 (1937).

162. See SCHAFFER, *supra* note 160, at 18–20.

its purpose, or talked against the war.¹⁶³ Newspapers agreed.¹⁶⁴ The *Tulsa Daily World* put it this way: “Watch your neighbor. If he is not doing everything in his power to help the nation in this crisis, see that he is reported to the authorities.”¹⁶⁵ The *New York Times* counseled its readers that “[i]t is the duty of every good citizen to communicate to proper authorities any evidence of sedition that comes to his notice,” and the Committee on Public Information—the federal government’s propaganda arm—ran advertisements urging readers to “report the man who spreads pessimistic stories. Report him to the Department of Justice.”¹⁶⁶

The continuum of loyalty-policing extended to violence and lynching, directed in particular at leftists and those of German descent; the war years saw more than seventy people killed and thousands terrorized by state institutions, private organizations, and mob violence.¹⁶⁷ These efforts lent an ironic truth to Attorney General Gregory’s 1918 statement that America had “never in its history . . . been so thoroughly policed.”¹⁶⁸

What was behind all this? World War I called forth in this country a never-before-seen mobilization of manpower, social organization, and popular resolve.¹⁶⁹ The result was a culture of what Christopher Capozzola has called “coercive voluntarism,” in which nongovernmental organizations relied on tools ranging from shaming to lynching to ensure that every man fulfilled his duty to his country.¹⁷⁰

That duty could be manifested in a variety of ways. A few states enacted compulsory work laws: In Maryland, as of June 1917, every able-bodied man between eighteen and fifty, not regularly employed, had to register to be assigned work by the state in agriculture, in canneries, or on the roads.¹⁷¹ West Virginia did the same; other states took other actions

163. *See id.* at 17.

164. *See id.* at 18–20.

165. *Id.*

166. PETERSON & FITE, *supra* note 153, at 20. The CPI also encouraged editors to submit articles to it for clearance. *See* SCHAFFER, *supra* note 160, at 13–14.

167. *See* CAPOZZOLA, *supra* note 155, at 117–43; SCHAFFER, *supra* note 160, at 26–30; PAUL MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 12–32 (1979); JENSEN, *supra* note 151, at 145–47.

168. PETERSON & FITE, *supra* note 153, at 20.

169. *See* CAPOZZOLA, *supra* note 155, at 8.

170. *See id.* at 8–12, 30–31.

171. *See* WILLIAM BREEN, *UNCLE SAM AT HOME: CIVILIAN MOBILIZATION, WARTIME FEDERALISM, AND THE COUNCIL OF NATIONAL DEFENSE, 1917–1919*, at 106–07 (1984).

against noncontributing “loafers.”¹⁷²

But coercive voluntarism can be seen most acutely in the draft. Selective service, President Wilson explained, was not to be seen as “a conscription of the unwilling.”¹⁷³ Rather, it was a “selection from a Nation [that] has volunteered in mass.”¹⁷⁴ Under that plan, the “whole Nation [was] a team, in which each man shall play the part for which he is best fitted.”¹⁷⁵ The government embarked on an energetic and effective public-relations campaign promoting draft registration; at the same time, it warned the public that anyone who failed to register, or who sought to dissuade others from registering, would face a prison sentence of up to one year.¹⁷⁶

The administration designed the draft so as to blunt opposition. Rather than presenting itself as an exercise of overbearing centralized military authority, the draft system was civilianized and decentralized.¹⁷⁷ Boards of local citizens, serving for no pay, were to supervise registration and rule on individual claims for exemption or deferment.¹⁷⁸ The system thus “put the administration of the draft into the hands of the friends and neighbors of the men to be affected”; existing social bonds were turned into political obligations.¹⁷⁹

On June 5, 1917, ten million men registered in their local communities.¹⁸⁰ Each received a pasteboard registration card; later, each would receive a classification notice setting out his draft status.¹⁸¹ Section 62 of the government’s Registration Regulations, published the previous month, made it clear that registrants were to carry that pasteboard card, and display it on demand:

Since all police officers of the Nation, States, and municipalities are

172. *Id.*; see also CAPOZZOLA, *supra* note 155, at 36; CHAMBERS, *supra* note 151, at 192.

173. Woodrow Wilson, *Proclamation 1370—Conscription*, AM. PRESIDENCY PROJECT (May 18, 1917), <http://www.presidency.ucsb.edu/ws/print.php?pid=65403>.

174. *Id.*

175. *Id.*

176. See *id.*; see also MEAD, *supra* note 155, at 375–77; CHAMBERS, *supra* note 151, at 184.

177. See ENOCH H. CROWDER, *THE SPIRIT OF SELECTIVE SERVICE* 120 (1920). General Crowder drafted the conscription bill and was named head of the Selective Service System. *Id.*

178. See CHAMBERS, *supra* note 151, at 171–73, 180–83; JENSEN, *supra* note 151, at 37–38.

179. See CROWDER, *supra* note 177, at 120.

180. See Keene, *supra* note 151, at 10–11.

181. See Alan Dranitzke, *Possession of Registration Certificates and Notices of Classification by Selective Service Registrants*, 1 SEL. SERV. L. REP. 4029, 4029, 4036 (1968).

required to examine the registration lists and make sure that all persons liable to registration have registered themselves, much inconvenience will be spared to those who are registered if they will keep those certificates always in their possession. All persons of the designated ages [twenty-one to thirty] must exhibit their certificates when called upon by any police officer to do so.¹⁸²

A different set of regulations, published a few months later, set forth a similar obligation:

Until notice of final classification is received by a registrant, he should keep always in his personal possession his registration certificate, and he is required to display the same whenever called upon by a police official or a member of a Local or District Board to do so. After receipt of the notice of final classification, . . . it will no longer be necessary to retain the registration certificate, but thereafter the registrant is hereby required to keep always in his possession his notice of final classification and to exhibit the same when called upon to do so by any member of a Local or District Board or any police official.¹⁸³

It should by now be clear why I'm telling this story. These regulations set out a straightforward requirement that persons subject to the rule carry government-issued papers at all times.¹⁸⁴ Nor was that the end of it: as events unfolded, the requirement was energetically (if sporadically) enforced.¹⁸⁵ Most of the enforcement agents were not government employees but members of a private organization called the American

182. See UNITED STATES ARMY, REGISTRATION REGULATIONS 24 (Wash. Gov't Printing Office 1917); Dranitzke, *supra* note 181, at 4035; see also *Big Task of War Registration Well in Hand in Oregon*, SUNDAY OREGONIAN, June 3, 1917, at 8 (explaining that the registration certificate "is to play an important part in keeping young men of military age out of trouble with the Government and military authorities . . . Any young man of military age who fails to produce this card necessarily will be branded a 'slacker' and will have no alternative other than a jail sentence unless he can prove his registration.").

183. Selective Service Regulations (Nov. 8, 1917), § 57; see also *id.* at § 100; Dranitzke, *supra* note 182, at 4029–30.

184. See Selective Service Regulations (Nov. 8, 1917), § 57.

185. The requirement generated one reported case. See *United States v. Olson*, 253 F. 233 (D. Wash. 1917) (rejecting the argument that requiring display of a draft card was inconsistent with the Fifth Amendment's self-incrimination protection).

Protective League (APL).¹⁸⁶

Business leaders had founded the APL to protect the home front against feared German sabotage.¹⁸⁷ The organization quickly morphed into a tool to be wielded against organized labor, and then took on a new role of enforcing the draft.¹⁸⁸ The APL's relationship with the federal government—specifically, with the FBI¹⁸⁹—was ambiguous. Its members were not federally commissioned and had no official legal status.¹⁹⁰ At the same time, APL members carried badges, often represented themselves as members of the Secret Service, and relied on their apparent or assumed authority to carry guns, conduct wiretaps, and make arrests.¹⁹¹

Following the initial draft registration, Attorney General Gregory was determined to locate non-registrants, and the FBI mobilized the APL to round up people who could not produce registration cards (or who were members of the International Workers of the World or otherwise seemed like troublemakers), usually without regard to due process or the need for warrants.¹⁹² In October 1917, the draft authorities opened the door to the APL's receiving cash bounties for apprehending non-registrants.¹⁹³ While the Justice Department warned that APL members had no legal right simply to stop men on the street and demand their registration cards, many of them did just that.¹⁹⁴

All this came to a head with the “slacker raids” of 1918.¹⁹⁵ APL members, in conjunction with FBI agents, local police, and other support, conducted systematic mass sweeps in major cities in which men of apparent draft age were stopped en masse and detained, for hours or longer, if they

186. See JENSEN, *supra* note 151, at 25–30.

187. See *id.* at 19–20.

188. See *id.* at 32–33, 60–61, 138–41, 158.

189. Between 1908 and 1935, the word “Federal” was missing from this organization's name; it was known as the Bureau of Investigation. See *A Brief History: The Nation Calls, 1908–1923*, FBI, <https://www.fbi.gov/about-us/history/brief-history> (last visited Mar. 20, 2017). I refer to it here as the FBI for simplicity's sake.

190. See JENSEN, *supra* note 151, at 89.

191. See *id.* at 45–49, 85, 93–94.

192. See *id.* at 60–61.

193. The bounties were supposed to be available only for the apprehension of deserters (people who had been ordered to military duty and failed to report) but local draft boards could reclassify nonregistrants as deserters. See *id.* at 83–84.

194. See *id.* at 85, 93–94.

195. See *id.* at 188–218.

couldn't produce papers demonstrating exemption.¹⁹⁶ The slacker raids appear to have been relatively uncontroversial until the badly managed New York raid, in which hundreds of thousands of men were interrogated and 60,000 arrested.¹⁹⁷ Men were held in chaotic conditions, some overnight, far beyond the ability of authorities to process them or to see whether there was any basis for holding them.¹⁹⁸

At that point, Republican Congress members attacked, demanding a full investigation, and even voices otherwise supportive of the Wilson administration took issue. One described the New York raid as “the kind of treatment that the Prussian commanders impose upon the helpless inhabitants of a conquered province.”¹⁹⁹ Federal authorities discontinued their cooperation with the APL in the aftermath of the raids, and a couple of months later the war came to an end.²⁰⁰

How should we think about the WWI draft card and the slacker raids? Earlier papers-carrying requirements had been imposed on racial noncitizens—on blacks, whom *Dred Scott* would declare to be outside the community of citizenship,²⁰¹ and on immigrant Chinese, who were denied citizenship by statute.²⁰² They were imposed, in other words, on minority groups that seemed threatening and in need of control, whose members seemed to white officialdom all to look alike—persons who therefore needed to be tabbed and registered and to carry identification papers if authorities were to adequately monitor them. But the draft card rule was

196. See CAPOZZOLA, *supra* note 155, at 41–43.

197. See JENSEN, *supra* note 151, at 188–218; CAPOZZOLA, *supra* note 155, at 43–51.

198. See JENSEN, *supra* note 151, at 188–218; CAPOZZOLA, *supra* note 155, at 43–51.

199. JENSEN, *supra* note 151, at 209 (quoting a *New York World* editorial); see also MURPHY, *supra* note 167, at 126–27, 222–25.

200. See CAPOZZOLA, *supra* note 155, at 51–53. Before ending this section, I'll also note the 1917–1918 requirement that German citizens in the United States register with the federal government. See CAPOZZOLA, *supra* note 155, at 188. Nearly half a million of them did, although the actual number of German citizens in the United States was likely substantially higher. See *id.* at 204. They too were required to carry registration cards on their persons. See Clarence Stroemer, *World War I Alien Registration Card (1918)*, BAY-J. (Sept. 2003), <http://bay-journal.com/bay/1he/writings/ww1alien-reg-card.html>. About 2300 of them were interned. See CAPOZZOLA, *supra* note 155, at 186–88. These requirements foreshadowed the enactment of registration and identity-card requirements for Germans and Japanese during World War II, followed by the internment of more than 100,000 Japanese immigrants and U.S. citizens of Japanese descent. See *infra* notes 273–78 and accompanying text.

201. See *Dred Scott v. Sandford*, 60 U.S. 393, 393 (1856).

202. See *supra* note 62.

something else; this requirement was imposed on everyday white Americans, en masse. It was not a symbolic identification of Otherness. This papers-carrying requirement, rather, was a way of exerting control over citizens—in particular, transient young working-class men²⁰³—to ensure that they performed their citizenship obligations.

At the same time, it's worth noting one key difference between this requirement and earlier ones: the cards that World War I registrants were required to carry had no biometric component.²⁰⁴ Recall that some of the papers issued to free blacks took pains to incorporate detailed descriptions of the holders. Policy-makers designing and implementing the Geary Act devoted a great deal of attention to the question of how the certificates could be tied to the physical bodies of their holders, ultimately settling on the inclusion of photographs.²⁰⁵ The draft card that young men carried, by contrast, contained no information describing the physical characteristics of the holder; they could have been issued to anyone.²⁰⁶ In this context, unlike the previous ones, policy-makers didn't consider biometric identification desirable or worth the expense.²⁰⁷

The draft card rules lapsed with the end of the war (unlike the Geary Act, which would not be wiped off the books until a quarter-century later).²⁰⁸ Similarly, after the war, the Attorney General forced the APL to dissolve.²⁰⁹

203. Most draft evaders were farm or industrial laborers, isolated from society or the war effort for geographical, economic, ethnic, or racial reasons. See CHAMBERS, *supra* note 151, at 211–12.

204. See, e.g., the copies of actual cards reproduced at *Walter Emuel Forshaw Family of Navarro County, Texas*, USWEBGEN PROJECT (2009), http://www.rootsweb.ancestry.com/~txnavarr/biographies/f/forshaw_walter_emuel.htm; *World War I Registration Certificate—Secor—Wallet Size Card*, GGARCHIVES, <http://www.gjenvick.com/Military/WorldWarOne/TheDraft/RegistrationCertificates/1917-06-05-DraftRegistrationCertificate-Secor.html> (last visited May 9, 2017). When individuals registered for the draft, the papers they filled out included, on the reverse side, notations from the person taking the registration indicating whether the registrant was “[t]all, medium, or short (specify which)” and “[s]lender, medium or stout (which),” as well as notations for eye color, hair color, and “Bald?” See, e.g., the cards reproduced at *WWI Draft Registration Cards and Essays*, MONROVIA SOUNDS STUDIO, <http://www.doctorjazz.co.uk/draftcards3.html> (last visited May 9, 2017). Those papers are sometimes described as “draft registration cards.” The registrant, however, was not expected to carry that document (and could not carry it, because he was not given a copy); rather, it was kept in government files. See *World War I Draft Registration Cards*, NAT'L ARCHIVES CATALOGUE 13–24, https://research.archives.gov/search?q=*&f.parentNald=572850&f.level=item&sort=naldSort%20asc (last visited May 9, 2017).

205. See *supra* notes 110–27 and accompanying text.

206. See *supra* note 204.

207. See *supra* note 204.

208. See *supra* note 148 and accompanying text.

209. See JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–*

Court decisions began to reflect a shift in American thinking, one that emphasized the relationship of the individual to the state and the limits on legitimate state power.²¹⁰ What would the public think of identification requirements and papers-carrying in the years following the first World War? In the next section, I'll answer that question.

IV.

For much of United States history, migration to this country from Europe or the Western Hemisphere was remarkably paperwork-free. No documents were required for entry, and the federal government did not even record the names of people entering across the Canadian or Mexican borders until the early twentieth century.²¹¹ In 1911, the chair of the Senate Immigration Committee offered a bill that would have directed immigration authorities to issue a “certificate of admission and identity” on entry to each noncitizen admitted to the United States.²¹² That certificate, the bill continued, would be evidence that the person had been regularly admitted.²¹³ There was no requirement that noncitizens carry or produce those certificates.²¹⁴

This provision, of course, was wholly unexceptional by modern standards; the bill only provided that new immigrants would receive documents memorializing their entry. Nonetheless, immigrant leaders strenuously opposed it, describing it as a revolutionary innovation.²¹⁵ They characterized the certificate’s very existence as bringing about an effective mandate that noncitizens carry it and be able to produce it—a Geary Act-style ticket of leave requirement, they said, that so far in the United States

1925, at 223 (2002). Disappointed APL members had “looked forward to a happy career ferreting out new disloyalties . . . and tried to work out with the United States Naturalization Service an arrangement for investigating every application for citizenship.” *Id.*

210. See CAPOZZOLA, *supra* note 155, at 190–97.

211. See THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 6 (7th ed. 2012). Arriving sea captains were required to submit a list of their passengers to the Collector of Customs beginning in 1819. *See id.*

212. See S. 3175, 62d Cong. § 18 (1911). The bill authorized officials to issue family certificates covering a wife and children under sixteen years old along with the head of household. *Id.* The certificate could be used to obtain a reentry permit should the holders later wish to travel abroad. *Id.*

213. *See id.*

214. *See id.*

215. *See Injustice in Immigration Bills: M.J. Kohler Says the Dillingham Plan of Restriction Would Violate Our Treaties*, N.Y. TIMES, Jan. 27, 1912.

had been imposed only on the Chinese.²¹⁶ The certificate, opponents predicted, would be a means of imposing on immigrants the burden of proving their legal presence in the United States.²¹⁷

In the views of opponents, the problem with this immigration documentation was that it would undercut a status quo in which “a man does not have to go about and prove his right to be in this country.”²¹⁸ Rather, it would lead to a new immigration system in which noncitizen immigrants’ status would become contingent, resting on their being able to produce documents proving the legality of their presence in the United States.²¹⁹ The shift, said opponents, was degrading, foreign, and un-American.²²⁰

The opponents were successful, and the provision was stripped out in the House committee.²²¹ While a few Congress members supported new identification and documentation requirements for noncitizens in the years that followed, most were skeptical. Shortly before the war in 1917, thus, California Democratic Representative John Raker’s suggestion that all noncitizens should have to register with the federal government was met with caution from other members. This step, they objected, would cost millions of dollars, and “when people come here from other countries they have the idea that this is a free country and they do not want to feel that the police are tagging after them.”²²²

The years following World War I, though, brought a shift in thinking about immigration legislation. The war had vastly heightened anxiety about

216. See *Dillingham Hearings*, *supra* note 149, at 21–30 (testimony of Leon Sanders); *id.* at 82 (testimony of Louis Levy); *id.* at 101 (resolution presented by Manuel Rehar); *id.* at 160–66 (testimony of Aaron Levy); *id.* at 203 (reproducing material from the *New York Evening Post*, Jan. 24, 1912).

217. See *id.* at 23–30 (testimony of Leon Sanders); *id.* at 48–50 (testimony of H.J. Reit); *id.* at 161–62 (testimony of Aaron Levy).

218. See *id.* at 161–62.

219. See *id.* at 161–66 (testimony of Aaron Levy).

220. See *id.* at 21–24 (testimony of Leon Sanders), 83 (testimony of Rep. Goldfogle), 97 (testimony of Joseph Barondess), 98 (letter from M.E. Selenkow), 101 (resolution presented by Manuel Rehar), 160 (testimony of Aaron Levy), 203 (reproducing material from the *New York Evening Post*, dated Jan. 24, 1912).

221. The provision also had been criticized on other grounds: that it would be overly expensive, would lead to document fraud, and, as written, would undercut the system of Chinese exclusion. See *id.* at 83 (testimony of Rep. Sabath), 139–40 (testimony of William Bennet), 193–94 (testimony of William Williams, Commissioner of Immigration). The federal government nonetheless began issuing such documents eighteen years later. See *infra* note 236.

222. See *Registration of Aliens: Hearing on 20936 Before the H. Comm. on Immigration & Naturalization*, 64th Cong. 20, 21 (1917) (statement of Rep. Edmonds and statement of Rep. Siegel).

immigrants' loyalty and assimilability.²²³ Nativism had been part of the American discourse since before 1890, fueled by economic uncertainty, racial and religious prejudice, the psychological dislocations brought by industrialization and urbanization, and fear of foreign radicalism.²²⁴ After the war era's focus on "100 per cent Americanism" and its persecution of socialists as disloyal and subversive, continued antiforeign sentiment and fear of leftists made that brew more toxic.²²⁵ The anti-German sentiments of WWI flowed smoothly into the Red Scare of 1919 and the post-war era's fear of Communist plots imported from abroad.²²⁶

There was considerable agitation following World War I to restrict new migration to the United States, and there were voices urging registration for noncitizens already here—urging a requirement, in other words, that *all* noncitizens in the United States (including those who had entered many years before) present themselves before and submit identifying information to the federal government. Even many proponents, though, saw registration as problematic.

Thus, the Reverend Sidney Gulick, head of a restrictionist group called the National Committee for Constructive Immigration Legislation,²²⁷ testified in 1919 that he heartily favored registration for aliens, but that in operation any such system would likely "involve the setting up of a general police supervision of immigrants all over the Country, which in many respects would be undesirable . . . and require a complete system of supervision in minute ways that would be very burdensome."²²⁸ Moreover, he added, such a system would ultimately lead to registration of American citizens as well: "All aliens would be constantly required to carry their papers, and the man who had already become an American citizen would also have to carry his papers to show to the police that he is a citizen and no longer an alien, and no longer required to register."²²⁹

House Immigration Committee chair Representative Albert Johnson

223. See U.S. SELECT COMMISSION ON IMMIGRATION & REFUGEE POLICY, STAFF REPORT ON U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 189 (1981).

224. See SALYER, *supra* note 61, at 122–32; HIGHAM, *supra* note 209, at 35–217.

225. See HIGHAM, *supra* note 209, at 194–234.

226. See *id.* at 218–28.

227. Gulick's group was more politically liberal than some, but the thrust of its proposals was a substantial cutback in immigration. See *id.* at 302–03.

228. *Percentage Plans for Restriction of Immigration: Hearing on H.R. 563 Before the H. Comm. on Immigration & Naturalization*, 66th Cong. 57 (1919) (statement of Rev. Gulick).

229. *Id.* at 62; see *id.* at 57.

introduced a bill that same year proposing universal alien registration.²³⁰ The bill, however, did not make it out of committee.²³¹

Restrictionists did secure passage of legislation in 1921 and 1924 that drastically reduced allowable immigration to the United States (in particular, reducing immigration from Eastern and Southern Europe to a tiny fraction of prior levels).²³² That change ended up providing some additional impetus for alien registration; the new limitations, predictably, led to increases in illegal entry.²³³ The *Saturday Evening Post*, thus, wrote in 1932 that hundreds of thousands, if not millions, of foreigners were in the United States in violation of the law; “this mortifying fact alone is ample excuse . . . for a thorough housecleaning.”²³⁴ Proponents urged registration as a tool to combat the believed-to-be-mushrooming illegal immigration problem.²³⁵ Over the course of the 1920s and 1930s, a variety of bills were introduced in Congress providing for mandatory alien registration. None of them, however, passed.²³⁶

A 1930 bill was exemplary. It required registration of every noncitizen in the United States, adding that “[e]very alien shall, on demand, at any time exhibit his [registration certificate] to any agent of the Department of Labor, to any Federal, State, Territorial, or other public police or peace officer.”²³⁷ Representative Samuel Dickstein, who would become chair of the relevant

230. See *Percentage Plans for Restriction of Immigration: Hearing on H.R. 563 Before the H. Comm. on Immigration & Naturalization*, 66th Cong. 57 (1919). Johnson was a fervent racist and nativist. See DENNIS WEPMAN, *IMMIGRATION* 252 (2008).

231. See SALYER, *supra* note 61, at 229. Once the process was complete, the bill’s proponents had urged, any noncitizen unable to exhibit a certificate of registration would be deported. See A. Warner Parker, *Immigration Control*, *SATURDAY EVENING POST*, Feb. 28, 1920, at 78, 82.

232. See HIGHAM, *supra* note 209, at 300–24.

233. See LIBBY GARLAND, *AFTER THEY CLOSED THE GATES: JEWISH ILLEGAL IMMIGRATION TO THE UNITED STATES, 1921–1965*, at 154–56 (2014).

234. GARLAND, *supra* note 233, at 154 (quoting *Saturday Evening Post*, May 28, 1932, at 20).

235. See *id.*

236. See 70 CONG. REC. 189–90 (Dec. 6, 1928). The federal government began issuing immigrant identification cards to new entrants in 1928, by executive order (and without notifying Congress). See *id.*; see also *Immigrant Identification Cards*, 13 *EUGENICAL NEWS* 111 (1928); Lee, *supra* note 79, at 42–43. Notwithstanding at least one immigrant leader’s belief that “failure to produce [the cards] when asked to do so by immigration officials places upon the immigrants the burden of proving their legal admission,” the step seemed to occasion little commotion in 1928; immigrant groups were more concerned with the threat of general alien registration. See *TWENTY-THIRD ANNUAL REPORT OF THE AMERICAN JEWISH COMMITTEE* 286–87 (1929), http://www.ajcarchives.org/ajc_data/files/1930_1931_9_ajcannualreport.pdf.

237. See H.R. 9101, 71st Cong. § 13 (1926).

House committee the following year, led the opposition.²³⁸ Registration, he said, would offer pretexts for deporting innocent noncitizens who had fallen afoul of its requirements.²³⁹ A rule that noncitizens must be prepared at all times to display their bona fides to immigration inspectors would give those inspectors “unlimited opportunity for oppression, blackmail, extortion, and other undesirable activities.”²⁴⁰ Indeed, he continued, that was the experience of the Chinese under the Geary Act.²⁴¹

Dickstein’s key objection was to the ramped-up interior enforcement the bill contemplated. Like earlier activists, he charged that a registration requirement was part of a shift that would render the noncitizen immigrant’s status ever more contingent.²⁴² Nor would registration even achieve its own goals:

The attempt to register aliens will eventually result in the registration of our own people, because how is anybody to tell whether or not a given individual is or is not an alien? And if we do that what is to prevent this Government from issuing passports to everybody, making them carry around with them cards with photographs to show that they have the right to live in this country.²⁴³

Like the others presented in Congress thus far, the bill failed.²⁴⁴

Congress was not the only battleground.²⁴⁵ In Depression-hit Michigan in particular, many feared the loss of American jobs to foreign radicals, criminals and illegal immigrants.²⁴⁶ Local business leaders, facing massive

238. See 72 CONG. REC. 3886 (Feb. 18, 1930).

239. See *id.*

240. *Id.*

241. See *id.*

242. See *id.*

243. *Id.*

244. See GARLAND, *supra* note 233. A historical side note: In 1937, Dickstein promised confidential information to the Soviet government in return for money. See Julian Borger, *The Spy Who Made McCarthy*, GUARDIAN (Jan. 26, 1999), <http://www.theguardian.com/theguardian/1999/jan/27/features11.g22>. His 1930 views set out above, though, were widely shared.

245. See, e.g., GARLAND, *supra* note 233, at 148–76.

246. See *id.* at 160. A quarter of Detroit’s population in 1930 was foreign-born. See U.S. DEP’T OF COM. & BUREAU OF FOREIGN & DOMESTIC COM., STATISTICAL ABSTRACT OF THE UNITED STATES 1931, FIFTY-THIRD NUMBER 23 (1931), <http://www2.census.gov/library/publications/1931/compendia/statab/53ed/1931-01.pdf>.

demonstrations by unemployed workers, saw immigrants as vectors of agitation and Communism.²⁴⁷ In response, they successfully pushed the Michigan legislature in 1931 to enact its own first-in-the-nation alien registration statute.²⁴⁸ Police were to arrest noncitizens who could not produce registration certificates.²⁴⁹ The statute never went into effect, though; a court struck it down as preempted by federal law.²⁵⁰

In 1940, Congress mandated alien registration.²⁵¹ What ultimately tipped the balance was fear of Communism, as in Michigan, together with fear of the Axis and the Fascist threat. Representative J. Will Taylor had urged Congress in 1939 to adopt fingerprinting and registration to deal with “the alien problem.”²⁵² The greatest menace to this country, he continued, lay not in external threats but in subversive enemy aliens boring from within.²⁵³ New York Representative Clarence Hancock, supporting the Smith Act in 1940 on the House floor, explained that the entry of aliens into the United States to organize espionage, sabotage, and subversion was a tool of war, and that measures for fingerprinting and registration were simple self-defense.²⁵⁴ A contemporaneous *New York Times* article saw the new requirement as a response to the “spasm of fear engendered by the success of fifth columns in less fortunate countries [W]ho could tell what secret

247. See GARLAND, *supra* note 233, at 148.

248. See *id.*

249. See *id.* at 148–49, 160–62. Again, the law’s impact would not be limited to aliens; as the state conceded, its practical effect would be “to require all persons who are not obviously American-born to carry and be ready to produce at all times proof of their citizenship, birth, or right of entry into the United States.” *Id.* at 169. Because the law in effect treated all persons who seemed foreign as suspect, whether they were citizen or noncitizen, immigrant groups saw it as “a betrayal of the very principle of naturalization.” *Id.*

250. See, e.g., *Arrowsmith v. Voorhies*, 55 F.2d 310 (E.D. Mich. 1931). The challengers had also objected that the registration requirement was unworkable, that it discriminated against aliens in violation of the equal protection clause, and that it authorized detention without probable cause or warrants. See Thomas A. Klug, *The Michigan Alien Registration Law of 1931 and the Arrowsmith Case*, 20 HIST. SOC’Y U.S. DIST. CT. E.D. MICH. 1 (2013). The court did not rule on those claims, and the state of Michigan did not appeal. *Arrowsmith*, 55 F.2d at 312.

Later in the decade, Pennsylvania and two other states enacted similar laws; the Supreme Court invalidated them in *Hines v. Davidowitz*, 312 U.S. 52 (1941).

251. See Alien Registration Act of 1940, Pub. L. No. 76-670, 54 Stat. 670 (1940).

252. 85 CONG. REC. 1375, 1378 (Nov. 3, 1939). See CHERYL LYNNE SHANKS, *IMMIGRATION AND THE POLITICS OF AMERICAN SOVEREIGNTY, 1890–1990*, at 127–29 (2001).

253. See sources cited *supra* note 252.

254. See 86 CONG. REC. 9033 (June 22, 1940); see also *id.* (statement of Rep. Smith); *id.* at 9032 (statement of Rep. Hobbs).

agents were already at work in America?”²⁵⁵

The 1940 Smith Act thus made it a crime to “advise [] or teach the duty, necessity, desirability, or propriety of overthrowing . . . government in the United States by force or violence.”²⁵⁶ It mandated the deportation of any noncitizen who had ever been affiliated with a subversive organization and, to better achieve that end, required all noncitizens to appear at local post offices to be registered and fingerprinted and to keep the government apprised of their current address at all times.²⁵⁷

The statute did not impose a carry requirement; federal regulations were careful to note that “[t]he alien is under no legal obligation to carry [any document] upon his person, and he shall suffer no penalty for disadvantage from failing to do so.”²⁵⁸ Rather, the point of registration was to provide the federal government with information enabling it to monitor foreigners living in the United States. “While policymakers recognized that not all noncitizens were subversives, they saw monitoring of all noncitizens as the best way to address the enemy threat.”²⁵⁹

255. Delbert Clark, *Aliens to Begin Registering Tuesday*, N.Y. TIMES (Aug. 25, 1940), <http://query.nytimes.com/mem/archive/pdf?res=9C05E7DD1530E03ABC4D51DFBE66838B659E DE>.

256. Alien Registration Act of 1940, Pub. L. No. 76-670, § 2(a)(1), 54 Stat. 670 (1940).

257. See Weinberg, *supra* note 9, at 203. The deportation provision was Section 23 of the Act, whose terms derived from the anti-anarchist Immigration Act of 1918. See *id.* at 203 n.46; see also *id.* at 204 n.47 (describing the Act in more detail).

258. Regulations Governing the Registration and Fingerprinting of Aliens in Accordance with the Alien Registration Act, 5 Fed. Reg. 2836, 2840 (1940) [hereinafter 1940 Regulations].

259. Weinberg, *supra* note 9, at 204. The threat, indeed, related not merely to aliens, but in particular, to Jews. See JONATHAN FREEDMAN, *KLEZMER AMERICA: JEWISHNESS, ETHNICITY, MODERNITY* 260–63 (2008). In some anti-Semitic discourse, the Jew was “oriental.” *Id.* The distance from the anti-Chinese Geary Act, thus, may not have been so far. See *id.* The virulent anti-Semitism of the 1920s, when a House Committee on Immigration report had described Jews as “unassimilable,” “filthy, un-American and often dangerous in their habits,” had subsided by the 1940s, but the public association of Jews and radicalism remained. HIGHAM, *supra* note 209, at 277–86, 309; JAMES G. RYAN & LEONARD SCHLUP, *HISTORICAL DICTIONARY OF THE 1940S* 29 (Routledge 2015). Michigan’s Assistant Attorney General, in defending the state’s registration bill, had been plain in his view that “[a]ll the Jewish organizations are Communistic.” GARLAND, *supra* note 233, at 171. Representative Taylor recited statistics in the same speech indicating that more than half of those admitted during the previous year were “Hebrews,” and asked rhetorically, “Are these figures self-explanatory? Do they reveal a situation to our satisfaction?” 85 CONG. REC. 1376 (Nov. 3, 1939). Mississippi Representative John Rankin would later be forthright in describing Communism as the work of “a racial [i.e., Jewish] minority [that] seized control in Russia” and was “trying to force their communistic program on the Christian people of America.” 98 CONG. REC. 4320 (1952).

The Justice Department prepared for the registration period with an extensive publicity campaign, attempting to send the somewhat contradictory messages that the registration program “involves neither stigma nor suspicion” and that failure to register “may well be construed as evidence that the alien has something to conceal.”²⁶⁰ The New York Times, while unabashedly shilling for the program, nonetheless described it as “probably the most radical departure from tradition in our whole national history.”²⁶¹

Almost five million noncitizens trooped to local post offices to be fingerprinted and to submit detailed questionnaires, covering matters such as name; address; birth date and place; physical description; circumstances of immigration; occupation and employment information; any membership in clubs, organizations, or societies; military service; applications for citizenship; U.S. relatives; criminal record; and activities on behalf of a foreign nation.²⁶²

Each registrant received an Alien Registration Receipt Card, or AR-3, as evidence of registration; it recited his or her name, postal address, and registration number.²⁶³ Unlike the Michigan law and some earlier federal proposals, which had limited registration to those legally present, the AR-3 was available without regard to whether the noncitizen was legally in the United States and didn’t incorporate or refer to any determination of immigration status.²⁶⁴ The point, rather, was simply to compile an inventory of noncitizens. “By encouraging and securing registration of *all* noncitizens, whether legally or illegally present, the government was best positioned to keep tabs on the disloyal or politically undesirable.”²⁶⁵

260. Clark, *supra* note 255.

261. *Id.*

262. See Smith Act of 1940, Pub. L. No. 76-670, §§ 31–33, 54 Stat. 673–74 (1940); Clark, *supra* note 255; Nancy Morawetz & Natasha Fernández-Silber, *Immigration Law and the Myth of Comprehensive Registration*, 48 UC DAVIS L. REV. 141, 160 (2014); *AR2 Form Image Gallery*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/history-and-genealogy/genealogy/ar2-form-image-gallery> (last updated Feb. 9, 2016).

263. See 1940 Regulations, *supra* note 258, at 2840; Morawetz & Fernández-Silber, *supra* note 262, at 159.

264. See Weinberg, *supra* note 9, at 204; Marian Smith, *Why Isn't the "Green Card" Green?*, 70 INTERPRETER RELEASES 1043 [#30] (1993). The 1940 Act granted the INS the power, for the first time, to legalize the status of otherwise deportable noncitizens. In the eight years that followed, the agency used that power repeatedly as it encountered registration files revealing people to be without legal status. See Weinberg, *supra* note 9, at 204 n.52.

265. Weinberg, *supra* note 9, at 204–05, 205 n.53. See *United States v. Ginn*, 222 F.2d 289, 290

The FBI matched Smith Act fingerprint files against its records of leftist activity, espionage, and crime; government agencies began compiling lists of subversives to be detained if war broke out.²⁶⁶ Unsurprisingly, though, the registration database soon became inaccurate.²⁶⁷ The Act provided for the registration at the border of new entrants, and required that persons once registered were to report every change of address to the Commissioner of Immigration and Naturalization.²⁶⁸ The Immigration and Naturalization Service (INS) assigned the job of processing those reports to its newly created Alien Registration Division.²⁶⁹

Records of changes of address, however, soon proved incomplete. Between five and forty percent of noncitizens changed addresses in the program's first two-and-a-half years while neglecting to file the forms.²⁷⁰ United States Attorneys were uninterested in prosecuting those violations.²⁷¹ Nor was there any record made when noncitizens died or left the country.²⁷²

There was a brief resurgence of interest in alien registration in 1942, as a prologue to the Japanese internment. In the early days of 1942, General John DeWitt (commander of the military Western Defense Command, with authority over U.S. forces on the Pacific Coast) expressed consternation that that he had “no confidence . . . whatsoever” in the loyalty of Japanese persons in the U.S.; that their registration documents were “very incomplete”; and that he needed to be able to “keep track of [the Japanese] at all times” with the help of a more elaborate registration process that generated documents including photographs and thumb prints.²⁷³ Once that was done, he continued,

I think we will be able to control them. By requiring those people

(3d Cir. 1955); Morawetz and Fernández-Silber, *supra* note 262, at 157; U.S. GEN. ACCOUNTING OFFICE, GAO-03-188, HOMELAND SECURITY: INS CANNOT LOCATE MANY ALIENS BECAUSE IT LACKS RELIABLE ADDRESS INFORMATION (2012); Elizabeth Burnes & Marisa Louie, *The A-Files Finding Your Immigrant Ancestors*, NAT'L ARCHIVES (2013), <http://www.archives.gov/publications/prologue/2013/spring/a-files.pdf>.

266. See Seltzer & Anderson, *supra* note 149, at 26.

267. See Weinberg, *supra* note 9, at 205.

268. See Smith Act of 1940, Pub. L. No. 76-670, §§ 35, 54, 54 Stat. 675 (1940).

269. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 265, at 31.

270. See *id.* at 31–32.

271. See *id.* at 40–41.

272. See *id.* at 31–32.

273. See Transcript, “Conversation in General DeWitt's Office” (Jan. 4, 1942) (on display at the Japanese American National Museum, Los Angeles, CA; copy on file with author), at 1–4.

to carry the registration card on their person, restrict their movements, I expect to be able to control them.²⁷⁴

Accordingly, on January 14, 1942, President Roosevelt signed a proclamation requiring all “alien enemies” (that is, citizens of nations with which the U.S. was then at war) to apply for new ID cards,²⁷⁵ and further requiring that an alien enemy, once issued a new card, must “at all times have his identification card on his person.”²⁷⁶ The U.S. government began issuing elaborate registration booklets to Japanese California residents no later than early February.²⁷⁷ That project, though, was soon swallowed up by the military’s more sweeping one of interning, for the duration of the war, all of the more than 100,000 Japanese immigrants and U.S. citizens of Japanese descent who had been living on the West Coast.²⁷⁸

Interest in the registration process for others in the United States briefly waned. The INS, concluding that it was impossible to keep track of noncitizens’ addresses “with any degree of accuracy,” disbanded its Alien Registration Division in 1944 and folded its functions into other agency offices.²⁷⁹

Nonetheless, as fears of Communism grew after the Second World War, it became increasingly clear at least to some that the source of the Communist contagion was immigration. “[C]ommunism in the United States is an alien movement; its ideology is alien, its leadership is alien, and its membership is largely of alien origin.”²⁸⁰ One member of Congress explained that “[n]ine out of every ten of the Communists that have been convicted of treason in this country were foreign born.”²⁸¹ A 1950 Senate

274. *Id.* at 4. General DeWitt also explained that he urgently needed legal authority for a warrantless search of the home of every noncitizen within his jurisdiction. *See id.*

275. Executive Proclamation No. 2537, Regulations Pertaining to Alien Enemies, 7 Fed. Reg. 329 (Jan. 17, 1942).

276. *Id.*

277. *See* Registration Documents of Kazue Miyamoto, issued February 9, 1942 (on display at the Japanese American National Museum, Los Angeles, CA; copy on file with author).

278. *See* Eric Mueller, *Of Coercion and Accommodation: Looking at Japanese American Imprisonment through a Law Office Window*, 35 L. & HIST. REV., at 1 (Mar. 2017).

279. *See id.* Congress in 1950 enacted a new rule requiring noncitizens in the United States to file new address forms every year, even if their addresses hadn’t changed; it eliminated that requirement in 1981. *See* Weinberg, *supra* note 9, at 205 n.60.

280. 96 CONG. REC. 9303 (1950) (statement of Rep. George Dondero).

281. 98 CONG. REC. 4315 (1952) (Rep. John Rankin). Unsurprisingly, this was not an accurate statement. No Communist has ever been convicted of treason in this country. *See* Erin Creegan,

committee report, released in support of what would become the 1952 McCarran-Walter Act, put the matter plainly: “Communism is, of necessity, an alien force. It is inconceivable that the people of the United States would, of their own volition, organize or become part of a conspiracy to destroy the free institutions to which generations of Americans have devoted themselves.”²⁸² In light of these facts, the report continued, “it is not strange that the vast majority of those who would establish a Communist dictatorship in this country come from alien lands.”²⁸³

Congress therefore doubled down on registration in the McCarran-Walter Act. That comprehensive immigration-law revision built on the McCarran Internal Security Act of 1950, which had broadened the grounds for exclusion and deportation of subversive immigrants²⁸⁴ (and included a chilling provision, reminiscent of the Japanese internment, that in case of war or “internal security emergency,”²⁸⁵ the federal government could indefinitely detain any person, citizen or alien, for whom there was “reasonable ground to believe that such person probably will engage in or . . . conspire with others to engage in acts of espionage or of sabotage”).²⁸⁶

Beyond those provisions, the McCarran-Walter Act added the requirement now embodied in 8 U.S.C. § 1304(e) that noncitizens in the United States, having registered, must carry their registration cards at all times.²⁸⁷ This requirement brings to mind the similar ones earlier imposed during wartime on German citizens and on Japanese.²⁸⁸ Its legislative history is sparse.²⁸⁹ Representative Preston of Georgia put the matter

National Security Crime, 3 HARV. NAT’L SEC. J. 373, 376–80 (2012). Of the twelve members of the Communist Party USA National Board indicted for Smith Act violations in the landmark case of *Dennis v. United States*, all but three were native-born. See *Dennis v. United States*, 341 U.S. 494 (1951).

282. THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, S. REP. NO. 81-1515, at 782 (1950); see also 96 CONG. REC. 9303 (1950) (statement of Rep. George Dondero, R-MI, quoting the report).

283. THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, S. REP. NO. 81-1515, at 782 (1950); see also 95 CONG. REC. 13058 (1949) (Rep. O’Conor); see generally SHANKS, *supra* note 252.

284. See Internal Security Act of 1950, Pub. L. No. 81–831, 62 Stat. 987 (1950).

285. *Id.* § 102, 62 Stat. at 1021.

286. *Id.* §§ 101–16, 64 Stat. at 987. Steps previously acceptable only when directed at racial minorities were now thinkable when directed at the quasi-racial Communist threat. See *id.* § 2, 64 Stat. at 987–99.

287. See 8 U.S.C. § 1304(e) (1952).

288. See *supra* notes 200, 273–77, and accompanying text.

289. See Weinberg, *supra* note 9, at 209 n.84. Pennsylvania Representative Earl Chudoff

succinctly, though: “I think we have mollycoddled these aliens long enough The time will not be too far off when we are going to want to get these people out and then we are going to have a very difficult time rounding them up.”²⁹⁰

The original AR-3 cards were not biometric—unsurprisingly, because there initially had been no requirement that holders carry them.²⁹¹ The important thing had been the compilation of noncitizens’ registration information and fingerprints in a new government database, not the notation of that information on a card issued as evidence of registration.²⁹² By the time of the McCarran-Walter Act, though, the government was no longer issuing the old AR-3 card.²⁹³ Lawful permanent residents and other persons entering the United States were expected to have submitted to registration and fingerprinting abroad, at a U.S. consulate, prior to their entry.²⁹⁴ The new requirement that registration take place outside the United States left little role for any continuing reliance on post office registration *within* the United States, or for the AR-3, which the agency abandoned.²⁹⁵ The agency promulgated rules allowing pre-1940 immigrants to exchange their old AR-3s for new I-551 green cards (which constituted evidence of lawful status, as the old cards did not).²⁹⁶

proposed an amendment limiting the statute’s bar to “willful[.]” failure to carry the card. Otherwise, he urged, “it would be a crime for any alien to go into a shower or take a bath unless he had this card in his personal possession”; noncitizens would find themselves subject to criminal penalties simply because they had left their registration cards in a different handbag or suit. 98 CONG. REC. 4433, 4438 (1952). Some hearing witnesses agreed, arguing that the new statute not only would import into American law a requirement reminiscent of authoritarian Europe, but moreover did not recognize the reality of “women who constantly change purses.” *Hearings Before the President’s Commission on Immigration and Naturalization, printed for the H. Comm. on the Judiciary*, 82d Cong. 318, 719, 722 (1952) (statements of Alice O’Connor and Elizabeth Wilson). Representative Chudoff’s amendment, however, was defeated. See Weinberg, *supra* note 9.

290. See Weinberg, *supra* note 9, at 209; *Department of Justice Appropriations for 1952: Hearings Before the Subcomm. of the H. Comm. on Appropriations*, 82d Cong. 397 (1951) (statement of Rep. Prince Preston).

291. See *supra* note 258 and accompanying text.

292. See *supra* note 259 and accompanying text.

293. See *Decentralization of Functions*, 15 Fed. Reg. 574, 579–80 (Feb. 2, 1950); Weinberg, *supra* note 9, at 208, 210–11.

294. See *Smith Act of 1940*, Pub. L. No. 76-670, §§ 30, 54, 54 Stat. 673 (1940); *Recording of Arrivals, Departures, and Registrations: Documentary Requirements for Aliens Entering the United States*, 11 Fed. Reg. 9982 (Sept. 11, 1946) [hereinafter, 1946 Regulations]; see also *Executive Order: Documents Required of Aliens Entering the United States*, 6 Fed. Reg. 2741 (June 6, 1941).

295. See Weinberg, *supra* note 9, at 208.

296. See *Replacement of Alien Registration Receipt Cards*, 16 Fed. Reg. 3333 (Apr. 17, 1951).

When the agency moved to implement the 1952 Act's carry requirement, thus, it explained that a noncitizen could satisfy the statutory requirements with whatever document she held.²⁹⁷ Increasingly, the document that noncitizens found themselves statutorily required to carry was the I-151 (later, I-551) green card.²⁹⁸ That document was and is biometric, like the Geary Act certificate; it incorporated a photograph from the start.²⁹⁹

V.

I've one more set of stories to tell; the first returns to the issue of draft cards, and requires backtracking just a bit in time. There was no draft registration and no draft-card carrying requirement after the end of World War I in 1918.³⁰⁰ Congress reinstated the draft in 1940, on the eve of our entry into the Second World War.³⁰¹ Once again, Selective Service regulations called for the carrying of draft cards.³⁰² Initially, the regulations merely directed registration personnel to warn the registrant that "he should carry the registration certificate with him at all times, as he may be required to show it from time to time."³⁰³ In mid-1941, though, the regulations were amended to provide explicitly that "[t]he registrant must have his registration certificate in his personal possession at all times and, upon request, must exhibit it"; failure to do so "shall constitute a violation of these Regulations and, in addition, shall be prima facie evidence of his failure to register."³⁰⁴

There were no slacker raids after 1940.³⁰⁵ While some people were criminally charged during World War II with violation of the possession

297. The agency allowed immigrants still in possession of AR-3s to use them for the next eight years, until 1960. *See* Registration and Fingerprinting of Aliens in the United States, 25 Fed. Reg. 7180-81 (July 29, 1960) (omitting the AR-3 from its list of forms constituting evidence of registration).

298. *See* 1946 Regulations, *supra* note 294, at 9983-84.

299. *See id.*

300. *See* Dranitzke, *supra* note 181, at 4030.

301. *See id.*

302. *See id.*

303. Executive Order Selective Service Regulations, 5 Fed. Reg. 3779, 3790 (Sept. 26, 1940); Dranitzke, *supra* note 181, at 4030.

304. Amending the Regulations so as to Require a Registrant to Carry His Registration Certificate, 6 Fed. Reg. 1796 (Apr. 5, 1941).

305. *See Selective Service System*, 1 ENFORCEMENT SELECTIVE SERV. L.: SPECIAL MONOGRAPH NO. 14 I, 13 (1950).

requirement,³⁰⁶ a Federal Bureau of Prisons report described them as “mostly socially inadequate individuals of low intelligence . . . arrest[ed] for vagrancy or on other . . . charges,” whose Selective Service Act violations were discovered post-arrest.³⁰⁷

The World War II draft law expired in 1947, but Congress reinstated draft registration in the Selective Service Act of 1948, this time in response to the perceived threat of international Communism.³⁰⁸ U.S. leaders, seeing the Soviet Union and the People’s Republic of China as “initiating a plan of world conquest,”³⁰⁹ viewed unilateral demobilization as too risky.³¹⁰ As before, the law directed registrants to maintain their draft cards in their personal possession.³¹¹ The new regulations, though, dropped any explicit requirement that the holder exhibit his card to a law enforcement officer upon request.³¹²

Draft registration remained relatively uncontroversial until the late 1960s and 1970s, when the country embarked on that phase of the notional fight against Communism known as the Vietnam War.³¹³ The 1948 rules remained in place.³¹⁴ Men of draft age were still required to carry their cards (although there was still no formal requirement that they show them to

306. See, e.g., *United States v. Minder*, 63 F. Supp. 369 (S.D. Calif. 1945), *aff’d mem.*, 157 F.2d 856 (9th Cir. 1946). Under section 11 of the 1940 Selective Training and Service Act, it was a criminal offense to “knowingly fail or neglect to perform any duty required . . . under . . . rules or regulations made pursuant to this Act.” Selective Training and Service Act of 1940 Pub. L. No. 76-783, 54 Stat. 885, § 11 (1940).

307. TOM C. CLARK, BUREAU OF PRISONS, FEDERAL PRISONS 1946 14 (United States Penitentiary 1947). Over the course of the war, more than 250 people were convicted either for possession of false or altered draft-related documents, or for failure to have documents. See *Selective Service System*, *supra* note 376, at 89. Available statistics, however, don’t reveal how many fell in each category. See *id.*; Dranitzke, *supra* note 181, at 4033. Almost no such charges were brought against conscientious objectors, who were predominantly charged with failure to report for induction. See *Selective Service System*, *supra* note 305, at 94.

308. See SELECTIVE SERVICE UNDER THE 1948 ACT 3–5 (1951).

309. *Id.* at 3.

310. See *id.* at 3–4.

311. See *id.* at 159. The 1948 Act, like the 1940 Act, made it a criminal offense to violate Selective Service regulations. The Seventh Circuit rejected a First Amendment challenge to the draft-card possession requirement in *United States v. Kime*, 188 F.2d 677 (7th Cir.), *cert. denied*, 342 U.S. 823 (1951).

312. See Dranitzke, *supra* note 181, at 4031–32.

313. See generally Louis Loeb, *The Courts and Vietnam*, 18 AM. U. L. REV. 376 (1969).

314. See Dranitzke, *supra* note 181, at 4032.

anybody).³¹⁵ The cards still contained no biometric information; as the Supreme Court later put it, each card showed “the eligibility classification of a named but undescribed individual.”³¹⁶

As a practical matter, enforcement of papers-carrying requirements during the Vietnam War was directed almost entirely against dissidents.³¹⁷ War protesters returned their draft cards to their draft boards or burned them; they were then charged with nonpossession.³¹⁸ Identification, of course, was hardly the issue.³¹⁹ An individual who mailed his conscription documents back to draft authorities was making no secret of his identity; indeed, he was going out of his way to call attention to himself. At the same time, his violation of the regulations was hard to dispute: he was not maintaining in his possession the card he returned.³²⁰

One Court of Appeals held in 1973, at the height of the controversy, that the statute did not permit criminal sanctions for violations of the carry rule.³²¹ That was a minority view, though;³²² the dissenting judge, and other courts, found it outrageous that a war protestor could escape criminal sanctions when he had violated draft regulations “purposefully, even defiantly.”³²³

The Vietnam-era draft-card rules presented a junior version of the other requirements surveyed in this paper: Both law enforcement actions and public debate were driven almost entirely by differing views of the legitimacy of young people’s defiance of society, duty, and the judgments of

315. *But see* Morris D. Forkosch, *Draft Card Burning—Effectuation and Constitutionality of the 1965 Amendment*, 32 BROOK. L. REV. 303, 324 (1966) (arguing that as a practical matter an individual who declined to show his draft card on an officer’s demand put himself in jeopardy).

316. *United States v. O’Brien*, 391 U.S. 367, 378 (1968).

317. The agency generally left other cases to the registrant’s draft board rather than the criminal process, giving the registrant “a chance to reconsider.” *See* *Judicial Review and Punitive Reclassification*, 1 SELECTIVE SERV. L. REV. 2 (1968).

318. *See, e.g.*, *United States v. Falk*, 472 F.2d 1101, 1107 (7th Cir. 1972).

319. *See, e.g., id.*

320. *See, e.g., id.*

321. *United States v. Eppinette*, 488 F.2d 365, 370 (4th Cir. 1973).

322. *Id.* at 367 n.3.

323. *Id.* at 371 (Russell, J., dissenting). The Supreme Court in 1968 upheld against First Amendment challenge a Selective Service regulation specifically directed at the burning of draft cards. *O’Brien*, 391 U.S. at 386. Chief Justice Warren’s opinion discussed the carry requirement. Implicitly acknowledging that police could not legally require anyone to display the card he was carrying, it suggested that a young man required by law to carry his documents might find that “[v]oluntarily displaying the two certificates [was] an easy and painless way” to prove his compliance. *Id.* at 378. *But see supra* note 315.

their betters, and prevailing understandings about the war.³²⁴ There was no formal legal requirement to display one's card, and the cards contained no biometric information. Once the Selective Service ended induction in January 1973, controversy over the draft card dissipated.³²⁵ In 1975, the carry requirement fell off the books with the end of Vietnam War-era draft registration.³²⁶ It was not reinstated.³²⁷

At the same time, though, a different body of law, relating to members of a different population, imposed a parallel requirement of showing identification documents to police.³²⁸ That story begins with the demise of state vagrancy laws in the 1960s and 1970s. Before the 1960s, all American states had broad criminal statutes defining the offense of "vagrancy"—in essence, the crime of being impoverished and idle.³²⁹ As of 1960, California law made it illegal, among other things, to "roam[] about from place to place without any lawful business."³³⁰ District of Columbia law made it criminal vagrancy for a person to be "wandering abroad and lodging . . . in the open air, and not giving a good account of himself."³³¹ The same was true if a person "wander[ed] about the streets at late or unusual hours of the night without any visible or lawful business and not giving a good account of

324. See Loeb, *supra* note 313, at 376–78.

325. See Andrew Glass, *U.S. Military Draft Ends, Jan. 27, 1973*, POLITICO (Jan. 27, 2012), <http://www.politico.com/story/2012/01/us-military-draft-ends-jan-27-1973-072085> (last visited Apr. 24, 2017).

326. See Gerald Ford, *Proclamation No. 4360—Selective Service Registration*, AM. PRESIDENCY PROJECT (Mar. 29, 1975), <http://www.presidency.ucsb.edu/ws/?pid=23818>.

327. President Carter restored draft registration in 1980 but did not reinstate the carry requirement. See Jimmy Carter, *Selective Service Revitalization Statement on the Registration of Americans for the Draft*, AM. PRESIDENCY PROJECT (Feb. 8, 1980), <http://www.presidency.ucsb.edu/ws/?pid=32906>.

328. See *infra* notes 344–62 and accompanying text.

329. See Arthur H. Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CAL. L. REV. 557, 559 (1960). The old common law offense of vagrancy had its roots in the ancient English poor laws. See William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 5–6 (1960). It took statutory form in the United States beginning shortly after the Civil War; the new laws made it a criminal offense to beg or be poor and willfully without employment. See Amy Dru Stanley, *Beggars Can't Be Choosers: Compulsion and Contract in Postbellum America*, 78 J. AM. HIST. 1265, 1266–67 (1992); see, e.g., *Ex parte Smith*, 25 Ohio Dec. 286 (Ct. Com. Pl. 1912). Vagrancy laws came to speak to a range of concerns about criminality and social stability. See *Ex parte Branch*, 234 Mo. 466, 471 (1911); Sherry, *supra*, at 560–62 (1960); see, e.g., *Vagabonds, What Shall Constitute*, ILL. CRIM. CODE § 270 (1877).

330. See Sherry, *supra* note 329, at 562 n.38.

331. Douglas, *supra* note 329, at 4 (quoting the then-current versions of D.C. CODE ANN. 22-3302(6), (8)); see also *id.* at 6 n.26.

himself.”³³²

The statutory language lent itself to highly discretionary, indeed arbitrary, application.³³³ The laws “avoided [definiteness] so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense.”³³⁴ At the same time, the theory ran, the trial judge’s ability to tailor results to the facts before him would ensure that “deserving but unfortunate persons [would not] suffer.”³³⁵

Vagrancy law’s discretionary nature, though, eventually came into tension with modern notions of how law was supposed to work.³³⁶ The California Supreme Court in 1960 invalidated a provision of the state’s vagrancy law as unconstitutionally vague.³³⁷ The District of Columbia’s law was invalidated in 1968.³³⁸ Academic commentators strongly attacked vagrancy law as constitutionally unsustainable.³³⁹

332. See sources cited *supra* note 331.

333. See, e.g., *Handler v. Denver*, 77 P.2d 132, 134 (Colo. 1938) (under Colorado law, vagrants included any person “who shall lead an idle, immoral, or profligate course of life”); *People v. Belcastro*, 190 N.E. 301 (Ill. 1934); *People v. Klein*, 127 N.E. 72 (Ill. 1920).

334. *Winters v. New York*, 333 U.S. 507, 540 (1948) (Frankfurter, J., dissenting).

335. *Morgan v. Commonwealth*, 191 S.E. 791, 795 (Va. 1937); see also Sherry, *supra* note 329, at 558 (discussing *Morgan*).

336. See Risa L. Goluboff, *Before Black Lives Matter*, SLATE (Mar. 2, 2016, 12:21 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/03/vagrancy_laws_and_the_legacy_of_the_civil_rights_movement.html. As early as 1941, President Roosevelt had vetoed a version of the District of Columbia vagrancy law, urging that modern “standards of legislative practice” were inconsistent with imposing criminal liability based on a police officer’s or judge’s understanding of “[w]hat constitutes ‘leading an idle life’ and ‘not giving a good account of oneself.’” 87 CONG. REC. 7576 (Sept. 29, 1941) (veto message of President Franklin D. Roosevelt).

337. See *In re Newbern*, 53 Cal. 2d 786 (1960) (addressing the proscription of being a “common drunkard”); see also *Baker v. Bindner*, 274 F. Supp. 658 (W.D. Ky. 1967) (striking down Kentucky’s vagrancy law); *People v. Diaz*, 151 N.E.2d 871 (N.Y. 1958) (striking down a loitering ordinance). Some judicial pushback had come earlier. The District of Columbia Court of Appeals had struck down a truly notable provision of local law under which “all suspicious persons” could be criminally punished as vagrants. *Stoutenburgh v. Frazier*, 16 App. D.C. 229, 234 (1900). Courts had sometimes rejected the use of disorderly conduct or disreputable association statutes where an arrest was premised on the bad reputation of defendant or his associates. See *Pinkerton v. Verberg*, 44 N.W. 579 (Mich. 1889); *St. Louis v. Fitz*, 53 Mo. 582, 584 (1873). Other courts had struck down statutes making it illegal to loiter or linger in a public place. See generally *Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931); *St. Louis v. Gloner*, 109 S.W. 30 (Mo. 1908).

338. See *Ricks v. Dist. of Columbia*, 414 F.2d 1097, 1110 (D.C. Cir. 1968).

339. See, e.g., Anthony G. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205 (1967); Forrest W. Lacey, *Vagrancy and Other Crimes of Personal*

The Supreme Court added its voice in *Papachristou v. City of Jacksonville*.³⁴⁰ That case arose from the criminal prosecution on vagrancy grounds of two white women and two African American men found riding in the same car in Jacksonville, Florida.³⁴¹ The Court ruled that Florida's vagrancy statute was unconstitutional.³⁴² It was inconsistent with a "rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich"; it created a regime in which "poor people, nonconformists, [and] dissenters" were allowed to stand on public sidewalks "only at the whim of any police officer."³⁴³

How, then, were states to preserve police prerogatives? The answer came in a new trend in legislation: the "stop-and-identify" statute.³⁴⁴ These laws tweaked the old vagueness rules so that a person previously subject to arrest for vagrancy was instead subject to an obligation "to identify himself [to police] and to account for his presence."³⁴⁵

By the mid-1970s, some form of stop-and-identify statute had been adopted by jurisdictions across the country.³⁴⁶ The laws varied from jurisdiction to jurisdiction. What they had in common, though, was that a suspicious person's status—rather than itself providing grounds for arrest—

Condition, 66 HARV. L. REV. 1203, 1206 (1953); see also Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 604 (1956) (asking "how far our criminal law administration should relax constitutional and procedural controls to permit greater administrative police discretion").

340. 405 U.S. 156 (1972). *Papachristou* was foreshadowed by the Court's per curiam opinion in *Palmer v. City of Euclid*, 402 U.S. 544, 546 (1971).

341. See *Papachristou*, 405 U.S. at 156. The vagrancy charge was nominally predicated on the car's having stopped near a used-car lot with a history of break-ins. See *id.* at 159.

342. See *id.* at 171.

343. *Id.* at 167, 170–71 (quoting *Shuttlesworth v. Birmingham*, 382 U. S. 87, 90 (1965)).

344. See *infra* notes 345–62 and accompanying text.

345. The quoted language is from a 1961 amendment to the California statute, enacted in the wake of *In re Newbern*, 53 Cal. 2d 786 (1960), and *In re Cregler*, 56 P.2d 308 (Cal. 1961). See also *People v. Weger*, 251 Cal. App. 2d 584 (1967) (discussing section 647(e) of the California Penal Code, governing disorderly conduct); Louis Keenan, *California Penal Code Section 647e: A Constitutional Analysis of the Law of Vagrancy*, 32 HASTINGS L.J. 285 (1980); see generally Sherry, *supra* note 329. The Model Penal Code tentative 1961 draft similarly proposed imposing civil penalties on a person who loiters or wanders in a suspicious manner and "refuses the request of a peace officer that he identify himself and give a reasonably credible account of the lawfulness of his conduct and purposes." See Nicholas C. Harbist, Note, *Stop and Identify Statutes: A New Form of an Inadequate Solution to an Old Problem*, 12 RUTGERS L.J. 585, 589–90 (1981). A later draft put the offense somewhat differently. See *id.* at 590–91 n.32.

346. See Harbist, *supra* note 345, at 589–90.

would trigger an identification requirement.³⁴⁷ If the person failed or refused to identify himself, he could be arrested on that basis.³⁴⁸ California's law, for example, applied to any person "who loiters or wanders upon the streets or from place to place without apparent reason or business," where "the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands [the person's] identification," and obliged that person to "identify himself and to account for his presence when requested by any peace officer."³⁴⁹

The California courts construed the new statute, in light of emerging Fourth Amendment law, to apply only where there was articulable suspicion of criminal activity sufficient to justify a *Terry* stop.³⁵⁰ Further, they ruled that a person could fully satisfy the law via "the production of reliable identification."³⁵¹ That identification, though, had to carry "reasonable assurance that [it] is authentic and provid[es] means for later getting in touch" with the individual in question.³⁵²

In other words, the statute's identification requirement was, in the typical case, a requirement of producing reliable *identification documents*. Other jurisdictions made that requirement explicit. A Detroit ordinance phrased the requirement this way:

When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification.³⁵³

347. *See id.*

348. *See id.*

349. *Quoted in Keenan, supra note 345, at 285 n.3.*

350. *See People v. Solomon*, 33 Cal. App. 3d 429, 435 (1973). *Terry v. Ohio* had held in part that police cannot stop or frisk an individual absent "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S. 1, 21 (1968). The Court explicitly extended that holding to stop-and-identify laws in *Brown v. Texas*, 443 U.S. 47 (1979), ruling that police could not detain a person and demand that he identify himself absent specific, objective facts providing reasonable suspicion of crime. *See also Keenan, supra note 345, at 596-97.*

351. *Solomon*, 33 Cal. App. 3d at 438.

352. *Id.*; *see also Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

353. *People v. DeFillippo*, 262 N.W. 2d 921, 923 (Mich. 1977) (finding the ordinance

It should be plain where this story has landed: once again, we are looking at a rule requiring the production of identity documents to police on demand.³⁵⁴ Under this new set of laws, the identification-document requirement applied to the suspicious and vagrant, to those suspected of street criminality—another socially disfavored group, disproportionately poor and dark-skinned.³⁵⁵

Unsurprisingly, stop-and-identify statutes were enforced in accordance with police officers' intuitive sense of who was suspicious, and that intuitive sense depended heavily on race.³⁵⁶ According to a careful contemporary study of Southern California police, over eighty percent of patrolmen believed that aggressive patrolling, including stop-and-identify questioning, was appropriate in certain neighborhoods. For those patrolmen, race was "one of the most salient criteria . . . in deciding whether or not to stop someone."³⁵⁷

The Supreme Court declared that regime intolerable in 1983, in *Kolender v. Lawson*.³⁵⁸ Suit had been brought pro se by one Edward Lawson, a tall African American man with dreadlocks, whom police had repeatedly stopped and demanded papers from under California's stop-and-identify law.³⁵⁹ The California law, Justice O'Connor's opinion stated, was unconstitutional because it gave insufficient guidance to police and

unconstitutionally vague), *rev'd on other grounds*, 443 U.S. 31 (1979). See also *State v. Ecker*, 311 So. 2d 104, 110–11 (Fla. 1975) (referring to compliance with the Florida statute through the production of credible identification).

354. See *DeFillippo*, 262 N.W. at 923–24.

355. See MICHAEL K. BROWN, *WORKING THE STREET: POLICE DISCRETION AND THE DILEMMA OF REFORM* 166, 169–70 (1981); JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY* 86–87 (1967); *1959–61 Report of Assembly Interim Committee on Criminal Procedure*, 22 ASSEMBLY INTERIM COMMITTEE REP. 1, 10 (1961).

356. See sources cited *supra* note 355.

357. See BROWN, *supra* note 355, at 166; see also Dan Stormer & Paul Bernstein, *The Impact of Kolender v. Lawson on Law Enforcement and Minority Groups*, 12 HASTINGS CONST. L. QUART. 105, 115–18 (1984). The Supreme Court itself, some years earlier, had noted that "in many communities, field interrogations are a major source of friction between the police and minority groups." *Terry v. Ohio*, 392 U.S. 1, 14 n.11 (1968) (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183 (1967)).

358. 461 U.S. 352 (1983).

359. Lawson had been detained about fifteen times; the circumstances suggested that his race and appearance played a role. *Id.* at 354. On at least one occasion, for example, part of the justification for the stop was that his appearance made him "unusual in the area." On another, police who were looking for a suspect identified as "a white male [with] one leg" called on the only two African Americans in the restaurant, including Mr. Lawson, to step outside for questioning. See Stormer & Bernstein, *supra* note 357, at 112–13 n.41; see also *id.* at 114 n.49.

pedestrians as to what was “credible and reliable” identification.³⁶⁰ What would happen if a jogger had no identification documents? Would it be sufficient for him simply to recite his name and address? Would he have to satisfactorily answer a series of questions about the route along which he had jogged?³⁶¹ The power to demand identification, and to decide whether the proffered identification was satisfactory, gave police discretion enabling “harsh and discriminatory enforcement . . . against particular groups deemed to merit [police] displeasure.”³⁶²

The Court built on those foundations the following year, indicating that when police detain a person based on reasonable suspicion, the detainee need not respond even orally to questions about his identity.³⁶³ The Justices pulled back from that ruling in 2004, holding 5–4 in *Hiibel v. Sixth Judicial District* that when a police officer has reasonable suspicion to detain a suspect, and the suspect’s identity is reasonably related to the purposes of the stop, the officer can constitutionally require him to state his name.³⁶⁴ Even then, though, the Court made clear that it was not upholding a requirement that the suspect provide “a driver’s license or any other document.”³⁶⁵

The Court’s opinions in *Lawson* and subsequent cases lay bare a tension inherent in identity-document regimes: It can be hard to impose an identity regime on strangers or suspicious persons without imposing it on ordinary citizens as well. Justice O’Connor, thus, expressed concern about a jogger

360. *Lawson*, 461 U.S. at 353–54.

361. See also, e.g., Brief of the State Public Defender of California as Amicus Curiae in Support of Appellee at 23, 27, *Kolender v. Lawson*, 461 U.S. 352 (1983) (No. 81–1320) (querying whether “a library card or a rent receipt,” “a pictureless credit card,” a “voter registration card,” or “an envelope addressed to the individual” would satisfy the identification requirement).

362. *Kolender*, 461 U.S. at 360 (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972), in turn quoting *Thornhill v. Alabama*, 310 U.S. 88, 97–98 (1940)). Moreover, the Court continued, to the extent the statute criminalized a person’s failure to answer questions put to him by police officers, it implicated the “settled principle that, while the police have the right to request citizens to answer [questions] voluntarily . . . they have no right to compel them to answer.” *Id.* at 360 n.9 (quoting *Davis v. Mississippi*, 394 U.S. 721, 727 n.6 (1969)).

363. See *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).

364. 542 U.S. 177, 188 (2004).

365. *Id.* at 185. The Court insisted on that caveat notwithstanding that the dash-cam footage suggested strongly that Mr. Hiibel was arrested for failure to comply with a police directive to produce his driver’s license. See Arnold H. Loewy, *The Cowboy and the Cop: The Saga of Dudley Hiibel, 9/11, and the Vanishing Fourth Amendment*, 109 PENN. ST. L. REV. 929, 930–36 (2005). The Court, it would appear, did not want to address that issue. *Id.*

being subjected to the same regime used to arrest Lawson.³⁶⁶ Representative Dickstein had hit on the same issue: “The attempt to register aliens will eventually result in the registration of our own people, because how is anybody to tell whether or not a given individual is or is not an alien?”³⁶⁷ Senator Schumer recognized the same point when he proposed that to protect against unauthorized migrants taking jobs in the United States, *all* United States workers should be issued a new ID card establishing their work bona fides.³⁶⁸ But that proposal went nowhere; Americans, as I’ll discuss later in this paper, don’t want national ID.

VI.

How do current privacy rules stack up against our historical experience? What’s most obvious is that racism has not disappeared from the use and abuse of ID in immigration enforcement. Race appears to play a role in current Customs and Border Protection demands for ID papers, and it has figured into attempts on the state level to beef up identification demands directed at people who appear to be Hispanic.³⁶⁹ During the 2016 Presidential Campaign, then-candidate Donald Trump, when questioned about whether we might need to “note [Muslims’] religion on their ID,” declined to rule the suggestion out.³⁷⁰

More generally, we are all pervasively tagged and tracked today. It’s hard to overestimate the extent to which everyone in the United States is subject to data surveillance. We live in a world in which the National Security Agency collected nearly every American’s phone records in bulk and hacks into Internet trunk lines to vacuum up whatever data it can find.³⁷¹ Our world is one in which your telephone provider can tell where you’ve

366. *See Larson*, 461 U.S. at 360.

367. *See supra* notes 242–43 and accompanying text; *see also supra* notes 227–29 and accompanying text (statement of Rev. Gulick); *supra* note 249 (criticism of the Michigan alien registration law on the same grounds); *supra* notes 119–20 (noting spillover of Geary Act requirements onto persons of Chinese ethnicity who were born in the United States or entered as non-laborers); Weinberg, *supra* note 9, at 201–03.

368. *See supra* notes 18–19 and accompanying text.

369. *See supra* notes 15–17 and accompanying text.

370. *See* Chas Danner, *Does Donald Trump Actually Want to Register American Muslims?*, N.Y. MAG. (Nov. 22, 2015), <http://nymag.com/daily/intelligencer/2015/11/does-trump-actually-want-a-muslim-database.html>.

371. *See* *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015); JAMES GRIMMELMANN, *INTERNET LAW: CASES AND PROBLEMS* 273–75 (6th ed. 2016).

been just by checking the records of your cell tower pings.³⁷² And it's one in which private actors, such as Google and Facebook, know more about us than our family members do.³⁷³ Data about our purchases, our browsing habits, and much more is everywhere; it's "the exhaust of the information age."³⁷⁴

Moreover, we frequently find ourselves called upon to display identification (most often our driver's licenses) to law enforcement or to Transportation Security Administration agents. We must show ID or be prepared to show ID in order to take a new job,³⁷⁵ to enter certain buildings,³⁷⁶ to drive,³⁷⁷ and, in many places, to vote.³⁷⁸ It is challenging (although not impossible) to fly without displaying ID,³⁷⁹ and ID is, as a practical matter, necessary for certain other forms of transport as well.³⁸⁰ If

372. See Barton Gellman & Ashkan Soltani, *NSA Tracking Cellphone Locations Worldwide, Snowden Documents Show*, WASH. POST (Dec. 4, 2013), https://www.washingtonpost.com/world/national-security/nsa-tracking-cellphone-locations-worldwide-snowden-documents-show/2013/12/04/5492873a-5cf2-11e3-bc56-c6ca94801fac_story.html.

373. See Caitlin Dewey, *98 Personal Data Points that Facebook Uses to Target Ads to You*, WASH. POST (Aug. 19, 2016), <https://www.washingtonpost.com/news/the-intersect/wp/2016/08/19/98-personal-data-points-that-facebook-uses-to-target-ads-to-you/>; Caitlin Dewey, *Everything Google Knows About You (and How It Knows It)*, WASH. POST (Nov. 19, 2014), <https://www.washingtonpost.com/news/the-intersect/wp/2014/11/19/everything-google-knows-about-you-and-how-it-knows-it/>.

374. BRUCE SCHNEIER, *DATA AND GOLIATH: THE HIDDEN BATTLES TO COLLECT YOUR DATA AND CONTROL YOUR WORLD* 17 (2015); see also David Cole, *The New America: Little Privacy, Big Terror*, 62 N.Y. REV. BOOKS 13, 18 (Aug. 13, 2015).

375. See 8 U.S.C. § 1324a (2004); DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGR. SERVS. OMB NO. 1615-0047, INSTRUCTIONS FOR EMPLOYMENT ELIGIBILITY VERIFICATION (2013), <http://www.uscis.gov/sites/default/files/files/form/i-9.pdf>.

376. See *REAL ID Act of 2005 Implementation: An Interagency Security Committee Guide*, DEP'T HOMELAND SEC. (Aug. 2015), http://www.dhs.gov/sites/default/files/publications/isc-real-id-guide-august-2015-508_0.pdf.

377. See David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 270 (1999); Ken Armstrong, *How the Supreme Court Made It Legal for Cops to Pull You over for Just About Anything*, MARSHALL PROJECT (Aug. 3, 2015), <https://www.themarshallproject.org/2015/08/03/how-the-supreme-court-made-it-legal-for-cops-to-pull-you-over-for-just-about-anything>.

378. See Wendy Underhill, *Voter Identification Requirements: Voter ID Laws*, NAT'L CONF. ST. LEGISLATURES (Sept. 26, 2016), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

379. See *Gilmore v. Gonzales*, 435 F.3d 1125, 1140 (9th Cir. 2006); Justin Levitt, *Company at 30,000 Feet: Plane Travel and the Voter ID Controversy*, LOY. L. SCH.: L.A. FAC. BLOG (Oct. 22, 2012), http://summaryjudgments.lls.edu/2012/10/company-at-30000-feet-plane-travel-and_2161.html.

380. See *Passenger Identification*, AMTRAK, <http://www.amtrak.com/passenger-identification>

you are travelling on a train or a bus within one hundred miles of the border, you may be woken with a flashlight in your face and directed to produce ID to a different set of law enforcement agents.³⁸¹

Businesses require us to verify our identities before we can open a bank account, rent an apartment, or cash a check.³⁸² Governments require satisfactory proof of identity, and often proof of residency or citizenship (which in turn is predicated on proof of identity), before they provide pension or welfare benefits, allow school enrollment, or register property transfers.³⁸³ Encounters with police officers may result in a summons or desk appearance ticket if one proffers identification, and arrest if not.³⁸⁴

By virtue of the REAL ID Act of 2005,³⁸⁵ the federal government is playing an increasing role in decisions regarding how (and whether) we can get ID.³⁸⁶ Federal law specifies the information and documents an applicant

(last visited Mar. 20, 2017). In some jurisdictions, a person carrying a concealed weapon must be prepared to display government-issued photo ID with his permit. *See, e.g.*, VA. CODE ANN. § 18.2–308.01 (2016).

381. *See* Nina Bernstein, *Border Sweeps in North Reach Miles into U.S.*, N.Y. TIMES (Aug. 29, 2010), http://www.nytimes.com/2010/08/30/nyregion/30border.html?pagewanted=all&_r=0. In theory, cooperation with that directive is voluntary. *See* United States v. Drayton, 536 U.S. 194, 196 (2002); Florida v. Bostick, 501 U.S. 429, 434–35 (1991); Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 27 (2008); *see also* Immigration & Naturalization Serv. v. Delgado, 466 U.S. 210, 212–13 (1984).

382. *See* Alan Gelb & Julia Clark, *Identification for Development: The Biometrics Revolution* 5–35 (Ctr. for Global Dev., Working Paper No. 315, 2013), <http://www.cgdev.org/publication/identification-development-biometrics-revolution-working-paper-315>; Karthick Ramakrishnan & Pratheepan Gulasekaram, *Understanding Immigration Federalism in the United States* 21 (2014), <https://www.americanprogress.org/wp-content/uploads/2014/03/StateImmigration-reportv2.pdf>; *see generally* Els de Graauw, *Municipal ID Cards for Undocumented Immigrants: Local Bureaucratic Membership in a Federal System*, 42 POL. & SOC’Y 309 (2014).

383. *See* Gelb & Clark, *supra* note 469, at 1–6.

384. *See* Benefits, I.D. N.Y.C., <http://www1.nyc.gov/site/idnyc/benefits/benefits.page> (last visited Mar. 20, 2017) (“IDNYC is accepted . . . [b]y NYPD for the purposes of issuing summons or desk appearance tickets instead of arrest.”).

385. Pub. L. No. 109-13, 119 Stat. 302 (2005).

386. The REAL ID Act does not purport to bind the states directly; rather, it provides that identification from noncompliant states cannot be used for “accessing Federal facilities, boarding federally regulated commercial aircraft, . . . and any other purposes that the Secretary shall determine.” Pub. L. No. 109-13, § 201(3), 119 Stat. 311 (2005). The Department of Homeland Security has faced significant resistance in implementing REAL ID. *See, e.g.*, *States Condemn National Standards for Drivers Licenses*, PEW RES. CTR. (Apr. 20, 2007), <http://www.pewresearch.org/daily-number/states-condemn-national-standards-for-drivers-licenses/>; Gardner, *supra* note 20. Through a persistent process of threats and waivers, though, it has been largely successful in bringing states into compliance. *See Current Status of States/Territories*, DEP’T HOMELAND SEC., <http://www.dhs.gov/current-status-states-territories> (last updated Jan. 30, 2017); *Countdown to*

must supply before a state can issue him a driver's license,³⁸⁷ and the Department of Homeland Security (DHS) has promulgated regulations specifying how states must verify those documents.³⁸⁸ State-issued driver's licenses must record specified information fields in standard format using a machine-readable bar code technology specified by the federal government,³⁸⁹ and DHS has undertaken to specify the information states must include in their driver's license databases.³⁹⁰

Moreover, a wide range of our interactions with government and business are structured by use of the Social Security Number (SSN) as a unique common identifier. Nearly every legal resident of the United States has a unique SSN; they are issued today as part of the birth registration process.³⁹¹ From 1943 to 2008, federal agencies were required to use the SSN to identify individuals in any new record system.³⁹² The IRS began using the SSN for federal tax reporting in 1962; a U.S. citizen cannot file a tax return today without including an SSN and cannot claim a dependent without including that person's SSN.³⁹³ The Civil Service Commission, the Department of Health, Education, and Welfare, the Veterans Administration, and the Defense Department all began relying on the SSN in the 1960s to identify federal employees, Medicare enrollees, hospital patients, and military service members respectively.³⁹⁴

In the 1970s, Congress required banks and credit unions to get SSNs from all of their customers; required an SSN as a prerequisite to receiving

REAL ID, NAT'L CONF. ST. LEGISLATURES (Jan. 21, 2016), <http://www.ncsl.org/research/transportation/count-down-to-real-id.aspx>.

387. See TODD TATELMAN, *THE REAL ID ACT OF 2005: LEGAL, REGULATORY, AND IMPLEMENTATION ISSUES* 3 (2008), <https://www.fas.org/sgp/crs/misc/RL34430.pdf>.

388. See *id.* at 22–24; see also *Information on Real ID and IL Licenses*, *supra* note 6.

389. See 6 C.F.R. § 37.33 (2016).

390. See *infra* note 459 and accompanying text.

391. See Carolyn Puckett, *The Story of the Social Security Number*, 6 SOC. SEC. BULL. 55, 64 (2009). A small number of people—fewer than five million people in 2007—are thought to have multiple SSNs, typically acquired in the 1930s when the system was less orderly. See *id.* at 64.

392. See *id.* at 67–68.

393. See *id.*; *Taxpayer Identification Numbers (TIN)*, INTERNAL REVENUE SERV. <http://www.irs.gov/Individuals/International-Taxpayers/Taxpayer-Identification-Numbers-TIN> (last updated Nov. 25, 2016). After introduction of the rule that taxpayers supply SSNs for all dependents age five or older, the number of dependents claimed by U.S. taxpayers dropped by seven million, suggesting that about seven million claims had been made the previous year for children who did not exist or who were not actually the filers' dependents. See Gelb & Clark, *supra* note 382, at 39 n.69.

394. See Puckett, *supra* note 391, at 67.

any federal benefit; and authorized states to require SSNs for benefits, including driver's licenses and automobile registrations.³⁹⁵ Nor was that the end of it.³⁹⁶ Federal law, for example, requires workers in the United States to provide an SSN before accepting any new job.³⁹⁷ Private businesses rely on the SSN heavily.³⁹⁸ Credit bureaus and information resellers are dependent on the SSN; health care plans rely on it as well.³⁹⁹ Other private actors routinely request it.⁴⁰⁰

So it's easy to understand the argument that we are all already subject to a de facto national ID regime.⁴⁰¹ Is that identification regime comparable to those examined earlier in this paper?

To answer that question, it's important to identify what is problematic about identity-papers regimes in the first place. The stories that I've told identify two fundamental characteristics of identity-papers requirements. First, they connect your physical body with the information the government knows about you. Consider the classic image of the Nazi (or other totalitarian) guard stopping citizens on the street and demanding their bona

395. *See id.* at 67–68.

396. *See id.*; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAP-04-1099T SOCIAL SECURITY NUMBERS: USE IS WIDESPREAD AND PROTECTIONS VARY IN PRIVATE AND PUBLIC SECTORS (2004) [hereinafter GAO REPORT].

397. *See supra* note 375 and accompanying text.

398. *See* GAO REPORT, *supra* note 484, at 4–7.

399. *Id.* at 6–7.

400. *See* Adrienne Jeffries, *Identity Crisis: How Social Security Numbers Became Our Insecure National ID*, VERGE (Sept. 26, 2012, 12:00 PM), <http://www.theverge.com/2012/9/26/3384416/social-security-numbers-national-ID-identity-theft-nstic>.

There's been pushback against use of the SSN as a common identifier. Some states have laws prohibiting its use as a student ID. *See* GAO REPORT, *supra* note 484, at 13. Some states have laws limiting the ability of private companies to request it. *See* Jeffries, *supra* note 488. Further, there is no uniform identification system used across federal agencies; not all federal agencies request SSNs, and not all agencies with access use it as a primary identifier. *See* GAO REPORT, *supra* note 484, at 12. It's plain, though, that the SSN is widely used across public and private databases. *See id.* at 4–12.

401. *See* A. Michael Froomkin, *The Uneasy Case for National ID Cards*, in SECURING PRIVACY IN THE INTERNET AGE 295–96 (Anupam Chander et al. eds., 2008) [hereinafter Froomkin, *The Uneasy Case*]; NAT'L RESEARCH COUNCIL, IDS—NOT THAT EASY: QUESTIONS ABOUT NATIONWIDE IDENTITY SYSTEMS 8 n.8 (Stephen T. Kent & Lynette I. Millett eds., 2002) (“Some might argue the SSN is already a de facto national identifier.”). A huge mass of information about individuals is available in databases of one sort or another; while many of those are commercial, they are available for government purchase. *See* Froomkin, *The Uneasy Case*, *supra*, at 309; A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1468 (2000).

fides.⁴⁰² In that movie-poster image, the identity card the guard demands is one that carries information (or links to information in police files) that determines whether he will choose to arrest you—whether you will disappear into some secret-police holding cell.⁴⁰³

The identity card thus fills a gap in the policing authority of the state.⁴⁰⁴ The government may have an extensive collection of information tied to your name in its files, but what connects that (perhaps incriminating) information to your person in a way that allows the government to arrest you, to deport you, and to exercise its authority on your physical body?⁴⁰⁵ The answer comes when you hold in your hand, and display to law enforcement, a biometric identification card containing a database pointer.⁴⁰⁶ That's what identity papers are for. Displaying one's identity papers is about showing a card linking your physical person to a dataset that tells law enforcement officers whether they want to arrest you. Without an identity-papers requirement, a law enforcement officer encountering an anonymous citizen has no access to the database-stored information that would provide basis for arrest. With it, that information is visible to the officer, and it puts the holder's body at risk.⁴⁰⁷

In each of the stories told in this Article, the requirement to carry and display ID was about showing a document that linked the holder to records that told law enforcement officers whether they wanted to enslave, detain, arrest, or deport him. It thus ensured the holder's physical vulnerability.⁴⁰⁸

402. See A. Michael Froomkin, *Identity Cards and Identity Romanticism*, in *LESSONS FROM THE IDENTITY TRAIL: ANONYMITY, PRIVACY AND IDENTITY IN A NETWORKED SOCIETY* 245, 246–47 (Ian Kerr et al. eds., 2009) [hereinafter Froomkin, *Identity Cards*].

403. See *id.*

404. See generally DAVID LYON, *IDENTIFYING CITIZENS: ID CARDS AS SURVEILLANCE* (2009).

405. See Harold Laidlaw, *Shouting Down the Well: Human Observation as a Necessary Condition of Privacy Breach, and Why Warrants Should Attach to Data Access, Not Data Gathering*, 70 N.Y.U. ANN. SURV. AM. L. 323, 354–55 (2015) (“The need for identification is, as a practical matter, indispensable. Given certain identifying characteristics of a criminal suspect, the need to index these characteristics to his or her identity is essential to any kind of effective law enforcement or intelligence action.”).

406. See David Wills, *The United Kingdom Identity Card Scheme*, in *PLAYING THE IDENTITY CARD* (Colin J. Bennet & David Lyon eds., 2008), at 163, 166.

407. Cf. *Dom Rep Resumes Patrols to Deport Migrants*, JAMAICA OBSERVER (Aug. 14, 2015, 6:36 PM), <http://www.jamaicaobserver.com/search/Dom-Rep-resumes-patrols-to-deport-migrants> (reporting that as the Dominican Republic engages in programs of deporting persons it has expatriated, its officials announce that “foreigners must carry documents at all times to prove they are living legally in the Dominican Republic”).

408. See *supra* Parts I–V.

That connection was weakest in the case of antebellum freedom papers, at a time when African Americans' physical vulnerability was greatest, literacy was not universal, and record-keeping was relatively primitive; the papers often served more as a (hoped-for) standalone safe-passage document than as a database call.⁴⁰⁹ Even then, though, it's notable that freedom papers were issued only as an incident of registration; the physical document to be offered up was a reflection of the data entered into government files.⁴¹⁰

Gentry Act registration was explicitly tied both to the underlying records and to the threat of deportation.⁴¹¹ The identity papers there were identified by their designers as a way of connecting individuals to their entries in government files—as a way of “identifying a Chinaman once he got within the borders of the Union,” so that “on arrival . . . [the government could] identify him from other Chinamen who had been here sometime” and process him for removal from the country.⁴¹²

The same was true, at least in part, for more recent requirements that noncitizens carry identity cards.⁴¹³ General DeWitt understood that requiring Japanese immigrants to carry identity cards would enable the U.S. military to “restrict their movements” and “control” them.⁴¹⁴ Ten years later, Representative Preston reasoned that requiring all noncitizens to carry identity cards would make it easier to “round[] them up” when necessary.⁴¹⁵ The carry requirement provided a way of linking the legal identities of the suspect and unreliable with their physical bodies.⁴¹⁶ Even the draft card was about the holder's vulnerability to long-term conscription into a profoundly unfree environment.

But there's a second key characteristic of identity-papers regimes to take into account. Recall that the key complaint of Chinese subject to the Gentry Act related to the humiliation it imposed on them. Identity documents, John Torpey has explained, carry with them “a massive illiberality, a presumption

409. *See supra* Part I.

410. *See id.*

411. *See supra* Part II.

412. *See supra* text accompanying notes 110–12.

413. *See supra* Part IV.

414. *See supra* notes 273–91 and accompanying text.

415. *See supra* text accompanying note 290.

416. Stop-and-identify statutes similarly carried with them the possibility of arrest of the person identified, after using his identification to tie him to information about him in government files.

of their bearers' guilt when called upon to identify themselves."⁴¹⁷ A state's requiring such documents flows from its foundational belief that its residents will lie if asked about their identities; it betrays a fundamental distrust and disconnect between government and people.⁴¹⁸ Identity-papers requirements impose (or assume) a hierarchical power relationship, in which police can demand papers because they are dominant, and citizens must provide them because they are subordinate.⁴¹⁹

Representative Hitt identified that presumption of the bearers' guilt as a key flaw of the Geary Act:

To obtain [the certificate] he must himself prove his whole case; he is assumed to be not entitled to it; the burden of proof is all upon him. The rule of all free countries and all civil laws is reversed. . . . But here are more than 100,000 men, innocent of offense, who must obtain this certificate, this ticket of leave, and carry it around with them in a free country!⁴²⁰

In the early twentieth century, opponents saw proposals for the introduction of new immigration documentation, and for immigrant registration, as posing the same risks.⁴²¹ They would undercut a status quo in which "a man does not have to go about and prove his right to be in this country," and replace it with the degrading presumption that the immigrant had the burden of proving his own legal presence.⁴²² When "people come here from other countries," said Representative Edmonds, "they have the idea that this is a free country and they do not want to feel that the police are tagging after them."⁴²³

The imposition of a subordinate status on those forced to carry ID papers, moreover, was clear. The Geary Act regime for tracking Chinese

417. JOHN TORPEY, *THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP, AND THE STATE* 166 (2000).

418. *See id.*

419. *See id.* at 16. Encounters between citizens and police typically reflect an asymmetrical power relationship. *See* Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN. DIEGO. L. REV. 507, 532–35 (2001); Maclin, *supra* note 381.

420. 23 CONG. REC. H3923 (May 4, 1892) (statement of Rep. Hitt).

421. *See infra* text accompanying notes 422–23.

422. *Dillingham Hearings*, *supra* note 149, at 161 (statement of Rep. Levy).

423. *Id.* at 20 (statement of Rep. Edmonds).

immigrants used the tools and techniques identified with tracking criminals.⁴²⁴ In the controversy over slacker raids, the *New York World* hit the nail on the head: The demand that New Yorkers caught up in sweeps produce their draft cards was “the kind of treatment that the Prussian commanders impose upon the helpless inhabitants of a conquered province.”⁴²⁵

These two fundamental characteristics of identity-papers regimes help explain why, in the United States, hostility to national ID cards has seemed so inextricably part of the American worldview.⁴²⁶ Multiple provisions in the United States Code recite that they shall not “be construed to authorize, directly or indirectly, the issuance or use of national identification cards or the establishment of a national identification card.”⁴²⁷ Rather, when we’ve imposed ID card requirements, we’ve almost always imposed them on people outside our circle of citizenship—on free blacks,⁴²⁸ on Chinese immigrants,⁴²⁹ on aliens,⁴³⁰ on (racialized) vagrants.⁴³¹ We’ve had no worries about humiliating those people, and carry requirements were the best means we had to maximize control over them. After all, as the Supreme Court declared in *Dred Scott*, free blacks were not citizens.⁴³² Chinese immigrants were not citizens (and could not be).⁴³³ Aliens were not citizens.⁴³⁴ They were not Us; they were Them.

It’s helpful, perhaps, to bring to mind Ta-Nehisi Coates’s statement in a

424. See *supra* text accompanying notes 125–30.

425. JENSEN, *supra* note 151, at 209 (quoting a *New York World* editorial).

426. See Froomkin, *Identity Cards*, *supra* note 402, at 248; see also *History of National Identification Cards*, ELEC. PRIVACY INFO. CTR., https://epic.org/privacy/id_cards/#hist (last visited Mar. 21, 2017). This hostility might be attributed primarily to concerns about privacy, but Americans’ feelings about privacy are conflicted at best. See, e.g., James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137 (2009). If we in this country wanted to protect privacy, there are straightforward steps we could take; we could move our legislative regime closer to that of Europe’s more privacy-protective one. We don’t seem interested in that.

427. 8 U.S.C. § 1324a(c) (2004); see also Homeland Security Act of 2002, 107 Pub. L. No. 296, § 1514, 116 Stat. 2135, 2311 (2002) (“Nothing in this Act shall be construed to authorize the development of a national identification system or card.”).

428. See *supra* Part I.

429. See *supra* Part II.

430. See *supra* Part IV.

431. See *supra* Part V.

432. *Dred Scott v. Sandford*, 60 U.S. 393, 422 (1856).

433. See *supra* note 62 and accompanying text.

434. See *supra* note 244 and accompanying text.

recent book that the subjugation of African Americans in this country was first and foremost a matter of endowing officials and private persons with the authority to destroy African American bodies.⁴³⁵ In the context of the visceral experience of racism—one that “dislodges brains, blocks airways, rips muscle, extracts organs, cracks bones, breaks teeth,” one that can be described with a variety of social–science flourishes that nonetheless “all land, with great violence, upon the body”—the key power of law enforcement over African Americans and other minorities was and is the power to lay hands on their physical persons.⁴³⁶ So too here, the power of a government imposing an ID-card carry requirement has been power over the physical body, the power to enslave, detain, arrest, or deport. It is the power to demonstrate who is in charge and who is subjugated.

The draft-card regime is the exceptional case here; it was differently motivated.⁴³⁷ It was imposed on citizens to enforce what were understood to be their obligations as citizens.⁴³⁸ The draft-card requirement was tied to perceived slacking from crucial national obligation and sacrifice, and to a fear of dissent—a fear of the splintering of citizenship and shared obligations.⁴³⁹ We used the carry requirement there to cleave those who were seen as unreliable citizens to ourselves, to demand that they stay in the fold.⁴⁴⁰ We required young men to hold documents in their personal possession as a manifestation of their loyalty.⁴⁴¹ But it is notable, I think, that the draft card was not biometric, and thus was not as well suited to tying the holder’s body to the database.⁴⁴²

In thinking about our current identity-information regime, therefore, it’s worth asking (1) the extent to which it imposes a state of subordination on those who are asked to display their papers on demand (we can call this “hierarchy”), and (2) how effectively it performs the task of linking citizens’ physical bodies with information in government databases (we can call this “linkability”).

In modern society, we are often called upon to display identification—at

435. See TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 9 (2015).

436. *Id.* at 10; see *id.* at 17, 54–55, 76, 94–95.

437. See *supra* text accompanying notes 201–03.

438. See *supra* text accompanying note 203.

439. See *supra* text accompanying note 198.

440. See *supra* text accompanying note 170.

441. See *supra* text accompanying notes 162–66.

442. See *supra* notes 204–11 and accompanying text.

traffic stops, to take planes and (sometimes) trains or intercity busses, to enter certain buildings, to vote, to take a new job.⁴⁴³ That implicates hierarchy, underlined by the fact that the citizen can sometimes be arrested for failure to comply.⁴⁴⁴ On the other hand, some rules for displaying ID implicate hierarchy more than others.⁴⁴⁵ A demand from a police officer for one's papers articulates the power relationship between citizen and police in a way that the legal requirement of showing documents to one's employer at the start of a new job does not, because no government actor is present for the latter.⁴⁴⁶ Also, today, we are not legally compelled to carry identification papers at *all* times while outside the house. Rather, we must do so in order to engage in particular activities.⁴⁴⁷ Does this fundamentally differentiate our current legal regime from those discussed in this Article?

Not entirely. As the number and importance of those activities that require identity papers increases, so does the potential for subordination.⁴⁴⁸ The requirement of displaying identification papers to engage in an activity means that whoever has the legal authority to examine those papers can challenge your right to do so; it gives that person the opportunity for petty harassment and more.⁴⁴⁹

What about linkability? The situation there is more complicated. The linkability inquiry asks about the extent to which a person's displaying his identity papers reveals information about him in government databases.⁴⁵⁰

443. See *supra* notes 375–81 and accompanying text.

444. In this connection, it's worth noting the aggression–subordination dynamic present in many police stops. See generally Frank Rudy Cooper, “Who’s the Man?”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671 (2009).

445. One might argue that identity-papers requirements are less subordinating when they are applied universally, because such rules do not reinforce a minority group’s classification as Other.

446. See *supra* note 419.

447. See TORPEY, *supra* note 417, at 166.

448. See *id.* at 166–67.

449. See, e.g., Lise Ragbir, *I Was Locked up Because I Went to a Texas National Park Without My Papers*, GUARDIAN (Dec. 23, 2015), <http://www.theguardian.com/commentisfree/2015/dec/23/locked-up-went-texas-national-park-without-papers>. Cf. *supra* note 52 and accompanying text (discussing antebellum harassment of free blacks in Midwestern states); *supra* notes 240–41 and accompanying text (reporting Rep. Dickstein’s characterization of Geary Act enforcement).

450. For more on this general issue, see NAT’L RESEARCH COUNCIL, *supra* note 401, at 5–15. A key consideration here is the extent to which the databases themselves are linked. Imagine a single massive national dataset in which every adult has an entry, and every entry consists of a thick dossier of information. Few of us would not see dangers for privacy there. The outcome is the same if information about individuals is stored in separate but easily linked datasets relying on unique common identifiers. Because it’s easy to search across the databases, the system is functionally

I've described the role the SSN plays in providing a unique common identifier for United States data structures.⁴⁵¹ While the SSN ties many databases together, it doesn't currently do a good job of supporting linkability as I've described it, because it doesn't tie individuals physically to their database entries.⁴⁵²

Americans aren't called upon to carry their Social Security cards, which bear no photos and are not biometric documents, or to present them.⁴⁵³ A driver's license doesn't display the holder's SSN; it's illegal for a driver's license or any other state-issued identification document to do so.⁴⁵⁴ When you present your driver's license to a police officer, he can call up information about you in your state's driver-information and associated databases (most importantly, whether you have outstanding warrants or other matters of criminal concern), and often federally-operated criminal databases as well.⁴⁵⁵ But you are not offering up your SSN and all of the information keyed to it in a myriad of files. By keeping the SSN off almost all our identification documents, we have limited its power.⁴⁵⁶ And driver's license databases are themselves fragmented and maintained by the various states.⁴⁵⁷

equivalent to a single huge dataset. The situation is different, though, if information about individuals is stored in different datasets that are difficult to aggregate. See Weinberg, *supra* note 42.

451. See *supra* notes 391–400 and accompanying text.

452. See SOC. SEC. ADMIN., REPORT TO CONGRESS ON OPTIONS FOR ENHANCING THE SOCIAL SECURITY CARD (1997), ch.5, <https://www.ssa.gov/history/reports/schlabach5.html> (last visited Apr. 25, 2017).

453. A worker must provide a SSN to take a new job. See *supra* note 397 and accompanying text. However, she need not present her physical Social Security card if she has other proof of citizenship or authorization to work. See 8 U.S.C. § 1324a (2004).

454. See 42 U.S.C. 405(c)(2)(C)(vi)(II) (2015). Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-408, § 7214, 118 Stat. 3638 (2004) (adding the SSN language to 42 U.S.C. § 405).

455. See Brad Flora, *What Do the Cops Have on Me?*, SLATE (Dec. 4, 2007), http://www.slate.com/articles/news_and_politics/explainer/2007/12/what_do_the_cops_have_on_me.html.

456. See *id.*

457. One more limitation, worth remembering, on use of the driver's license as a key to individuals' data: A large number of Americans don't have a driver's license or, for that matter, any state-issued photo ID, and there is no legal requirement that they get one. See *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*, NYU BRENNAN CTR. (Nov. 2006), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf (eleven percent of U.S. citizens have neither driver's licenses nor other government-issued photo IDs); NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 30 (Aug. 2001), <https://www.verified>

Yet there's reason to think that this may soon no longer be the case. DHS regulations implementing the REAL ID Act⁴⁵⁸ require states to maintain drivers' SSNs in their motor vehicle databases.⁴⁵⁹ The same statute requires states to "[p]rovide electronic access to all other States to information contained in the motor vehicle database of the State."⁴⁶⁰ A decade after REAL ID's enactment, that electronic access mostly hasn't happened yet. DHS has funded a pilot program operated by the American Association of Motor Vehicle Administrators (AAMVA),⁴⁶¹ directed to verifying whether a driver's license applicant in one state also possesses a valid license in another jurisdiction.⁴⁶² That inquiry without more falls far short of the sort of data sharing that would be worrisome.⁴⁶³

The potential for mischief, though, lies in the software architecture AAMVA has put in place for that program. That software—built on an existing database for commercial license holders—contemplates pulling together all participating states' driver's license information into a single distributed database, searchable in a single step, that links driver's license information to SSNs.⁴⁶⁴ Participating states must upload into a central index file information including each license holder's name, date of birth, driver's license number, and SSN (to be truncated to the last five digits of the SSN

voting.org/wp-content/uploads/2012/10/NCFER_2001.pdf (eight percent of registered voters lack a driver's license); Matt A. Barreto et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS: POL. SCI. & POL. 111, 113 (2009) (only seventy-eight percent of voting-age Indiana residents had a current driver's license, and only eighty-four had either a current driver's license or a state-issued ID).

458. See *supra* notes 385–90 and accompanying text.

459. See 6 C.F.R. § 37.33 (2016).

460. Pub. L. No. 109-13, § 202(c)(3)(d)(12), 119 Stat. 231, 315 (2005).

461. AAMVA is a nonprofit association whose members are U.S. states and possessions, and Canadian provinces and territories. See *Bylaws*, AM. ASS'N MOTOR VEHICLE ADMINISTRATORS (Dec. 1, 2015) <http://www.aamva.org/AAMVABylaws/>.

462. See *State to State (S2S) Verification Services*, AM. ASS'N MOTOR VEHICLE ADMINISTRATORS, <http://www.aamva.org/State-to-State/> (last visited Mar. 20, 2017).

463. See *id.*; DEP'T HOMELAND SEC., SECURE IDENTIFICATION STATE PROGRESS 25 (2012), <http://www.aamva.org/WorkArea/DownloadAsset.aspx?id=3018>; U.S. GOV'T ACCOUNTABILITY OFF., DRIVER'S LICENSE SECURITY: FEDERAL LEADERSHIP NEEDED TO ADDRESS REMAINING VULNERABILITIES (2012), <http://www.gao.gov/assets/650/648689.pdf>.

464. See *generally* AM. ASS'N OF MOTOR VEHICLE ADMINISTRATORS, STATE POINTER EXCHANGE SERVICES MASTER SPECIFICATION: AIME VERSION (2015), https://papersplease.org/_dl/SPEXS%20Master%20Specification%20%28AMIE%29%20r6.0.8.pdf. This specification is highlighted in *How the REAL-ID Act Is Creating a National ID Database*, PAPERS, PLEASE! (Feb. 11, 2016), <https://papersplease.org/wp/2016/02/11/how-the-real-id-act-is-creating-a-national-id-data-base/> (highlighting these specifications).

once all jurisdictions upgrade to version 5.1 of the software).⁴⁶⁵ Once information is loaded into AAMVA's central file, it will be immediately searchable by any organization with access to that file (including the federal government), and additional information about individuals in state databases will be only a database call away.⁴⁶⁶ That's effectively a single national database.⁴⁶⁷ The only saving grace here is AAMVA's plan in the future to truncate SSNs to their last five digits.⁴⁶⁸

DHS has not at this time issued regulations making a state's participation in AAMVA's central database a condition of REAL ID compliance, but that would be a legally straightforward step. After all, the statute's text makes it a condition of REAL ID compliance that states maintain specified information in their driver's license databases and provide other states with electronic access to that information.⁴⁶⁹ For the foreseeable future, the only affordable way for a state to provide such access will be AAMVA's system.⁴⁷⁰

This suggests that Americans at large may be drifting towards an identity-papers regime characterized by no less hierarchy than in the past (perhaps more, by virtue of our being called upon to display documents more often) and by significantly greater linkability. To that extent, the regime we're facing begins to look more like the ones we've imposed in the past on minorities and noncitizens. Why this drift? Some might draw a link to the increasing prominence of authoritarian views in American society,⁴⁷¹ or to fears of terrorism and foreigners.⁴⁷² Neither of those things, though, is

465. See AM. ASS'N OF MOTOR VEHICLE ADMINISTRATORS, *supra* note 464, at 1, 5–8, 28.

466. See sources cited *supra* note 464.

467. See *supra* note 450.

468. See *supra* note 464 and accompanying text.

469. See *supra* notes 459–60 and accompanying text.

470. See ELEC. PRIVACY INFO. CTR., YOUR PAPERS, PLEASE: FROM THE STATE DRIVERS LICENSE TO A NATIONAL IDENTIFICATION SYSTEM: AN ASSESSMENT OF THE PROPOSAL OF THE AMERICAN ASSOCIATION OF MOTOR VEHICLE ADMINISTRATORS (AAMVA) TO TRANSFORM THE STATE DRIVERS LICENSE INTO A DE FACTO NATIONAL ID CARD (2002), <https://epic.org/reports/yourpapersplease.pdf>.

471. See generally MARC J. HETHERINGTON & JONATHAN D. WEILER, *AUTHORITARIANISM AND POLARIZATION IN AMERICAN POLITICS* (2009).

472. See Jonathan Martin & Dalia Sussman, *Fear of Terrorism Lifts Donald Trump in New York Times/CBS Poll*, N.Y. TIMES (Dec. 10, 2015) (reporting that “Americans are more fearful about the likelihood of another terrorist attack than at any other time since the weeks after September 11, 2001”).

new; we've been fearful and authoritarian before.⁴⁷³ I'll tentatively suggest, rather, two other explanations.

The first is that modern technology is allowing the drift towards an identification regime to happen partly under the radar. If REAL ID enables a nationwide database linking the information we display with our driver's licenses to our larger dossiers, it will not have taken place with the sort of public visibility that accompanied, say, the Geary Act. It's not happening before our eyes. The second, perhaps, is that in the Internet age, some of us may feel that resistance is futile:⁴⁷⁴ the battle is lost, we have no privacy, and we should get over it.⁴⁷⁵ But the conflicts over REAL ID aren't yet resolved,⁴⁷⁶ and so the rest of this story remains to be told.

CONCLUSION

On several occasions in our history, U.S. law has imposed a requirement on some group that its members register and carry identification. These rules fill a gap in the policing authority of the state by connecting the individual's physical body with the information the government knows about him. They entail humiliation and some degree of subordination. Accordingly, when we've imposed such requirements, we've almost always imposed them on people outside our circle of citizenship—on free blacks, on Chinese immigrants, on aliens, on (racialized) vagrants. Current developments in United States identity management, though, seem to be moving us closer to a universal identity-papers regime that has much in common with our older ones.

473. See, e.g., JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956); Richard Hofstadter, *The Paranoid Style in American Politics*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 3 (1964); see also *supra* Parts I–IV.

474. See Mary Madden & Lee Rainie, *Americans' Attitudes About Privacy, Security and Surveillance*, PEW RES. CTR. (May 20, 2015), <http://www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/> (reporting that fifty percent of Americans believe that they have “no” or “not much” control over collection and use of their personal data).

475. Cf. Polly Sprenger, *Sun on Privacy: 'Get over It,'* WIRED (Jan. 26, 1999), <http://archive.wired.com/politics/law/news/1999/01/17538> (quoting Sun Microsystems CEO Scott McNealy as saying, “You have zero privacy anyway Get over it.”).

476. See *supra* note 386.