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Policing the Polity

ABSTRACT. The era of Chinese Exclusion left a legacy of race-based deportation. Yet it also had an impact that reached well beyond removal. In a seminal decision, the U.S. Supreme Court upheld a law that required people of "Chinese descent" living in the United States to display a certificate of residence on demand or risk arrest, detention, and possible deportation. Immigration control provided the stated rationale for singling out a particular group of U.S. residents and subjecting them to race-based domestic policing. By treating these policing practices as part and parcel of the process of deportation, the Court obscured the full reach of the law and its impact on U.S. communities. Through case studies of immigration policing and "anti-illegal immigrant" nuisance ordinances, this Essay argues that a "deportation-centric" framework continues to provide too limited a lens to recognize and redress unjustified surveillance within the United States. It argues for adopting what I call a "polity-centric" framework, which treats immigration status as necessarily fluid rather than fixed, and which considers the impact of front-end enforcement practices — including race-based demands to justify one's presence — in light of the aim of building an integrated political community. This Essay closes by considering how a polity-centric framework could reorient how we understand the reach of immigration enforcement as it relates to antidiscrimination and Fourth Amendment doctrine.

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ESSAY CONTENTS

INTRODUCTION

The era of Chinese Exclusion is foundational to the field of immigration law. In enduring decisions, the U.S. Supreme Court upheld laws that provided for race-based exclusion and deportation. Today, immigration scholars often discuss the seminal 1893 decision, *Fong Yue Ting v. United States*, solely as a decision about deportation. Yet it had an impact well beyond the removal process. The Court upheld a law that required those of Chinese descent living in the United States to obtain a "certificate of residence" or else establish through "at least one credible white witness" their eligibility to remain in the United States.[1] As a dissenting Justice put it, the law transformed targeted U.S. residents into "ticket-of-leave men"—a reference to former prisoners who risked reimprisonment at any time if they failed to carry and display their tickets-of-leave—who "cannot move about in safety without carrying with [them] this certificate."[2] The policing practices at issue in *Fong Yue Ting* reflected a racial presumption that those of apparent Chinese descent were indelibly foreign; race rendered them deportable and also obligated them to show their papers on demand.

Fong Yue Ting left two legacies that continue to shape immigration doctrine: the legacy of the "plenary power doctrine"—the doctrine of relaxed judicial review of federal immigration law[3]—and a legacy of race-based domestic policing in stated service of immigration control. Thus far, the policing practices at issue in *Fong Yue Ting* have received relatively little attention. That may be because the decision predates both modern deportation procedures and modern policing,[4]

1. Fong Yue Ting v. United States, 149 U.S. 698, 699 n.1 (1893) (citing Geary Act, ch. 60, § 6, 27 Stat 25, 26 (1892) (repealed 1943)).

2. *Id.* at 743 (Brewer, J., dissenting).

3. The plenary power doctrine has been subject to a wide range of criticism. *See, e.g.*, Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984) ("Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system."); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 5-12 (1998) (observing that "[i]mmigration law scholars love to hate the plenary power doctrine" and arguing that the doctrine was designed to maintain white supremacy); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 607-12 (1990) (explaining how the plenary power doctrine has established conflicting constitutional norms in immigration law).

4. For a discussion of policing as primarily a subfederal phenomenon, see Trevor George Gardner, *Immigrant Sanctuary as the "Old Normal": A Brief History of Police Federalism*, 119 COLUM. L. REV. 1, 29-30 (2019), which describes policing until 1918. For a discussion of the shortcomings of modern deportation procedures, see, for example, Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181 (2017).

or because the government ultimately chose not to pursue mass arrests or deportations.[5] Scholars may also view the policing practices and deportation practices as two faces of the same coin. The same dynamics—racism, labor exploitation, colonialism, and an indifference to the suffering of those considered outsiders—produced both deportation and race-based policing.[6]

I do not seek to discount these dynamics; *Fong Yue Ting's* holding with regard to deportation does much to explain the Court's acceptance of race-based domestic policing. Yet my aim in this Essay is to show that its domestic policing legacy deserves recognition in its own right, and not only as a path to deportation. By conceptualizing the law as primarily about deportation, the Court adopted an analytic lens too narrow to recognize its impact on those who remained present. This "deportation-centric" account continues to shape how courts recognize substantive rights within the United States. "Immigration" law as a field governs admissions and removal decisions, while "alienage" law governs the treatment of noncitizens within the United States. But courts lack a vocabulary for recognizing a liminal space where people are subject to legal regulation because they are presumed not to belong.

This Essay shows how the deportation-centric approach developed and how it continues to shape contemporary understandings of immigration enforcement. It argues for a more expansive approach to understanding the reach and impact of immigration law, which I call a "polity-centric" approach. One problem with the deportation-centric framework is that it conceptually narrows the full reach of enforcement practices. If the aim of immigration control is to build an integrated political community inside the United States, then we need, at

5. Gabriel J. Chin, Chae Chan Ping *and* Fong Yue Ting*: The Origins of Plenary Power*, *in* IMMIGRATION STORIES 7, 17, 21 (David A. Martin & Peter H. Schuck eds., 2005) (explaining how the vast majority of targeted residents did not obtain the required certificates). The named plaintiffs were arrested and subsequently deported for not complying with the certificate requirement, but afterward, the "government chose not to take the opportunity to deport the Chinese community en masse." *Id.* at 20.

6. A number of accounts emphasize how the legal processes of exclusion and deportation are fundamentally violent, discriminatory, and reflect unjustified power disparities. Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1053-54 (1994) (criticizing the view that "the exclusion of aliens from access to various rights and benefits in this society properly preserves the benefits of membership for those deemed to belong within the moral boundaries of the national community" and arguing that it results in alienage discrimination); E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1517-21 (2019) (arguing for expanding the admission of economic migrants); Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2322 (2019) (criticizing the U.S. immigration system as "pervasively organized around principles of family separation"); Deborah M. Weissman, Angelina Godoy & Havan M. Clark, *The Final Act: Deportation by ICE Air*, 49 HOFSTRA L. REV. 437, 477-81 (2021) (discussing physical abuse in the context of removal).

minimum, a better descriptive account of the legal processes employed in stated service of building the polity. Those legal processes include front-end stops and surveillance of U.S. residents, regardless of any subsequent connection to deportation.

Second, a deportation-centric account provides too limited a lens to recognize, much less redress, how enforcement practices themselves conflict with core constitutional protections inside the United States.[7] Scholars have examined practices including immigration detention,[8] jailhouse immigration screening,[9]

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7. A large literature on "crimmigration" examines how the merger of criminal law and immigration law has expanded the enforcement powers of the government while simultaneously weakening procedural protections designed to guard against government overreach. *See, e.g.*, Marisol Orihuela, *Crim-Imm Lawyering*, 34 GEO. IMMIGR. L.J. 613, 617-19 (2020) (discussing the need for "crim-imm" advocacy in light of intertwined civil/criminal consequences); Ingrid V. Eagly, Gideon*'s Migration*, 122 YALE L.J. 2282, 2300-13 (2013) (discussing the need for an immigration-defender system); Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 140-47 (2009) (describing how lower procedural standards affect migration-related criminal prosecutions); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 475-99, 511-18 (2007) (discussing asymmetric incorporation of criminal-enforcement norms and weakened procedural protections in immigration law); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1689-1706 (2009) (examining how deportation lacks proportionality); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1906-07 (2000) (conceptualizing how criminal-immigration enforcement functions as a site of postentry social control); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 161-62 (2012) (discussing the instrumental use of criminal or civil tools by enforcement actors so as to maximize enforcement power); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376-79 (2006) (coining the term "crimmigration" and discussing its implications). A related literature criticizes the weak procedural norms in immigration adjudication, where the stakes are arguably akin to criminal law because they include the potential for both detention and deportation. *See, e.g.*, Shalini Ray, *Abdication Through Enforcement*, 96 IND. L.J. 1325, 1337-41 (2021) (arguing that the President may be required to set meaningful removal priorities).

8. *See, e.g.*, Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42 (2010) (examining the merger of immigration control and criminal-law enforcement in the detention context); Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785 (2018) (providing an empirical study of asylum outcomes for detained immigrant families); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014) (arguing that immigration detention constitutes punishment); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449 (2015) (arguing against immigration detention).

9. *See, e.g.*, Eisha Jain, *Jailhouse Immigration Screening*, 70 DUKE L.J. 1703 (2021) (focusing on problems with the government's Secure Communities program); Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member,"* 2007 U. CHI. LEGAL F. 317 (criticizing the methods by which immigration officials identify gang members

and criminal-immigration prosecution[10] to show how the intersection of criminal and immigration law enforcement can magnify the carceral impact of enforcement choices while minimizing procedural protections. This Essay seeks to add to these conversations by showing how front-end enforcement practices — such as racialized demands that people justify their presence in a particular place — erode constitutional protections and cut against immigration goals of integrating people into a larger political community.

Recognizing front-end immigration-enforcement practices today is particularly important, given the close connection between immigration enforcement and domestic policing. In the domestic-policing context, courts and scholars have recognized the subordinating impact of race-based surveillance. In *Terry v. Ohio*, even as the Supreme Court upheld the constitutionality of police stops justified by a standard less than probable cause, it acknowledged the "difficult and troublesome issues" inherent in identifying "suspicious persons" and cited to the "wholesale harassment" that racial minorities report experiencing during police stops.[11] A body of legal scholarship conceptualizes how domestic policing practices erect "racialized borders" within the United States.[12] When policing practices target communities on the basis of race, they alienate communities at large

as vague and overbroad); Eric S. Fish, *The Paradox of Criminal History*, 42 CARDOZO L. REV. 1373, 1379 (2021) (discussing how the impact of relying on heuristics such as past criminal charges and sentences varies markedly based on arbitrary differences in defendants' records).

10. *See, e.g.*, Peter L. Markowitz & Lindsay Nash, *Pardoning Immigrants*, 93 N.Y.U. L. REV. 58 (2018) (examining the pardon power as a tool that should be used in immigration prosecution); Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197 (2016) (using immigration as a case study for how criminal prosecutors respond to collateral consequences during plea bargaining); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1288 (2010) (detailing a collaborative relationship between immigration and criminal prosecutors that undermines procedural protections and the civil/criminal divide); Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 556 (2013) (conceptualizing state courts as de facto immigration courts given how state criminal convictions may trigger mandatory immigration consequences); Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1796-1802 (2013) (discussing how noncitizen defendants in misdemeanor cases approach plea bargaining in light of possible deportation).

11. 392 U.S. 1, 9, 10, 14 (1968); *see also* Utah v. Strieff, 579 U.S. 232, 251-54 (2016) (Sotomayor, J., dissenting) (identifying how policing practices can treat "members of our communities as second-class citizens").

12. *See, e.g.*, Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 947, 957 (2002); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 46, 69 (2009) [hereinafter Capers, *Policing*] (describing how law-enforcement practices take into account "racial incongruity in assessing whether reasonable suspicion exists to justify a *Terry* stop" and how, consequently, "law-abiding minorities entering predominantly white neighborhoods are frequently stopped and questioned as to the reason for their presence in the

from the body politic.[13] As Professor Monica C. Bell writes, racialized policing practices create the perception among poor people of color that they are "essentially stateless—unprotected by the law and its enforcers and marginal to the project of making American society."[14]

Race-based policing often operates the exact same way in the immigration context—yet in the immigration context, the justification is that the targets are "illegal" as well as criminal. During the period of Chinese Exclusion, the Court adopted a legal framework that accepted race-based policing as a means of protecting the polity from a foreign threat. And while that approach has shifted over time, it has never been abandoned altogether. Courts still characterize front-end policing practices as nothing more than a pipeline to deportation. This doctrinal approach essentializes deportation as the primary work that immigration enforcement does, at the expense of recognizing how front-end surveillance can operate in tension with the immigration-law goal of promoting integration into a larger political community.

This Essay aims to create a discursive space to recognize the front-end impact of immigration enforcement choices. I examine two contemporary case studies of a deportation-centric approach: immigration policing and "anti-illegal immigrant" nuisance ordinances. "Anti-illegal immigrant" nuisance ordinances are an example of shifting borders; localities employ the logic of national immigration control to justify surveillance and racial steering inside the United States. These

neighborhood"); Aya Gruber, *Policing and "Bluelining,"* 58 HOUS. L. REV. 867, 873 (2021) (describing police "bluelining" as "maintaining raced and classed spatial and social segregation through the threat and application of violence"); L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 280 (2012) (discussing how "entire neighborhoods of racial minorities are labeled as high crime," which, in turn, "allow[s] officers to view nonwhite neighborhoods as hotbeds of criminal activity"); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 19 (2011) ("Racial profiling is the source of at least five citizenship harms: scripting harms, race-making harms, stigma-legitimizing harms, virtual segregation harms, and feedback loop harms. Each alone is problematic. Collectively, they are citizenship diminishing, suggesting a racial hierarchy inconsistent with our goal of equal citizenship."); *see also* Jessica M. Eaglin, *To "Defund" the Police*, 73 STAN. L. REV. ONLINE 120, 136 (2021) (arguing that the place to start an analysis of the defund movement is with the "structural marginalization of black people").

13. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2057, 2085-86 (2017) (describing this phenomenon as "legal estrangement").

14. *Id.* at 2057; *see also* I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 655 (2018) (arguing that the Court's policing jurisprudence conveys that a "good citizen" ought to be willing to surrender constitutional rights and submit to police searches and questioning); Capers, *Policing*, *supra* note 12, at 46 (arguing that "[w]hen racial incongruity functions as a factor" for police stops, it "sends [an] expressive message from a representative of the state about who belongs and who does not" (footnote omitted)).

ordinances operate with the stated aim of blocking those who lack lawful immigration status from obtaining rental housing within certain localities. When courts view these laws under the theory that they regulate immigration by encouraging "self-deportation," they accept without justification the underlying assumption that Latinos who move into predominately white localities are "illegal aliens." This analysis, in turn, is too narrow to recognize the full reach and impact of these laws, including their potential conflict with antidiscrimination law.

My analysis focuses on courts because of their role in safeguarding rights. However, it also has implications outside the doctrinal context. I argue for a broader recognition of how enforcement practices relate to building a political community. The kernels of a "polity-centric" approach appear in a 1941 case, *Hines v. Davidowitz*, which involved state surveillance directed towards Italian and German immigrants.[15] There, the Supreme Court recognized how immigrants could become future citizens, and how singling out a particular group for surveillance could undermine important interests in free movement and integration into the polity.[16]

This Essay closes by considering how a "polity-centric" approach could reorient constitutional doctrine with regard to front-end enforcement practices. Local "anti-illegal immigrant" nuisance laws provide a case study for a more expansive understanding of the reach and impact of immigration enforcement practices. Any law that prevents people from living with whom they choose raises significant equal-protection concerns, including those that affect millions of mixed-immigration-status households.[17] When courts frame these laws principally in relation to deportation, they obscure how they are part and parcel of a tradition of promoting residential segregation, including through laws that have racialized effects on intimate association.

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15. 312 U.S. 52 (1941).

16. *Id.* at 72.

17. *See* Paul Taylor, Mark Hugo Lopez, Jeffrey S. Passel & Seth Motel, *Unauthorized Immigrants: Length of Residency, Patterns of Parenthood*, PEW RSCH. CTR. 6 (Dec. 1, 2011), https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2011/12/Unauthorized-Characteristics.pdf [https://perma.cc/8CG3-WRER] ("Overall, at least 9 million people are in 'mixed-status' families that include at least one unauthorized adult and at least one U.S.-born child."); Asad L. Asad, *Latinos' Deportation Fears by Citizenship and Legal Status, 2007 to 2018*, 117 PROC. NAT'L ACAD. SCIS. U.S. 8836, 8836 (Apr. 21, 2020) (summarizing statistics that show that "26.6 million Latino US citizen adults live with 4.8 million noncitizens; 17.3 million Latino US citizen children live with 7.7 million noncitizens," while further noting that "[e]ven in households where all Latino members are U.S. citizens, worries of being misrecognized as deportable . . . may contribute to deportation fears").

This Essay also adds to a body of criminal-law scholarship that argues that police stops should be subject to greater scrutiny.[18] Immigration policing embarrasses the notion that police are in the business of targeting suspicious conduct. Immigration is a legal status; it is not about anyone's conduct at a particular time. Courts should also recognize how civil-enforcement responsibilities expand the coercive potential for police-resident interactions.[19] This is particularly true when domestic police have the systemic power to initiate actions such as eviction without ever making a criminal arrest.

The balance of this Essay proceeds as follows. Part I argues that the era of "Chinese Exclusion" established a particular way of thinking about policing practices in the context of immigration enforcement. Namely, when it came to those racial minorities perceived as foreign, courts focused on how enforcement practices could lead to deportation, without considering how surveillance and arrest itself could undercut individual liberty interests. Parts II and III show the continuing impact of a deportation-centric approach over time through case studies of contemporary immigration-enforcement practices, with a focus on policing and "anti-illegal immigrant" nuisance laws, respectively. Part IV makes the normative case for a polity-centric approach and considers its doctrinal implications for antidiscrimination and Fourth Amendment doctrine.

18. *See, e.g.*, Shawn Ossei-Owusu, *Police Quotas*, 96 N.Y.U. L. REV. 529, 584-87 (2021) (explaining how police quotas can lead to overbroad stops); Jeffrey Fagan, Terry*'s Original Sin*, 2016 U. CHI. LEGAL F. 43, 86 ("[O]ne of *Terry*'s sins was placing a substantial burden of review on federal trial and appellate courts in a succession of suppression motions and constitutional challenges."); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 273 (arguing that the Court's Fourth Amendment "understandings strongly favor law enforcement and, more troublingly, disregard the distinctive grievances and concerns of minority motorists stopped by the police"); Alexandra Natapoff, *A Stop Is Just a Stop:* Terry*'s Formalism*, 15 OHIO ST. J. CRIM. L. 113, 116-19 (2017) (arguing that *Terry*'s formalistic approach to police-resident interactions "flooded the system, eroding institutional protections against subsequent arrests, charges and ultimately convictions").

19. Coercive policing practices, in turn, can contribute to residential segregation. *See generally* Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650 (2020) (identifying how policing perpetuates residential segregation and offering a framework for antisegregation policing); Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 179-80 (2019) (describing how "crime-free ordinances" and policing contribute to segregation); Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation: From Ferguson to New York*, 106 GEO. L.J. ONLINE 33, 112-34 (2017) (arguing that policing has resulted in legal and financial controls that amount to "new segregation").

I. "CHINESE EXCLUSION" AND DELINEATING BELONGING

In 1882, Congress passed the Chinese Exclusion Act, which barred Chinese people from immigrating to the United States.[20] This law is widely known for heralding the era of "Chinese Exclusion." Yet federal law during this time did more than exclude; it also treated people of apparent Chinese ancestry living in the United States as presumptively outside the political community. Lawmakers viewed immigration law as a means of constructing the polity along racial lines. As historian Erika Lee has discussed, these laws "reflected and maintained an exclusionary and racialized national identity."[21] As a substantive matter, Chinese Exclusion laws went hand in hand with a host of other laws that were designed to encourage certain white immigrants to become members while barring Chinese immigrants from doing the same.[22] One example of this dual approach is legislation that permitted white immigrants to file for "declarant" status and thus declare their intention to become U.S. citizens. Doing so, in turn, permitted noncitizens to receive a host of legal privileges as future citizens. While white immigrants were able to file for declarant status, Chinese immigrants were ineligible both to become declarants and to naturalize.[23]

Lawmakers defending exclusion argued—and the Supreme Court agreed—that the presence of Chinese people would alter the American political community in irreparably harmful ways. Political theorist Michael Walzer, whose work has been foundational to the field of immigration law, conceptualizes the political community as a source of rights and as a means of developing a "collective consciousness."[24] The American polity is a self-perpetuating membership community; members select new members and thus shape membership in the future. Laws that provided for deportation were passed with the rationale of insulating the political community against a perceived foreign threat. In the case of Chinese Exclusion, part of the rationale for excluding and deporting Chinese

20. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

21. ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943, at 17 (2003).

22. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 119-20 (2006) (discussing how white immigrants were able to avail themselves of a "declarant" status and receive certain benefits that were not extended to other groups); Gabriel J. Chin, *A Nation of White Immigrants: State and Federal Racial Preferences for White Noncitizens*, 100 B.U. L. REV. 1271, 1274-75 (2020) (discussing racial preferences for white immigrants as entrenching racial discrimination).

23. *See* MOTOMURA, *supra* note 22, at 127-28; Chin, *supra* note 22, at 1275.

24. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 28, 50 (1983).

residents was that their presence was incompatible with the creation of a "collective" American consciousness.

In guarding against this perceived foreign threat, the Court accepted race-based surveillance inside the United States. In *Fong Yue Ting*, the Supreme Court treated racial surveillance, stops, and immigration-status checks as nothing more than steps on the path toward deportation.[25] Under this logic, if a resident was stopped hundreds of times and required to show a certificate of residence before being permitted to travel, that would function as a legitimate form of immigration control—regardless of whether the resident was ever subject to deportation or a deportation-related arrest.

This approach paved the way for people who fit a racial stereotype to be treated as foreign, regardless of their actual immigration status. The Court's doctrinal approach thus did not merely enforce preexisting membership categories. It also determined how rigid or fluid those categories would be. White immigrants were permitted to integrate over time; their immigration status was treated as fluid. But for racially undesirable people perceived as foreign, integration was not the goal, regardless of their length of presence or actual legal status. This Part develops these claims by showing how the era of Chinese Exclusion led to racial surveillance inside the United States.

A. Chinese Exclusion as Race-Based Policing

With the passage of the Chinese Exclusion Act of 1882, the United States prohibited all Chinese immigration to the United States.[26] The Chinese Exclusion Act prohibited entry at the border, but it also had implications for people living in the United States.[27] Chae Chan Ping had lived in San Francisco for twelve years before leaving to visit China in 1888.[28] One week before he returned to San Francisco, Congress barred all Chinese people from entry. In a unanimous opinion, the Supreme Court upheld his exclusion.[29] In taking this approach, the Court placed no weight on the twelve years Chae Chan Ping had spent inside the United States—he was treated just like a Chinese immigrant seeking admission for the first time. The Court's reasoning explicitly linked exclusion to racial constructs and a perceived refusal to assimilate, stating that if "the government of the United States, through its legislative department, considers the presence of

25. *See* Fong Yue Ting v. United States, 149 U.S. 698, 728-30 (1893).

26. Chinese Exclusion Act, ch. 126, 22 Stat. 58, 59 (1882) (repealed 1943).

27. *See* Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889).

28. *Id.* at 582.

29. *Id.* at 609-10 (analogizing the license to reenter to a contractual privilege that can be revoked by the government at any time).

foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed."[30]

The Chinese Exclusion Act was passed in response to widespread sentiment that Chinese residents changed the polity for the worse. Chinese workers constituted the vast majority of those who labored to construct the Central Pacific Railroad, but once the railroad was complete in 1869, they were seen as a growing threat.[31] Chinese Exclusion rested on racial stereotypes regarding the inferiority of the Chinese people, as well as anxieties by white workers about labor competition. By 1870, Chinese residents accounted for less than ten percent of the population of California, but they amounted to approximately twenty-five percent of its workforce.[32] Anti-Chinese activists viewed Chinese people not just as an economic threat, but as "an existential threat to their vision of a free white republic."[33] One anti-Chinese slogan painted the perceived racial threat in primary colors: "Meat vs. Rice—American Manhood vs. Asiatic Coolieism. Which Shall Survive?"[34]

Precisely because Chinese people were perceived as a threat to the character of the American polity, lawmakers also sought to deport anyone of Chinese descent already living in the United States. The Geary Act of 1892 made "any Chinese person or person of Chinese descent" found in the United States subject to deportation "unless such person shall establish, by affirmative proof . . . his lawful right to remain in the United States."[35] All targeted residents were required to obtain a "certificate of residence" from the local collector of internal revenue at the risk of deportation.[36] The law created an enforcement exception for residents who could establish good cause for not obtaining a certificate and demonstrate "by at least one credible white witness" that they had been living in the United States before the passage of the Geary Act.[37]

In *Fong Yue Ting v. United States*, the Supreme Court upheld the Geary Act, reasoning that courts should defer to the "political departments" in matters of

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30. *Id.* at 606.

31. *See* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 202 (updated ed. 2014) (describing the Chinese Exclusion Act as generating the first "illegal aliens"); Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 649-52 (2005).

32. BETH LEW-WILLIAMS, THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA 34-35 (2018).

33. *Id.* at 29.

34. LEE, *supra* note 21, at 33.

35. Geary Act, ch. 60, § 3, 27 Stat. 25, 25 (1892) (repealed 1943).

36. *Id.* § 6.

37. *Id.*

immigration law.[38] The majority reiterated the plenary power doctrine, stating that "it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the Constitution to the other departments of the government."[39] In upholding the Geary Act, the Court also upheld its enforcement mechanism of ongoing race-based policing.

The era of Chinese Exclusion reveals much about how racial constructs of belonging intersect with concepts of membership. Immigration enforcement is premised on the theory that exclusion is necessary for building cohesion and shared values. As Walzer puts it, "the political community is probably the closest we can come to a world of common meanings. Language, history, and culture come together (come more closely together here than anywhere else) to produce a collective consciousness."[40] The flip side of this reasoning provides a rationale for excluding those seen as incapable of sharing in a "collective consciousness." If the goal was to build a sense of collective community—to create the concept of "American"—then a firm line needed to be drawn against a group perceived as permanent outsiders.

Yet the line the government sought to draw was never confined to the national border. It undercut liberties subject to protection within the United States. Justice Brewer's dissenting opinion in *Fong Yue Ting* criticized the Court's approach as inconsistent with the due-process protections owed to all people. Despite being directed against the "obnoxious Chinese," the law, in Brewer's view, created an unacceptable risk of "arrest and detention" for innocently losing or misplacing a certificate.[41] The law violated the due-process rights of residents who "have been invited here" and "have been told that if they would come here they would be treated just the same as we treat an Englishman, an Irishman, or a Frenchman."[42] Brewer drew a distinction between the exclusion of noncitizens at the border and the "arbitrary and unrestrained power to banish residents" who had already been admitted.[43] The law created an unacceptable risk of turning residents into "ticket-of-leave men" who "cannot move about in safety without carrying with [them] this certificate."[44]

38. Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893).

39. *Id.* at 712.

40. WALZER, *supra* note 24, at 28.

41. *See Fong Yue Ting*, 149 U.S. at 743 (Brewer, J., dissenting).

42. *Id.* at 737.

43. *Id.* at 738.

44. *Id.* at 743 (adopting the term from Senator Sherman in the Senate debate on the Act).

In upholding the law, the majority did not respond to language in Justice Brewer's dissent characterizing the Chinese as "ticket-of-leave men." Nor did the majority explain how surveillance itself was consistent with its assertion that

> Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility.[45]

One explanation is that the majority viewed racial violence as acceptable when directed towards those of apparent Chinese descent. Well before the passage of the Geary Act, Chinese immigrants could not venture into certain parts of the country without risking arrest, harassment, and other forms of violence. As Professor Beth Lew-Williams describes, "[i]n 1885 and 1886, at least 168 communities across the U.S. West drove out their Chinese residents," using violence that included "planting bombs beneath businesses, shooting blindly through cloth tents, and setting homes ablaze."[46] The Chinese Exclusion Act did not create the risk of violence. Instead, it legitimated violence as a means of enforcing the national border. It permitted white residents who sought to expel Chinese residents to see themselves as acting on behalf of the polity at large, rather than out of their self-interest.

By treating the Chinese as "ticket-of-leave" men, the law also provided a way to subordinate people who were seen as racially undesirable, regardless of their membership status.[47] Racial subordination continued after the Court recognized birthright citizenship for those of Chinese descent. In 1898, the Court determined that birthright citizenship extended to Wong Kim Ark, a San Francisco-

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45. *Id.* at 724 (majority opinion).

46. LEW-WILLIAMS, *supra* note 32, at 1. In multiple incidents, white residents who admitted to killing Chinese residents and destroying their homes received no punishment. *See* Kevin R. Johnson, *The Racist Foundations of Modern U.S. Immigration Law*, *in* HANDBOOK ON RACE, RACISM, AND THE LAW (Aziza Ahmed & Guy Uriel-Charles eds., forthcoming 2022) (manuscript at 3-8) (on file with author) (discussing the Trout Creek Outrage of 1876 as an exemplar); Kevin R. Johnson, *From Chinese Exclusion to Contemporary Systemic Racism in the U.S. Immigration Laws*, 97 IND. L.J. (forthcoming 2022), https://ssrn.com/abstract=3872912 [https://perma.cc/EB79-EBLT] (discussing the Trout Creek outrage and arguing that "the desire to exclude Chinese immigrants from the United States, which could not be accomplished by the individual states, fueled the federalization of immigration law").

47. *See* Chin, *supra* note 5, at 9 (discussing how legislators viewed the Chinese "as part of a larger racial problem" and citing to the following 1882 statement by Senator John P. Jones: "What encouragement do we find in the history of our dealings with the negro race or in our dealings with the Indian race to induce us to permit another race-struggle in our midst?").

born child of Chinese immigrants.[48] He had lived in the United States for over two decades before departing to visit China.[49] On his return, the U.S. government sought to exclude him. He was placed in detention on the grounds that his "race, language, color and dress" marked him as a noncitizen, regardless of his birth in the United States.[50] In recognizing his citizenship, the Court cited the common-law principle that birth and allegiance operated together in England.[51] All "subjects" of the British Crown were also "citizens" of the British empire. These principles, in addition to legislative history relating to the passage of the Fourteenth Amendment, led the Court to conclude that birthright citizenship extended to the children of Chinese nationals born on U.S. soil.[52]

But even as the Court rejected the U.S. government's call for a racially restrictive definition of citizenship, the Court did not disrupt the view that those of Chinese descent were undesired as members. To the contrary, one of the reasons the majority gave for recognizing Wong Kim Ark's citizenship was a need to preserve citizenship for "thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States."[53] In order to build the polity by incorporating the children of white immigrants as Americans, it was necessary to also extend birthright citizenship to the children of Chinese nationals born on U.S. soil.

The Court's holding had a dual impact. As a matter of substantive immigration law, it extended birthright citizenship to qualifying children of Chinese immigrants. As a matter of enforcement practices, however, it left undisturbed the federal government's view that Wong Kim Ark's "race, language, color and dress" marked him as a noncitizen. By extension, the federal government acted properly in presuming that a person of apparent Chinese descent was a noncitizen and detaining him as an initial matter.

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48. United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898).

49. *Id.* at 650-51.

50. *Id.* at 650.

51. "All persons born in the allegiance of the King are natural-born subjects, and all persons born in the allegiance of the United States are natural-born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country, as well as of England." *Id.* at 662 (quoting United States v. Rhodes, 27 F. Cas. 785, 789 (C.C.D. Ky. 1866) (No. 16,151)).

52. *See id.* at 697-99 (discussing history indicating that lawmakers contemplated that the Fourteenth Amendment would include all those born on U.S. soil, including the children of Chinese immigrants). The Court recognized exceptions to this rule, such as for the children of foreign diplomats. *See id.* at 664.

53. *Id.* at 694.

The Court's approach in *Wong Kim Ark* reflects a reliance on race as a source of national cohesion for white residents and as the basis for excluding racial minorities, who were treated as presumptively outside the membership and protection of the American polity. The treatment of those of Chinese descent has certain parallels to the treatment of other racial minorities. For instance, as historian Martha S. Jones has discussed, free Black citizens in the antebellum period invoked their claims to birthright citizenship when opposing calls by some lawmakers that they be removed from the country.[54] Native Americans were also initially denied birthright citizenship and were also subjected to repeated displacement within the United States.[55] Immigration control was used as a means of enforcing a national border, but it was also used to erect and enforce racial dividing lines within the polity based on presumptions of belonging.

B. Integration and the Impact of Surveillance

The analysis in *Fong Yue Ting* was not inevitable. In the 1941 case *Hines v. Davidowitz*,[56] the Court revisited the significance of surveilling suspected immigrants. *Hines* involved a Pennsylvania law passed shortly before the outbreak of World War II that required noncitizens to register their presence with the state, carry their registration card at all times, and show their card to police officers on demand.[57] The targets of the ordinance included German and Italian residents living in the United States.[58] Given that the federal government had recently enacted a similar law, Pennsylvania argued that its law should be upheld; the state

54. *See generally* MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA (2018) (documenting how free Black citizens in Baltimore resisted calls for their removal to Haiti).

55. Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 CARDOZO L. REV. 1185, 1215-18 (2016) (discussing how John Elk, who unsuccessfully petitioned for birthright citizenship as a Native American, likely faced "a lifetime of forced removals" as a member of the frequently displaced Winnebago tribe).

56. 312 U.S. 52 (1941).

57. *See id.* at 59. The state law made an exception for certain categories of immigrants, such as those who had applied for naturalization and met other eligibility requirements. *See id.* at 59 n.2.

58. Brief for Appellants at 43, Hines v. Davidowitz, 312 U.S. 52 (1941) (No. 22) (describing the law as aimed as "a Fifth Column" within the United States). The actual plaintiffs in the case were Bernard Davidowitz and Vincenzo Travaglini. Court filings identified Travaglini as an Italian national, and Davidowitz as a naturalized U.S. citizen who was stereotyped as foreign. *See* Davidowitz v. Hines, 30 F. Supp. 470, 473 (M.D. Pa. 1939). Available evidence suggests that Davidowitz was likely of Hungarian origin. *See B. Davidowitz, Sales Chief, Dies*, PHILA. INQUIRER, May 6, 1958, at 22.

law did not "usurp or conflict with any power granted to the Federal Government."[59]

In striking down the law on preemption grounds, the Supreme Court focused on the harms of imposing "distinct, unusual and extraordinary burdens and obligations upon aliens—such as subjecting them alone, though perfectly law-abiding, to indiscriminate and repeated interception and interrogation by public officials."[60] The Court held that these are "not mere census requirements . . . even though they may be immediately associated with the accomplishment of a local purpose."[61] One problem with surveillance was that it might undermine the federal government's ability to navigate foreign relations. But the Court's analysis was not confined to considering how the state law could potentially interfere with foreign affairs. Rather, the Court recognized how policing practices could also harm individual liberty interests. The Court cited Justice Brewer's dissent in *Fong Yue Ting*,[62] which argued that the certificate requirement inhibited the free movement of people because a person subject to the certificate requirement "cannot move about in safety without carrying with him this certificate."[63] The *Davidowitz* opinion ended with a focus on the "personal liberties" of noncitizens and their interest in being "free from the possibility of inquisitorial practices and police surveillance."[64]

The Court's analysis drew in part from a legal brief filed by the U.S. government. The brief argued that when Congress passed its own federal registration law, "Congress was well aware" of the risk that the law was "susceptible of being used as a means of curtailing the liberties of loyal and law-abiding aliens and that, if so used, it would increase rather than minimize the evils of disaffection and disloyalty against which the Act is directed."[65] In other words, surveillance itself could breed disloyalty to the polity. In addition, the federal government argued that Pennsylvania's law would create barriers to movement within the

59. Brief for Appellants, *supra* note 58, at 7.

60. *Davidowitz*, 312 U.S. at 65-66.

61. *Id.* at 66.

62. *See id.* at 71 n.30.

63. Fong Yue Ting v. United States, 149 U.S. 698, 743 (1893) (Brewer, J., dissenting); *see also id.* ("The situation was well described by Senator Sherman in the debate in the Senate[:] 'They are here ticket-of-leave men, precisely as, under the Australian law, a convict is allowed to go at large upon a ticket-of-leave, these people are to be allowed to go at large and earn their livelihood, but they must have their tickets-of-leave in their possession.'").

64. *Davidowitz*, 312 U.S. at 74.

65. Brief for the United States, Amicus Curiae, *Davidowitz*, 312 U.S. 52 (No. 22), 1940 WL 71236, at *9.

United States.[66] Forcing aliens to produce an identification card to avoid arrest, the federal government urged, was "totally inconsistent with the privilege of free movement throughout all of the United States conferred upon aliens who are lawfully admitted pursuant to the provisions of federal law."[67]

With respect to policing, *Hines* had an impact that was marginal at best. Indeed, shortly after *Hines*, the Supreme Court issued its decision in *Hirabayashi v. United States*, which upheld curfew requirements for all U.S. citizens of Japanese descent, as well as for Japanese, Italian, and German immigrants.[68] The Court's rationale for upholding the curfew related to the war and the perceived need to protect the West Coast from attack.[69] But U.S. citizens of Japanese descent were the only ones singled out for the curfew requirement. The curfew applied to Italian and German noncitizens, but it did not target U.S. citizens of Italian and German ancestry.[70] The Court justified the curfew against U.S. citizens of Japanese descent by reasoning that these citizens had not been "assimilat[ed] as an integral part of the white population."[71] It cited a long history of discrimination against Japanese nationals, including the history of laws that racially barred the Japanese and other "Asiatic races" from naturalizing.[72] Given this history of being treated as undesirable, those of the "Asiatic races" would be perceived as a foreign threat.

The Court's reasoning reinforced a dividing line between white immigrants and racially undesirable U.S. citizens. Precisely because U.S. laws discriminated against Japanese immigrants, U.S. citizens of Japanese descent should continue to be seen as presumptively disloyal and not entitled to advantages granted to other citizens. This presumption justified singling out U.S. citizens of Japanese descent for surveillance and, later, for displacement and internment in *Korematsu v. United States*.[73] In stated service of protecting desired members of the polity

66. *Id.* at *40-41 (arguing that the state law would deter aliens from moving to Pennsylvania and that it would "have an adverse effect upon the free movement through Pennsylvania of aliens residing in other states").

67. *Id.* at *41.

68. 320 U.S. 81, 88, 98-99 (1943).

69. *See id.* at 94. The federal government introduced false evidence of an imminent Japanese attack on the West Coast, upon which the Supreme Court then relied. *See* Eric L. Muller, Hirabayashi *and the Invasion Evasion*, 88 N.C. L. Rev. 1333, 1346-54, 1383 (2010).

70. *See Hirabayashi*, 320 U.S. at 88 (noting that the curfew applied to "all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1").

71. *Id.* at 96.

72. *Id.* at 96-97.

73. 323 U.S. 214 (1944).

from a foreign threat, the Court permitted enforcement actions that eroded key liberty interests within the United States.

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The Chinese Exclusion period did more than establish an immigration enforcement structure that permitted race-based exclusion and deportation. Examining this early legal doctrine shows how immigration policing depended on racial constructs that certain residents had no place in the United States. Those who fit external markers of being "an American" or being a future American could expect to be integrated into the polity; those presumed to be foreign because of their race would be treated as outsiders, regardless of their actual status. This approach treated surveillance and policing as a means of constructing a political community premised on racial exclusion and subordination.

II. RACE-BASED POLICING AND THE CONSTRUCTION OF ILLEGITIMATE INTERNAL BORDERS

Fong Yue Ting remains foundational to the field. It is the origin of a central conceptual distinction between "immigration" and "alienage" law. *Fong Yue Ting* regulates "immigration" because targeted residents could, in theory, be deported.

By contrast, *Yick Wo v. Hopkins*, decided seven years earlier, is an "alienage" decision. *Yick Wo* involved an equal-protection challenge to a local ordinance that barred the operation of wooden laundries without municipal approval.[74] In *Yick Wo*, the Court determined that the San Francisco ordinance violated the Equal Protection Clause because licenses had been "arbitrarily" denied to all Chinese applicants, but granted to all non-Chinese applicants.[75] In *Fong Yue Ting*, the Court distinguished *Yick Wo* because the issue of laundry ordinances related to "the power of a [S]tate over aliens continuing to reside within its jurisdiction, not . . . the power of the United States to put an end to their residence in the country."[76] By fashioning *Fong Yue Ting* as about deportation, the Court thus treated policing practices as unrelated to the exercise of government power over suspected aliens "continuing to reside" within a given place.

Taken together, *Fong Yue Ting* and *Yick Wo* create a conceptual void. It is as though there are only two distinct possibilities: laws that affect noncitizens living in the United States ("alienage" laws), and laws that regulate movement across

74. Yick Wo v. Hopkins, 118 U.S. 356, 368 (1886).

75. *Id.* at 374 (stating that licenses had been denied to all who petitioned—"all of whom happen to be Chinese subjects"—but granted to all other applicants who were not Chinese subjects).

76. Fong Yue Ting v. United States, 149 U.S. 698, 725 (1893).

the national border ("immigration" laws). But this dichotomy is a fiction—virtually any law can have some effect both on immigrants within the United States and on movement across borders.[77]

This conceptual dichotomy provides little analytic room to evaluate how enforcement practices undertaken in stated service of immigration control affect liberty interests inside the United States. The practice of "policing immigration" raises two core questions. First, how are people identified for stops? Immigration is a legal status—it is not about anyone's suspicious conduct at a particular time. To "police immigration status" necessarily requires believing that police can identify through visual inspection who belongs in the United States. Second, how does surveillance, separate and apart from its connection to removal, affect the political community? Law relating to surveilling noncitizens is not ancillary to immigration control; it is how immigration control is actually experienced today for the bulk of the nation's long-term undocumented residents.[78]

This Part uses contemporary policing practices as a case study to illustrate how immigration-enforcement practices themselves compromise substantive rights. They open residents to the risk of arrest and detention.[79] By using policing practices as a mechanism of selectively identifying and surveilling people who appear out of place, government institutions delineate a line between presumed insiders and presumed outsiders. Section II.A examines federal immigration policing, which continues to rely on racial constructs as a proxy for belonging. Section II.B turns to jailhouse immigration screening, which has been presented as a race-neutral alternative to street stops, but which should be understood as magnifying and entrenching racial disparities that pervade domestic policing. Section II.C then turns to domestic police decisions to check immigration status during low-level stops. In each of these settings, courts adopt a framework that permits race- and class-based proxies about "who belongs" to justify surveillance and detention.

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77. As scholars such as Professors Adam B. Cox and Linda S. Bosniak have discussed, virtually any law that regulates noncitizens within the United States could also lead to movement across an international border. Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 351-53 (2008); Bosniak, *supra* note 6, at 1053-57.

78. Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1464-65 (2019).

79. While my focus is on the police, it is important to note that this surveillance by private actors can have analogous consequences. *See, e.g.*, Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 780 (2008) (discussing private immigration policies, such as status checks for boarding a Greyhound bus); Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115, 1120 (2009) (explaining that "moving borders" occur where "proof of immigration status becomes centrally important at multiple points both at the border and inside the country").

A. Racial Constructs as Proxies for Belonging

The Fourth Amendment's prohibition against unreasonable searches and seizures applies to immigration seizures. But unlike in domestic criminal-law enforcement, courts view race as a legitimate factor in ascertaining whether an immigration stop is justified.[80] In 1976, the Supreme Court held that immigration officers at a fixed checkpoint may selectively stop vehicles for any reason, including on the basis of race. Citing data from 1972, the Court stated that an estimated "85% of . . . illegal immigrants are from Mexico."[81] This, in turn, made "Mexican appearance" relevant to the decision to engage in an investigatory stop.[82]

The Court's acceptance of racial proxies offers an example of how immigration-enforcement choices can operate to preserve a static vision of who belongs in the polity, regardless of its actual multiracial composition. The Court's approach reflects two unjustified assumptions: (1) Mexican ancestry can be ascertained through visual inspection, and (2) people who fit the stereotype of "looking Mexican" should be treated as presumptively less entitled to belong in the country than anyone else.[83] This approach reflects an illusory line between targeting "suspicious conduct" and targeting "suspicious people."

A 2014 decision, *Maldonado v. Holder*, shows how crude proxies relating to race and class can be employed to justify surveillance and arrest.[84] There, the Second Circuit considered whether a joint operation between federal immigration officials and local police that targeted Latino dayworkers violated the Fourth Amendment. The police action began when undercover officers entered a recruitment site and took workers into their vehicle with the promise of work.[85] But rather than driving the workers to a job site, the officers drove the workers

80. *See generally* Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. Rev. 1543, 1546 (2011) ("[B]ecause Latino identity is deemed relevant to the question of whether a person is undocumented, all Latinos live under a condition of presumed illegality.").

81. United States v. Martinez-Fuerte, 428 U.S. 543, 551 (1976).

82. *Id.* at 563.

83. Kevin R. 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, 1009 (2010) (criticizing "the excessive and undue reliance on race in immigration enforcement" by permitting immigration officers the discretion to use "a vague, and quite crude, identifier—'Mexican appearance'—in making an immigration stop").

84. 763 F.3d 155 (2d Cir. 2014).

85. *Id.* at 169.

to an abandoned parking lot, interrogated them, and placed them under arrest.[86] The Second Circuit denied a motion to suppress the evidence obtained during this interrogation. It held that the arrest, based on the workers' suspected national origin and their status as day laborers, did not establish an "egregious" Fourth Amendment violation, as required for civil deportation proceedings.[87]

In *Maldonado*, the immigration surveillance was not predicated on suspicious conduct. The officers did not observe any effort to engage in a clandestine border crossing. In fact, the officers did not target any particular individuals at all; they planned to seize "whoever got in [the vehicle] first."[88] The seizure was based entirely on two group-based associations: day laborers as undocumented—as part of "an occupation that is one of the limited options for workers without documents"[89]—and Latinos as undocumented. This is a classic example of a "thin script"—an "evidentiary claim in which the government asserts that a *single fact* (or a very small set of interrelated facts) is sufficient *in and of itself* to establish the likelihood that the target of a search or seizure is involved in illegal activity."[90] Yet the court offered no recognition of how group-based associations compromised the liberty interests of the targeted workers.

The court's reasoning invites the question: after *Maldonado*, what should a similarly situated person do differently to avoid the risk of arrest? A candid answer would acknowledge that, for a racial minority who fits the stereotype of "undocumented," the mere act of lawfully seeking work triggers the risk of arrest. The opinion reveals how "race, language, color and dress"[91] continue to be employed as the basis for targeting U.S. residents in the present day.

B. Jailhouse Immigration Screening

In terms of its impact, jailhouse immigration screening is likely the most significant development in interior immigration enforcement in recent years. Since

86. *Id. But see* Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 741 (2015) (criticizing *Maldonado* for creating a situation in which many immigrants now live in fear of police and "rampant racial profiling").

87. *Maldonado*, 763 F.3d at 159-67.

88. *Id.* at 160.

89. *Id.* at 161.

90. Andrew Manuel Crespo, *Probable Cause Pluralism*, 129 YALE L.J. 1276, 1291 (2020).

91. United States v. Wong Kim Ark, 169 U.S. 649, 650 (1898).

2012, every single custodial criminal arrest has triggered automatic screening.[92] Jailhouse immigration screening is often understood as a way to shift away from racial profiling in immigration stops. But because jailhouse screening relies on all custodial criminal arrests as a screening device, it allows for biases inherent in the criminal arrest process to be replicated in immigration enforcement.

Put differently, jailhouse immigration screening cannot be race neutral if the underlying process of criminal arrest is not. A large criminal-law literature analyzes how domestic criminal arrests sort people on the basis of factors such as race, class, or disability.[93] For instance, Professor Jamelia N. Morgan's analysis of "disorderly conduct" laws shows how enforcement of these laws offers a "ready mechanism for tightly regulating access to public space" and "reinforce[s] deeply rooted understandings of which conduct—and which persons—are considered disorderly."[94] The law of disorderly conduct itself reflects a normative vision of which type of people are perceived as lacking order in relation to their environment.

Discretionary front-end judgments about who appears suspicious, in turn, contribute to racially biased stop and arrest practices. The evidence presented in *Floyd v. City of New York*, which examined New York City's stop-and-frisk program, showed how low-level policing practices resulted in pronounced racial disparities.[95] It also quoted at length police supervisors whose comments showed their "contempt and hostility" toward the policed population. In one recording, a police lieutenant told other officers:

> [W]e've got to keep the corner clear . . . . Because if you get too big of a crowd there, you know, . . . they're going to think that they own the

92. Most people removed from inside the United States are now identified through screening in prisons and jails. *See* Jain, *supra* note 9, at 1704-05. *See generally Secure Communities*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/secure-communities [https://perma.cc/9QVE-9Z64] (noting that the program was implemented nationwide on January 22, 2013, and that it began a gradual roll out in limited jurisdictions starting in 2008); Jain, *supra* note 9, at 1761 (making a structural argument for uncoupling immigration screening from jails).

93. Jamelia N. Morgan, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489 (2022) (analyzing "how the Fourth Amendment's vast scope of police discretion renders individuals with disabilities vulnerable to policing and police violence"); Capers, *Policing*, *supra* note 12, at 67; Alexandra Natapoff, Atwater *and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147, 152 (2020) (arguing that low-level criminal offenses "expand the power of the state to criminalize large numbers of people for common, rarely culpable, often harmless conduct, and they confer vast discretion on police to aim that carceral power in racially disproportionate ways").

94. Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1642 (2021).

95. For instance, in *Floyd*, the Southern District of New York cited data that New York City police officers stopped 4.4 million people in an eight-year period from 2004 to 2012, of whom over eighty percent were racial minorities. Floyd v. City of New York, 959 F. Supp. 2d 540, 572-73 (S.D.N.Y. 2013) (summarizing relevant "uncontested statistics").

> block. We own the block. They don't own the block, all right? They might live there but we own the block. All right? We own the streets here. You tell them what to do.[96]

The lieutenant reminded the officers that they were "not working in Midtown Manhattan where people are walking around smiling and happy. You're working in Bed-Stuy"—referring to Bedford Stuyvesant, a predominantly Black community—"where everyone's probably got a warrant."[97] In *Floyd*, officers saw their job as policing spatial boundaries and blocking free movement. Under the logic of imposing "order," the police made low-level arrests that, in effect, prevented targeted residents from moving freely without the risk of police harassment.[98] When immigration screening is downstream of criminal arrests, it incorporates these types of race-based disparities into the screening process.

Pretextual criminal arrests also contribute to the population subject to jailhouse immigration screening. In her dissent in *Utah v. Strieff*, Justice Sotomayor articulated how pretextual surveillance can create the sense that people are "subject[s] of a carceral state" who lack the basic liberty to move without fear of police intrusion.[99] Sotomayor's dissent conceptualized how pretextual policing practices both alienate and subordinate:

> Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. This Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact. . . . [T]his case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.[100]

In *Strieff*, Justice Sotomayor focused on the use of outstanding traffic warrants to provide a pretextual justification for criminal-law enforcement.[101] Yet

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96. *Id.* at 597.

97. *Id.*

98. Alice Ristroph, *Criminal Law as Public Ordering*, 70 U. TORONTO L.J. 64, 74 (2020) (describing public-order enforcement as "monitoring daily life to generate and maintain a state of affairs labelled as 'order'").

99. 136 S. Ct. 2056, 2071 (2016) (Sotomayor, J., dissenting).

100. *Id.* at 2069-71.

101. *Id.* at 2064-71.

outstanding traffic warrants may also provide a pretextual basis for checking immigration status. Police officers who suspect an individual lacks status may choose to make arrests they would not otherwise pursue. In addition, as I have discussed elsewhere, once someone is in jail, the immigration screening process can lengthen carceral treatment at the front-end of the criminal legal process.[102] Jailhouse immigration screening thus does not merely operate within the criminal legal system; it systemically has the potential to make the criminal arrest process harsher by leading to outcomes like bail denial.[103] Rather than offering a race-neutral alternative to immigration stops, jailhouse immigration screening thus incorporates and potentially exacerbates underlying disparities in criminal arrest.

C. Racial Steering and Race-Based Stops

The Supreme Court's decision in *Arizona v. United States* shows how notions about who belongs in a particular place can be employed to justify police stops.[104] The Court considered a facial challenge to Arizona's Support Our Law Enforcement and Safe Neighborhoods Act (known as S.B. 1070), a state law adopted with the stated aim of achieving "attrition through enforcement."[105] Among other provisions, S.B. 1070 required police officers to check immigration status during stops.[106] The Obama Administration challenged this provision on the ground that it would lead to racial profiling and would "delay the release of some detainees for no reason other than to verify their immigration status."[107] In addition to this "show me your papers" provision, Arizona's law also included a "criminalization" provision that authorized state police officers to make warrantless arrests if "the officer has probable cause to believe [that the arrested individual] has committed any public offense that makes the person removable from the United States."[108] This provision, in essence, permitted police officers to arrest those suspected of committing federal civil-immigration violations by over-

102. *See* Jain, *supra* note 9, at 1722-31.

103. *Id.*

104. 567 U.S. 387 (2012).

105. *Id.* at 393.

106. This "show me your papers" provision required state officers to make a "'reasonable attempt . . . to determine the immigration status' of any person they stop, detain, or arrest on some other legitimate basis if 'reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.'" *Id.* at 411 (quoting ARIZ. REV. STAT. ANN. § 11-1051(B) (2010)).

107. *Id.* at 413.

108. *Id.* at 394, 407 (quoting ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (2010)).

staying a visa or otherwise being present in the United States without authorization.[109] The law further required noncitizens to register their presence with the state of Arizona, so that a driver's license check could be used to verify their immigration status.[110]

The majority described Arizona's law as addressing issues "related to the large number of aliens within its borders who do not have a lawful right to be in this country."[111] The majority upheld the "show me your papers" provision but struck down the criminalization provision solely on preemption grounds.[112] Justice Scalia's opinion, which took the position that Arizona's "anti-illegal immigrant" policing law should have been upheld in its entirety,[113] went further in conceptualizing the core issue as a lack of "immigration" control. According to his opinion, S.B. 1070 was passed by "citizens [who] feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy."[114] This analysis relied on a sharp distinction between citizens who want to police immigration and unauthorized migrants who are subject to policing practices—without answering the question: how can police officers purport to recognize people who lack lawful status in the country?

Litigation challenging Arizona's law centered on the role of racial profiling. Even as *Arizona* was being litigated, the Maricopa County Sheriff's Office was under investigation for racially profiling Latino residents.[115] During oral argument in *Arizona*, Justice Breyer asked what would happen if the police approached a "Hispanic-looking" jogger with a backpack containing water and Pedialyte.[116] As Breyer put it, the state officer thinks "oh, maybe this is an illegal person," but in actuality, the jogger is a U.S. citizen with an out-of-state driver's license.[117] The question went to the heart of what the law purported to do. By

109. *Id.* at 407-09.

110. *Id.* at 411.

111. *Id.* at 392-93.

112. *Id.* at 416.

113. *Id.* at 416-40 (Scalia, J., concurring in part and dissenting in part).

114. *Id.* at 436.

115. *See* Melendres v. Arpaio, 695 F.3d 990, 1000 (9th Cir. 2012) (upholding a preliminary injunction preventing the Maricopa County Sheriff's Office from detaining Latino motorists "based solely on reasonable suspicion or knowledge that a person was unlawfully present in the United States").

116. Transcript of Oral Argument at 10-11, *Arizona*, 567 U.S. 387 (No. 11-182).

117. *Id.* at 11.

claiming the legal authority to stop and arrest residents suspected of being present without authorization, Arizona asserted that its officers had a legitimate metric to identify on visual inspection who belonged in a particular place.

The Court's opinion did not engage with Justice Breyer's question, leaving intact the underlying assumption that immigration status can legitimately be ascertained through visual inspection. The Court struck down the criminalization provision based largely on concerns about how the state law might affect foreign affairs.[118] The majority reasoned that, given the complexity of immigration law, police officers might make mistakes or target noncitizens the federal government had chosen not to pursue.[119] Based on these concerns, the Court held that the criminalization provision was preempted. Applying similar reasoning, the Court upheld the "show me your papers" provision against a facial challenge. Unlike imprisonment, the Court viewed a stop itself as a minor intrusion. Given that police already engaged in low-level stops for a host of reasons, checking immigration status during a stop would pose minimal additional intrusion.[120] As an example of a legitimate stop, the majority imagined the police stopping a jaywalker and asking him to show his papers. The Court reasoned that if the jaywalker had no identification and if the police officers could not make a "reasonable" attempt to verify the individual's status with ICE, then the police officers would have to release him.[121] Since the duration of the stop would be limited, the Court viewed this mechanism of surveillance as a legitimate way to screen immigration status. The purpose of the stop was to share information with federal immigration-enforcement officials, who could then determine whether to take custody.[122]

The Court's example ignores the deeper question: why would the police stop a jaywalker in the first place? Public-order stops like jaywalking, which target common conduct detached from the principles of culpability, are rife with the potential for racial profiling.[123] For police, one tangible benefit of engaging in low-level stops may be to steer people perceived as not belonging away from a particular place. Indeed, this was the stated aim of the law; if state lawmakers

118. *Arizona*, 567 U.S. at 409.

119. *Id.* at 408-09.

120. *Id.* at 416.

121. *Id.* at 413-14.

122. *Id.* at 412-13.

123. *See* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1491-95 (2016) (describing how calls to the police for public-order offenses like loitering increased during a period of racial integration and gentrification); Capers, *Policing*, *supra* note 12, at 46 (discussing "racialized borders" when "law-abiding minorities entering predominantly white neighborhoods are frequently stopped and questioned as to the reason for their presence in the neighborhood").

could not keep "illegal aliens" out of the country, they could use policing practices to keep them out of desirable areas in Arizona.

In *Floyd*, the court quoted the police officer's directive to "own the block" to show how the police constructed illegitimate borders.[124] Yet the *Arizona* opinion leaves open the possibility that steering suspected undocumented residents away through policing practices is legitimate. In focusing on the threat posed by "illegal aliens," the Court sidestepped the implications of using policing as a means to keep undesired people out of particular places.

III. "ANTI-ILLEGAL IMMIGRANT" ORDINANCES

This Part extends the critique of the deportation-centric approach to local "anti-illegal immigrant" ordinances. The domestic policing practices in Part II had some connection to federal immigration enforcement; federal immigration-enforcement officials either conducted screening directly or permitted state police to use federal databases to check immigration status. This Part, by contrast, focuses on local laws that lack any direct relationship to federal immigration enforcement. Nonetheless, these laws have also been construed by some courts to regulate immigration by encouraging "self-deportation." "Anti-illegal immigrant" laws offer a case study in how the logic of immigration control can be deployed to justify policing and surveillance deep inside the interior. They also show how a deportation-centric account provides too limited a lens to recognize the full impact of front-end surveillance, including its relationship to residential segregation.

Hazleton, Pennsylvania drew national attention in 2006 and 2007 after it passed laws declaring that new, predominantly Latino residents were a nuisance because they lacked lawful immigration status.[125] Hazleton passed a rental-registration ordinance that required all residential tenants to obtain a certificate of

124. Floyd v. City of New York, 959 F. Supp. 2d 540, 597 (S.D.N.Y. 2013).

125. Hazleton, Pa., Ordinance No. 2006-18 (Sept. 21, 2006), https://www.aclu.org/other/hazleton-pa-ordinance-no-2006-18 [https://perma.cc/WM97-G2L2]; *see* Lozano v. City of Hazleton (*Lozano I*), 496 F. Supp. 2d 477, 484 (M.D. Pa. 2007), *aff'd in part, vacated in part*, Lozano v. City of Hazleton (*Lozano II*), 620 F.3d 170, 220-21 (3d Cir. 2010), *vacated*, 563 U.S. 1030 (2011), *remanded to* 724 F.3d 297 (3d Cir. 2013) (*Lozano III*). For national media coverage related to the ordinances, see, for example, Julia Preston, *City's Immigration Restrictions Go on Trial*, N.Y. TIMES (Mar. 13, 2007), https://www.nytimes.com/2007/03/13/us/13hazleton.html [https://perma.cc/A9KZ-W63M].

lawful immigration status in order to rent a home.[126] Other localities passed similar laws, though the precise mechanism of enforcement varied. Fremont, Nebraska, for instance, required tenants to provide identifying information to the police department, which would then issue an occupancy permit required for renting a home.[127]

These laws had no formal connection to removal; the police had no ability to make a federal immigration arrest. Nonetheless, residents and lawmakers commonly framed the laws as targeted at immigration control under a theory of "self-deportation."[128]

This Part first provides a brief overview of how courts analyzed anti-illegal immigrant ordinance litigation through the lens of deportation. It then addresses conceptual problems with an analytic paradigm centered on deportation.

A. An Overview of "Anti-Illegal Immigrant" Housing Ordinance Litigation

In 2006, the City of Hazleton, Pennsylvania passed two ordinances with the stated aim of barring unauthorized migrants from the town: an "Illegal Immigration Relief Act Ordinance" and a "Rental Registration Ordinance."[129] The rental certification required every prospective renter over the age of eighteen to obtain an "occupancy permit" from Hazleton's Code Enforcement Office.[130] The ordinances contained three relevant enforcement mechanisms: (1) a certification

126. Hazleton's ordinance inspired hundreds of similar laws. *See* Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 569 (2008) ("In the first six months of 2007 alone, more than 1400 bills addressing immigration and immigrants in some capacity were introduced in state legislatures across the country, and nearly 200 of those bills became law."); *see, e.g.*, Second Amended Complaint ¶¶ 2, 66-76, Martinez v. City of Fremont, 853 F. Supp. 2d 959 (D. Neb. 2012) (No. 4:10-cv-3140), 2011 WL 11736718 ("On June 21, 2010, Fremont voters passed a City Initiative Petition enacting Ordinance No. 5165, an 'ordinance relating to immigration.'"); Second Amended Complaint at 1-2, 8-9, Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858 (N.D. Tex. 2008) (No. No. 3-06cv2371-L), 2007 WL 1348174; Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 541 (5th Cir. 2013) (Reavley, J., concurring) ("[N]o alien with an unlawful status will be able to obtain the basic need of shelter through a rental contract. Illegal aliens will therefore have no recourse but to self-deport from Farmers Branch.").

127. Keller v. City of Fremont (*Keller I*), 853 F. Supp. 2d 959, 964-65 (D. Neb. 2012).

128. *See infra* notes 143-148 and accompanying text.

129. *Lozano I*, 496 F. Supp. 2d at 484-85; Hazleton, Pa., Ordinance No. 2006-18 (Sept. 21, 2006), https://www.aclu.org/other/hazleton-pa-ordinance-no-2006-18 [https://perma.cc/WM97-G2L2] (Immigration Relief Act); Hazleton, Pa., Ordinance No. 2006-13 (Aug. 15, 2006), https://www.aclu.org/other/hazleton-pa-ordinance-no-2006-13 [https://perma.cc/DPX2-7NAE] (Rental Registration).

130. *See Lozano I*, 496 F. Supp. 2d at 530.

requirement that all adult prospective tenants document lawful immigration status; (2) a policing mechanism, which permitted any resident to report violations of the law and trigger an investigation; and (3) a penalty mechanism that subjected landlords and tenants to escalating consequences if they entered into leases without immigration certification.[131]

Occupancy permits were to be issued in Hazleton after prospective tenants offered "[p]roper identification showing proof of legal citizenship and/or residency" and paid a ten-dollar fee, among other requirements.[132] Landlords who did not check certification before entering into a lease could face steep penalties—an up-front fine of $1,000 and additional daily $100 fines per violation per occupant.[133] Landlords who rented apartments to tenants without obtaining an occupancy permit risked sanctions for "harboring" unauthorized aliens.[134]

Both the harboring provision and the verification provision were enforced through a private complaint system.[135] The Hazleton ordinance inspired more than a hundred similar laws.[136] One law, passed in Fremont, Nebraska, after the Latino population tripled between 2000 and 2010, remains in effect today.[137] Fremont's ordinance requires adult prospective renters to obtain an "occupancy license" from the Fremont Police Department by providing the police department with detailed personal information:

> name; mailing address; address of dwelling unit; name and business address of the unit's owner or manager; date of lease commencement; date of birth of occupant; occupant's country of citizenship; name and date of birth of each minor dependent residing with occupant; and either a signed declaration that the applicant is a United States citizen or national

131. *Lozano III*, 724 F.3d at 326-27.

132. *Id.* at 334-35.

133. *Id.* at 335-36.

134. *Id.* at 327.

135. *Id.* ("An enforcement action shall be initiated by means of a written signed complaint to the Hazleton Code Enforcement Office submitted by any official, business entity, or resident of the City.").

136. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 394 (2012); Rodríguez, *supra* note 126, at 569.

137. Keller v. City of Fremont (*Keller II*), 719 F.3d 931, 937 (8th Cir. 2013) ("In recent years, as reflected in U.S. Census Bureau data, the City's Hispanic or Latino population nearly tripled, rising from 1,085 in 2000 (4.3% of the City's population) to 3,149 in 2010 (11.9%)."); *see Immigration Ordinance News*, CITY FREMONT NEB., https://fremontne.gov/450/Immigration-Ordinance-News [https://perma.cc/WRG6-KVWW] (containing information on the ordinance and its enforcement provisions).

> or an identification number assigned by the federal government establishing lawful presence.[138]

The ordinance further prohibits landlords from leasing any dwelling unit without obtaining copies of occupancy licenses for each known adult occupant.[139]

The housing provisions were challenged, inter alia, on the grounds that they violated the due-process rights of tenants, conflicted with the Immigration and Nationality Act (INA), and violated the Fair Housing Act.[140] Several courts struck down the ordinances on preemption grounds.[141] The Eighth Circuit, by contrast, held that the Fremont ordinance was neither discriminatory nor preempted, and permitted its implementation.[142]

In analyzing whether the housing provisions conflicted with federal law, some courts focused on whether enforcement would force noncitizens to "self-deport." As the Third Circuit put it: "'It is difficult to conceive of a more effective method' of ensuring that persons do not enter or remain in a locality than by precluding their ability to live in it."[143]

The Third Circuit conceptualized Hazleton's ordinance as conflicting with federal law because it was "nothing more than a thinly veiled attempt to regulate residency under the guise of a regulation of rental housing."[144] Since "[d]eciding which aliens may live in the United States has always been the prerogative of the federal government,"[145] the court concluded that the certification provision conflicted with federal law. It noted that "by prohibiting the only realistic housing option many aliens have, Hazleton is clearly trying to prohibit unauthorized aliens from living within the City."[146] This, in turn, "interfere[s] with the federal government's discretion in deciding whether and when to initiate removal proceedings."[147]

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138. *Keller I*, 853 F. Supp. 2d at 964-65.

139. *Id.* at 965.

140. *See, e.g.*, *id.* at 968, 972-73.

141. *See, e.g.*, *Lozano III*, 724 F.3d 297 (3d Cir. 2013); Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 526 (5th Cir. 2013); United States v. Alabama, 691 F.3d 1269, 1296 (11th Cir. 2012) (holding that a provision preventing undocumented migrants from enforcing contracts "constitutes a thinly veiled attempt to regulate immigration under the guise of contract law" and is thus preempted).

142. *Keller II*, 719 F.3d at 942-49.

143. *Lozano II*, 620 F.3d at 220-21 (quoting Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 164 (1989)).

144. *Lozano III*, 724 F.3d at 315.

145. *Lozano II*, 620 F.3d at 220; *Lozano III*, 724 F.3d at 315.

146. *Lozano III*, 724 F.3d at 317.

147. *Id.*

A concurring Fifth Circuit opinion in *Villas at Parkside Partners v. City of Farmers Branch* directly stated the connection between the law and "self-deportation":

> Illegal aliens will . . . have no recourse but to self-deport from Farmers Branch. This forced migration of illegal aliens conflicts with the careful scheme created by the INA and burdens the national prerogative to decide which aliens may live in this country and which illegal aliens should be removed.[148]

The majority opinion in *Farmers Branch* focused on how the locality defined "lawfully present" in a way that was not coextensive with any terminology found in the INA.[149] This, in turn, created a conflict with the INA. The Fifth Circuit also found that the registration requirement was overbroad, in that the ordinance targeted aliens who had not actually been subject to any removal order.[150]

One problem with conceptualizing these ordinances as a means of effecting "self-deportation," is the lack of evidence that the ordinances had any effect on migration across national borders. The Eighth Circuit focused on this point and rejected the notion that the laws conflicted with federal immigration law because they did not make "a determination of who should or should not be admitted into the country."[151] As the district court put it, requiring prospective tenants to provide their immigration status to the Fremont Police Department operated "in harmony" with federal law because localities shared the federal government's goal of identifying unauthorized aliens.[152] It rejected the view that "[l]aws designed to deter, or even prohibit, unlawfully present aliens from residing within *a particular locality* are . . . tantamount to immigration laws establishing who may enter or remain in the country."[153] In other words, the Fremont ordinance did not "regulate immigration" because the "rental provisions do not remove aliens from this country (or even the City), nor do they create a parallel local process to determine an alien's removability."[154] The Eighth Circuit observed that

148. Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 541 (5th Cir. 2013) (Reavley, J., concurring) (citation omitted).

149. *Id.* at 533 (majority opinion) ("While federal law provides carefully calibrated definitions of the term 'qualified alien' for the purpose of conferring benefits, the Ordinance does not specify which of many federal immigration classifications Farmers Branch officials would use to resolve whether a non-citizen was 'lawfully present.'").

150. *Id.* at 530-31.

151. *Keller II*, 719 F.3d 931, 941 (8th Cir. 2013) (quoting De Canas v. Bica, 424 U.S. 351, 354-55 (1976)).

152. *Keller I*, 853 F. Supp. 2d at 972.

153. *Keller II*, 719 F.3d at 941.

154. *Id.* at 942.

the likely impact of the ordinance was that those denied housing certification would relocate by "obtaining other housing in the City, renting outside the City, or relocating to other parts of the country."[155]

B. Beyond Self-Deportation

It is hard to dispute the Eighth Circuit's observation that an inability to find housing in certain parts of Fremont, Nebraska is hardly tantamount to forced departure from the country. Targeted residents would likely move to neighboring areas. But the court elided the key question: whether the law used illegitimate means to prevent Latinos from integrating predominantly white neighborhoods.[156] By framing anti-illegal immigrant ordinances in relation to deportation, courts limit their ability to recognize the ordinances' reach and impact, including on those who remain present.

As applied to these ordinances, "self-deportation" conflates exit from the country with exit from the locality.[157] It fails to offer a meaningful way to distinguish between legitimate local efforts to attract or deter residents and discriminatory ones.[158] Focusing on deportation also renders invisible the impact of the law on people who remain within a particular place over time. Even when localities link domestic policing to immigration control, their objective may not be to exclude certain groups completely, but rather to promote segregation inside a particular area. Localities may welcome workers to perform risky jobs, such as meatpacking during a pandemic,[159] but they may not want those workers as

155. *Id.* at 941.

156. *See id.* at 948.

157. Scholars have applied this term more broadly to refer to subordination as well as departure. *See, e.g.*, K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1887 (2019) ("[S]ubordination necessarily outsizes any migration the laws can provoke, since all those who leave will suffer, while not all those who suffer will leave."); Angela M. Banks, *The Curious Relationship Between "Self-Deportation" Policies and Naturalization Rates*, 16 LEWIS & CLARK L. REV. 1149, 1151 (2012) ("Yet these policies are having a broader impact; they are creating a hostile context of reception for all immigrants, regardless of immigration status.").

158. For arguments that localities play an important role in immigration debates, see, for example, Rodríguez, *supra* note 126, at 571; and Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339, 1359 (2013) ("[N]otwithstanding the constitutional origins of the federal government's plenary power over immigration, states have always had plenty of opportunities to regulate immigration in practice.").

159. Raymond G. Lahoud, *Study Says 69% of Undocumented Immigrant Workers Hold Essential Jobs to Fight COVID*, NAT'L L. REV. (Jan. 14, 2021), https://www.natlawreview.com/article/study-says-69-undocumented-immigrant-workers-hold-essential-jobs-to-fight-covid [https://perma.cc/DWS8-3V5A]. Undocumented workers constitute roughly 4.5% of the overall U.S. labor force. Jens Manuel Krogstad, Jeffrey S. Passell & D'Vera Cohn, *Five Facts About Illegal*

neighbors. The aim of policing in such cases is to preserve access to certain spaces along the lines of race and class—in much the same way as other nuisance and zoning laws have operated to maintain segregated spaces.[160]

One problem with the self-deportation framework is that it obscures how enforcement processes operate to justify ongoing surveillance. Both public and private policing operated in tandem with registration requirements. Anyone who suspected that another person had violated the ordinances could report them to the municipality. In *Hazleton*, the plaintiffs argued that Latinos would be subject to racial profiling and stereotyped as undocumented.[161] Since tenants have no obligation to disclose to anyone else where they live, the concern was that Latino tenants would be stopped and asked to justify their presence.

In addition, by framing these laws as related to deportation, courts obscured how provisions requiring residents to certify their immigration status were particularly likely to be empty. In Fremont, after that ordinance went into effect, local officials reported that they had no way to verify the immigration status of anyone who declared they were a noncitizen.[162] In the year after the ordinance went into effect, only about thirty-five people out of the nearly 1,300 who obtained certificates of residence stated that they lacked U.S. citizenship; the locality was unable to verify the immigration status of any of the self-declared noncitizens.[163] The certification requirement was an empty ritual—it bore virtually no relationship to actual immigration verification. The theater of verification served an expressive function in signaling who could enter.

Immigration in the United States, PEW RSCH. CTR. (June 12, 2019), http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s [https://perma.cc/H96M-TRED]. For a discussion of employers' incentive to engage in a "collusive" relationship with undocumented workers, see Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1106 (2009).

160. Archer, *supra* note 19, at 183.

161. *Lozano I*, 496 F. Supp. 2d 477, 539-40 (M.D. Pa. 2007). The district court dismissed this concern because the locality had added language after litigation had commenced that barred the locality from responding to any private complaint based on racial discrimination. *Id.* at 537-41. The court did not, however, explain how the locality would determine if a complaint was based on racial discrimination.

162. Jackie Sojico, *Fremont's Housing Ordinance Is in Effect, but Difficult to Enforce*, NEB. PUB. MEDIA (June 6, 2014, 6:30 AM), https://nebraskapublicmedia.org/en/news/news-articles/fremonts-housing-ordinance-is-in-effect-but-difficult-to-enforce [https://perma.cc/4TDX-W6EM].

163. David Hendee, *Catch-22 Keeps Fremont from Acting on Controversial Housing Ordinance*, OMAHA WORLD HERALD (Apr. 12, 2015), https://omaha.com/news/local/catch-22-keeps-fremont-from-acting-on-controversial-housing-ordinance/article_34091da3-ddd3-5643-8076-f474fd328260.html [https://perma.cc/DVD3-D6MZ] (reporting that in the first year the law was in effect, nearly 1,300 people obtained certificates and at least thirty-five people said they were not U.S. citizens, though the locality was unable to verify the immigration status of any of the registrants).

In light of widespread noncompliance with a front-end registration requirement, back-end policing becomes particularly important. In the context of housing, landlords and tenants have important incentives not to comply with the certification requirement. Landlords might simply want to rent to willing tenants and avoid incurring immigration-screening responsibilities.[164] If landlords in practice rent to tenants without verifying their status, enforcement turns entirely on back-end policing.

Tenants do not all face the same risk of back-end policing if they fail to comply with the certification requirement. The enforcement provision of the Hazleton housing ordinance contemplated that "any official, business entity, or resident of the City" could file a complaint against a landlord for "harboring" illegal aliens.[165] There was no language in the ordinance that indicated how the validity of the complaint would be assessed.[166] In effect, the certification requirement assumed that residents could identify who lacked immigration status through external cues. Compliance with the registration requirement provided no security that any given tenant would not later be asked to prove whether she had the right to be present.

Racial minorities in Hazleton introduced testimony that they experienced heightened surveillance. One witness testified that business at his Mexican restaurant decreased due to heightened police surveillance. "A police car was often parked across the street from the restaurant, and after a police officer paid a visit, 'people began to comment that the police [were] there to take the clients away when they came to eat.'"[167] In legal filings, advocacy organizations representing Latino and Black police officers also recognized the risk of racial profiling.[168]

This account is consistent with a large academic literature analyzing how police may target racial minorities perceived as out of place.[169] Formal inquiries about immigration status and the threat of eviction are embedded within a larger system of using law to maintain racial segregation. By accepting the ordinances as a form of immigration control, courts elided several important questions.

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164. For an analogous argument in the employment context, see Lee, *supra* note 159, at 1105-06 (discussing employer-employee collusion to avoid immigration regulation).

165. *Lozano I*, 496 F. Supp. 2d at 537.

166. *Id.*

167. *Id.* at 490.

168. Brief for Appleseed, National Latino Officers Association & National Black Police Association as Amici Curiae Supporting Plaintiffs-Appellees at 31-32, 34, *Lozano II*, 620 F.3d 170 (3d Cir. 2010) (No. 07-3531), 2008 WL 3989657, at *31-32, *34.

169. *See, e.g.*, Bell, *supra* note 19, at 696-701; Fagan & Ash, *supra* note 19, at 124-25; Capers, *Policing*, *supra* note 12, at 60-62; Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being "Out of Place" from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1155-58 (2017).

Why did lawmakers assume that new Latino residents were undocumented? And why did they attribute social problems to undocumented migration?

Evidence introduced during trial showed that local lawmakers had no idea what proportion of residents lacked lawful immigration status. In *Hazleton*, the district court stated that Hazleton's demographics had rapidly changed – shifting from 23,000 to approximately 30,000 in the span of roughly seven years, and that "[t]he increase in Hazleton's population can be explained largely by a recent influx of immigrants, most of whom are Latino."[170] White residents went from comprising ninety-five percent of the population in 2000 to just under seventy percent by 2010.[171] The record showed that the new residents included "citizens, lawful permanent residents and undocumented immigrants," and that "[t]he number of undocumented immigrants in Hazleton is unknown."[172] By assuming that the Latino population consisted of "undocumented immigrants," the court drew an unjustified connection between race and immigration status. This assumption permits courts to view anti-illegal immigrant ordinances as motivated by immigration control rather than racial stereotypes.

In viewing the laws as race-neutral, courts ascribed no significance to other evidence that the laws were motivated by racial bias. In Farmers Branch, one lawmaker stated that he introduced the ordinance because: "I saw our property values declining . . . . [W]hat I would call less desirable people move[d] into our neighborhoods, people who don't value education, people who don't value taking care of their properties."[173] The mayor of Valley Park commented: "You got one guy and his wife that settle down here, have a couple kids, and before long you have Cousin Puerto Rico and Taco Whoever moving in."[174] In *Hazleton*, a federal judge found significant evidence of escalating "ethnic tensions" because of the ordinances that subjected Latinos to harassment and intimidation.[175] A Latino U.S. citizen testified about receiving a letter stating that "European Americans are being dispossessed of their own nation" and "inva[ded] by

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170. *Lozano I*, 496 F. Supp. 2d at 484.

171. Phil McCausland, *Before Trump's State of the Union, Pennsylvania Town Considers Impact of Immigration*, NBC NEWS (Feb. 4, 2019, 4:38 AM), https://www.nbcnews.com/news/us-news/trump-s-state-union-pennsylvania-town-considers-impact-immigration-n966261 [https://perma.cc/FF5K-UNZN] (discussing Hazleton census data).

172. *Lozano I*, 496 F. Supp. 2d at 484.

173. Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 80 (2009).

174. Kristen Hinman, *Valley Park to Mexican Immigrants: "Adios, Illegals!"*, RIVERFRONT TIMES (Feb. 28, 2007), https://www.riverfronttimes.com/stlouis/valley-park-to-mexican-immigrants-adios-illegals/Content?oid=2483315 [https://perma.cc/LQ6M-DADA].

175. *Lozano II*, 620 F.3d at 195 ("[T]he named Plaintiffs had been harassed and intimidated for their involvement in this litigation.").

millions of unskilled Mexicans who threaten to bankrupt us."[176] The district court found that undocumented plaintiffs faced a risk of violence that was serious enough to grant their motion to proceed anonymously.[177] Yet, at the same time, the court treated this risk of violence as though it were unconnected to the law itself.[178]

The absence of evidence connecting undocumented immigration to social problems is relevant to determining whether the anti-illegal immigrant ordinances served a legitimate purpose. Local laws have historically played an important role in maintaining desirable neighborhoods as white enclaves.[179] Decades after the passage of the Fair Housing Act, neighborhoods remain highly segregated.[180] Since 1980, Latino-white residential segregation has increased in several major metropolitan areas.[181] By presuming these ordinances were about "immigration" control, courts implicitly adopted the view that they were not based on other discriminatory factors.

There are certain parallels between how courts construed anti-illegal immigrant laws and the era of Chinese Exclusion. As Professor Kevin R. Johnson has discussed, while Chinese Exclusion laws are now widely understood as motivated by anti-Chinese racism, at the time, some courts minimized "blatantly racist statements" and instead "focused on the inability of the Chinese to assimilate into U.S. society because of their cultural differences."[182] This alternate explanation allowed courts to depict Chinese Exclusion as designed to protect against moral decay and other social problems, rather than as stemming from a desire to maintain a white polity. Similarly, by linking Latino residents to unauthorized migration and by assuming without justification that undocumented residents created social problems, courts blocked plaintiffs from developing arguments that would show that social problems were a pretext for racial discrimination.

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176. *Lozano I*, 496 F. Supp. 2d at 509.

177. *Id.* at 505-06.

178. The history of racially exclusionary localism, however, shows that this is not the case. *See* Archer, *supra* note 19, at 183 ("The long history of racially exclusionary localism reaches back to 'sundown towns,' which excluded Black people through ordinances and policies, exclusionary covenants, threats, and harassment by local law enforcement officers. . . . Not only were Black people barred from living in these towns, but Black people who entered the town or were found there after sunset were subject to harassment, threats, and acts of violence.").

179. *Id.* at 178 ("Local laws are often more central than federal or state laws to creating and perpetuating racially segregated neighborhoods. Exclusionary local laws and policies are among the primary mechanisms used by predominantly White communities to ward off racial integration.").

180. Bell, *supra* note 19, at 661-62, 664-65.

181. *Id.* at 665.

182. Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 529.

The Supreme Court has established a relatively high threshold for finding racial discrimination in zoning. In the 1977 case *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court held that a highly segregated locality could deny a rezoning application for low- and moderate-income tenants where the denial would, in effect, block Black residents from entry.[183] The Court overturned a lower court determination that the locality had been "exploiting" "a high degree of residential segregation" by making no plans for building affordable housing and that the discriminatory effects of this policy violated the Equal Protection Clause.[184] The Court observed that even though there was evidence of a disparate impact on Black residents, there was "little about the sequence of events leading up to the decision that would spark suspicion" of racial bias, given that the white residents had articulated concern that a zoning change would decrease their property values.[185]

But even against this legal backdrop, localities should have to articulate a legitimate rationale for ordinances that have a disparate impact on racial minorities. Unlike in *Arlington Heights*, Hazleton residents were not seeking a zoning change; they were merely seeking to occupy rental housing that had already been constructed and zoned for occupancy. The township encouraged and desired this housing. The objection was not to new residents moving in, but rather to a particular type of resident.

Just as some courts took at face value lawmakers' claims that "illegal immigrants" had moved to their towns, courts also took at face value lawmakers' claims that unauthorized immigration caused social problems. Hazleton lawmakers identified illegal immigration as causing a host of social ills: "higher crime rates, subject[ing] our hospitals to fiscal hardship and legal residents to substandard quality of care, contribut[ing] to other burdens on public services, increasing their cost and diminishing their availability to legal residents, and diminish[ing] our overall quality of life."[186]

Whether or not the locality had a legitimate rationale for passing the laws goes to the heart of understanding the antidiscrimination claim. Yet, instead of inquiring whether there was even a rational basis for the law, the Third Circuit relegated to a footnote the observation that "the parties hotly contest whether aliens in Hazleton actually caused any of these purported problems and whether Hazleton officials had any valid reason to think they did."[187] That footnote further noted that the trial court made no "factual findings about the cause of any

183. 429 U.S. 252, 258, 270 (1977).

184. *Id.* at 260.

185. *Id.* at 258, 269.

186. *Lozano II*, 620 F.3d at 177.

187. *Id.* at 177 n.3.

social or fiscal problems Hazleton may be facing, and our discussion should not be interpreted as supporting either side of that debate."[188] But by assuming without any factual findings that the law regulated "immigration"—that it conflicted with federal law since "[d]eciding which aliens may live in the United States has always been the prerogative of the federal government"[189]—the court ascribed legitimate motivations to the law. Immigration control is a legitimate government objective, while racial steering is not. Assuming an immigration-control purpose, in this context, precluded full consideration of whether and how these laws affected people racially stereotyped as noncitizens.

By not assessing whether new residents caused any social problems, the court implicitly accepted the perspective of lawmakers who saw changing racial demographics as evidence of undocumented immigration. This framework, in turn, obscured the actual impact of the law in restricting access to rental housing within a particular residential area. Adopting this framework left little room for the court to consider how front-end enforcement practices affected targeted residents—U.S. citizens and immigrants alike—who felt under siege by monitoring and surveillance practices themselves, regardless of any subsequent connection to deportation.

IV. DEVELOPING A POLITY-CENTRIC APPROACH TO IMMIGRATION ENFORCEMENT

This Part makes a normative argument for shifting away from a deportation-centric approach. If the aim of immigration control is to build a particular political community inside the United States, then we need a better understanding of how membership decisions and enforcement choices operate together to shape that political community.

Imagine two different political communities, State *A* and State *B*. State *A* offers those who live within its borders a certain set of protections against government intrusion: police stops require individualized suspicion; people exercise freedom of association; and all people enjoy the liberty to live in households of their choice. State *B* is a police state: anyone can be stopped at any time and the government is free to block associational activities without justification.

These two states could have the same categories for admission and removal, and they could effect the same number of deportations in a given year. But they should have divergent immigration-enforcement architectures. Since State *B* is a police state, the government would be free to stop anyone at any time and ask

188. *Id.*

189. *Id.* at 220; *Lozano III*, 724 F.3d at 315.

to see their papers. In State *A*, by contrast, enforcement practices should be consistent with the underlying liberties protected within the political community. If immigration-enforcement choices bring State *A* closer to a being a police state, then the enforcement practices themselves change that political community. They diminish the nature of the liberty interests that all people expect against unjustified government intrusion.

This Part advances the central normative argument: if a core aim of immigration law is to build a political community within a territorial border that protects certain fundamental interests, then courts should assess whether front-end enforcement choices within those borders are consistent with those underlying interests. This Part develops two principles that should guide what I call a "polity-centric" approach to immigration enforcement: a commitment to protecting fundamental liberties of all people who are territorially present and a commitment to recognizing the fluidity of membership status. Using the policing and anti-illegal immigrant nuisance ordinances discussed in Parts II and III, it then considers how adherence to these principles could reorient constitutional doctrine related to antidiscrimination and Fourth Amendment law.

A. Constructing a Political Community

One common rationale for immigration enforcement is to construct a political community through membership decisions. This rationale is often linked to social-contract theory.[190] Members enter into an implicit social contract with their government; they agree to be governed and, in return, they derive immensurate benefits that come with membership. This theory justifies deportation on the ground that undocumented migrants are not a party to the social contract and that their very presence diminishes the political community.[191] Professors Peter H. Schuck and Rogers M. Smith have relied on this notion of mutual consent to argue that undocumented migrants are present without the consent of the polity, as are their U.S.-born citizen children.[192] This conception of membership is static; people who are not selected for membership at a particular time remain outside the boundaries of the membership community, regardless of length of presence in the United States.

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190. For background on social-contract theory, as well as its relationship to membership and the constitutional entitlements of citizens and aliens, see GERALD NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 9-15 (1996).

191. PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 2-3 (1985).

192. *Id.* In their analysis, birth on U.S. soil does not necessarily entitle a person to birthright citizenship. This argument is widely recognized as inconsistent with the Fourteenth Amendment.

This framework oversimplifies the aims of immigration enforcement. It leads to an overemphasis on legal processes related to deportation at the expense of other compelling interests. There are two problems with understanding interior enforcement primarily in relation to deportation. First, courts commonly assume a static line between "legal" and "illegal" that can be identified and policed on the ground. But not only is such a line not visible, it is also constantly shifting. Given the Fourteenth Amendment's guarantee of birthright citizenship, new members constantly enter the polity.[193] Second, people who enter unlawfully at one point in time may gain membership over time. If immigration enforcement is meant to actualize the preferences of the membership community, then it should seek to be responsive to the continually shifting choices of an ever-changing membership community.

Law, of course, can bind the polity in the future—there is nothing problematic with a statute that constrains who may receive membership going forward. Yet a commitment to recognizing evolving membership preferences over time necessarily requires revisiting the question of belonging. If we use fixed categories as a means of governing future belonging, then we constrain the ability of the polity to evolve and incorporate new definitions of membership.

One problem with the deportation-centric theory of enforcement is that it essentializes deportation as the primary function of immigration law. Yet deportation should be better understood as just one way to build a membership community. As a number of scholars have argued, immigration status should be understood as operating along a spectrum,[194] rather than as a binary between documented and undocumented.

Professor Hiroshi Motomura has argued for recognizing fluidity in immigration status and for treating noncitizens as "Americans in waiting."[195] Motomura argues that legal institutions ought to take a broader conception of who belongs and that they should extend a wider range of government programs and services

193. In addition, young immigrants often play a role in promoting integration of older family members. Professor Stephen Lee observes that immigrant youth, including undocumented youth, can function as "cultural brokers" and help to integrate older family members. Stephen Lee, *Growing Up Outside the Law*, 128 HARV. L. REV. 1405, 1408, 1426 n.81 (2015) (reviewing MOTOMURA, *supra* note 22) ("Childhood arrivals can help forge ties between natives and newcomers, and bridge the gap separating the mainstream and the margins.").

194. *See, e.g.*, Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. Rev. 1126, 1137 (2013) (describing an "alienage spectrum" rather than a discrete binary); David A. Martin, *Twilight Statuses: A Closer Examination of the Unauthorized Population*, MIGRATION POL'Y INST. 1-2 (June 2005), https://www.migrationpolicy.org/sites/default/files/publications/MPI_PB_6.05.pdf [https://perma.cc/6JP7-DTF4] (describing various categories of immigrants with claims to lawful permanent resident status); MING HSU CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA 5 (2020).

195. MOTOMURA, *supra* note 22, at 8-9.

to unauthorized migrants. His analysis draws support from *Plyler v. Doe*, where the Supreme Court recognized both how immigration status can change and how denial of access to education could have wide-ranging repercussions for society at large.[196] In *Plyler*, the Court's rationale for striking down a Texas law that denied undocumented students access to public education had to do with its view that "[b]y denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."[197] The Court further observed that some of the students would likely become citizens in the future; immigration status at one point does not determine future status.[198]

The Court's decision to imagine what the U.S. political community would look like in the future if undocumented children were denied education reflected a polity-centric perspective; the Court viewed denial of education not just in terms of its potential to incentivize undocumented people to leave Texas, but also as an engine of subordination within the political community. This analysis extends to front-end enforcement choices.[199] The question is not only whether people who are territorially present should be able to access institutions like public education, but also on what terms.

Stops, surveillance, and demands to justify one's presence can systemically alienate people from integration into the polity, even in the absence of any further enforcement consequences. In some cases, surveillance excludes by treating a group of people as suspected criminals; in other cases, the logic of exclusion is justified by stereotypes about immigration status and criminality. In all cases, whenever surveillance is based on stereotypes about the type of person who belongs, we diminish the nature of a political community by restricting access to space on the basis of overbroad visual proxies.

This Part now turns to how elevating interests in integration could alter constitutional doctrine with respect to antidiscrimination law and the Fourth Amendment.

B. Antidiscrimination Doctrine

In evaluating the relationship between substantive antidiscrimination law and immigration enforcement, courts should more fully assess how enforcement

196. 457 U.S. 202 (1982).

197. *Id.* at 223.

198. *Id.* at 230.

199. As Professor Ming Hsu Chen writes, "[e]nforcement does not operate neutrally among groups but rather disfavors already mistrusted groups." CHEN, *supra* note 194, at 37.

mechanisms themselves operate in tension with protected interests. In the context of admissions policy at the border, one criticism of equal-protection doctrine in the immigration context is that courts give too much deference to racially-biased immigration decisions.[200] In *Trump v. Hawaii*, a divided Supreme Court considered whether a "travel ban" targeting predominantly Muslim countries violated the Establishment Clause. The dissent argued that President Trump's anti-Muslim statements were important in establishing that the ban was motivated "by hostility and animus toward the Muslim faith."[201] The majority, by contrast, viewed the President's anti-Muslim statements as being of limited significance when it came to evaluating decisions about the "admission and exclusion of foreign nationals."[202] Citing the plenary power doctrine, the majority held that when it comes to a "fundamental sovereign attribute exercised by the Government's political departments," courts have a deeply circumscribed role in evaluating federal decisions.[203]

Whatever the merits of plenary power principles in the context of the travel-ban litigation,[204] they have no application to local laws enacted with the stated rationale of targeting unauthorized immigration. When considering equal-protection claims, courts should not assume that laws are justified by a legitimate local interest in preventing undocumented immigration. In *Hazleton*, the district court assumed that the locality had an interest in regulating unauthorized immigrants, stating "for our analysis on the issue of equal protection, it is sufficient for us to find that the City identified serious crimes committed by illegal aliens as a problem."[205] The court made this assumption despite its recognition that the plaintiffs disputed the existence of any connection between illegal immigration and crime, and that they had in fact offered evidence that the "crime rate had actually decreased during the years when increasing numbers of immigrants moved to the City."[206]

By accepting the locality's unsupported claims that the Hazleton ordinance was directed towards "illegal immigrants," the court implicitly gave credence to the assumption that Latinos who moved into the locality were "illegal aliens"

200. Chin, *supra* note 5, at 7 ("Under domestic law, of course, racial classifications are now suspect; indeed, racial discrimination is more likely to be illegal than discrimination on any other basis. The message from these cases [in the immigration-policing context], . . . then, is that where the status of immigrants is concerned, almost anything goes.").

201. Trump v. Hawaii, 138 S. Ct. 2392, 2435 (2018) (Sotomayor, J., dissenting).

202. *Id.* at 2418 (majority opinion).

203. *Id.* (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

204. For criticisms of the doctrinal approach, see, for example, SHOBA WADIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 2-28 (2019).

205. *Lozano I*, 496 F. Supp. 2d at 542 n.69.

206. *Id.*

who caused crime and other problems. Rather than assume localities act within their police power to curb unauthorized immigration, courts should scrutinize whether lawmakers had a basis for using the police power. A concurring opinion in *Farmers Branch* took this approach, criticizing the majority for treating the ordinance "as a mere housing regulation and . . . ignoring its purpose and effect: the exclusion of Latinos from the city of Farmers Branch. The record leaves no doubt of this."[207] The concurrence questioned "whether this ordinance qualifies to be called an exercise of police power, because it cannot be said 'to promote the safety, peace, public health, convenience and good order of its people.'"[208] Similarly, in *Garrett v. City of Escondido*, a federal court found that there was no rational basis for an anti-immigrant "harboring" ordinance, given that the unrefuted evidence showed that "no increase in criminal activity has occurred, nor that illegal aliens are or should be tied to any alleged criminal activity in the City."[209]

In considering equal-protection claims for nuisance laws, courts should also recognize their impact along the lines of race and family status. Mixed-immigration-status families—where some household members have U.S. citizenship or lawful immigration status and others do not—are not an anomaly; they are a common type of household in the United States.[210] Any nuisance law that prevents families from living together raises serious constitutional concerns. In a 1977 decision, *Moore v. City of East Cleveland*, the Supreme Court struck down a zoning ordinance that barred a grandmother from living with her grandson as a violation of the grandmother's substantive due-process rights.[211] The plurality commented that the law "has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[212] Just as the ordinance in *Moore* intruded on "freedom of personal choice in family" life by barring nonnuclear families from living together, ordinances that bar families from living together based on immigration status operate in much the same way.

Laws that regulate household composition based on immigration status cut against core aspects of intimate association. When courts ignore mixed-status

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207. Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 539 (5th Cir. 2013) (Reavley, J., concurring).

208. *Id.* (quoting City of Birmingham v. Monk, 185 F.2d 859, 861-62 (5th Cir. 1950)).

209. 465 F. Supp. 2d 1043, 1053 (S.D. Cal. 2006).

210. Taylor et al., *supra* note 17, at 6 ("Overall, at least 9 million people are in 'mixed-status' families that include at least one unauthorized adult and at least one U.S.-born child.").

211. 431 U.S. 494, 495-97, 506 (1977) (plurality opinion); *see also* Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 306-08 (2020) (discussing *Moore*).

212. *Moore*, 431 U.S. at 499 (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974)).

families, they assume that enforcement unfolds in a silo. This approach both reflects and reinforces long-held stereotypes that undocumented residents are single men with no ties to the United States.[213]

Taking a polity-centric approach to immigration enforcement helps illuminate how local law enforcement can foreclose the process of transition. Immigration law contemplates the possibility that those who lack immigration status will be able to obtain it in the future based on the presence of family ties.[214] Local laws that bar households from living together are in tension with an immigration architecture that encourages integration through the formation of family ties.

C. Fourth Amendment Doctrine

Many of the central conceptual problems that occupy domestic-policing scholars also apply to policing done in stated service of immigration control. When courts view immigration policing through the lens of deportation, they adopt too limited a framework to recognize these parallels. This Section preliminarily addresses potential ways to close this gap.

One concern is pretext and racial profiling. Police officers cite common conduct—such as low-level traffic violations—as a pretextual basis for stopping racial minorities. The problem of pretext is common to both immigration and domestic criminal policing. But immigration policing also raises a different problem. Immigration is a legal status—it is not about anyone's conduct at a given time. Police who make arrests for suspected immigration violations must necessarily resort to underlying group-based stereotypes of who belongs in a particular place. Courts should recognize this tension. In the context of immigration stops, courts should no longer permit race to play any role in justifying government seizures. It is not defensible to rely on racial constructs in front-end immigration-enforcement decisions if the political community does not define membership according to race. It is inconsistent with the values of a polity that rejects caste-based discrimination.

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213. For a discussion of how unauthorized migrants have been stereotyped by lawmakers as transient, single, male workers, see Eisha Jain, *Immigration Enforcement and Harboring Doctrine*, 24 GEO. IMMIGR. L.J. 147, 157-58 (2010). For a discussion of housing discrimination against single men, who have been stereotyped as a threat to health and safety, see Noah M. Kazis, *Fair Housing for a Non-Sexist City*, 134 HARV. L. REV. 1683, 1721-24 (2021).

214. As a statutory matter, family ties in the United States are crucial to obtaining "cancellation of removal," which permits qualifying noncitizens to cancel the removal proceeding and adjust their status to that of a lawful permanent resident. *See* 8 U.S.C. § 1229b (2018). Those eligible for cancellation of removal must show presence in the United States for over ten years, good moral character, no disqualifying criminal convictions, and that removal would result in "exceptional and extremely unusual hardship" to a U.S. citizen or lawful permanent resident "spouse, parent, or child." *Id.* § 1229b(b)(1).

Second, in differentiating "stops" from "consensual encounters," courts should consider how civil-enforcement mechanisms magnify the coercive potential of police-resident encounters. If an encounter is "consensual," then it triggers no Fourth Amendment scrutiny; if it is "coercive," it does. In considering whether police encounters rise to the level of being coercive, courts have examined a totality of circumstances, such as a show of force on the part of a police officer or a display of weapons that could lead to coercion.[215] But in some cases, coercion arises not from any overt evidence of intimidation, but rather from the stopped individual's awareness that the police officer wears multiple hats. Police officers who have the systemic ability to trigger deportation or eviction without ever making an arrest wield more power relative to residents than police who do not have similar formal civil regulatory responsibilities.[216] That, in turn, may affect whether any given encounter is "consensual."

It is also important to recognize how non-criminal law-enforcement responsibilities affect police incentives and the efficacy of institutional constraints on police behavior. In *Terry*, the Supreme Court viewed an individual police stop as the product of an individual police officer's investigative process; the police officer observes suspicious behavior and, based on the officer's law-enforcement expertise, determines whether to engage in a stop based on a legal standard of less than probable cause.[217] As Professor Tracy L. Meares has argued, however, *Terry*'s underlying assumption—that police stops are driven by individual officers observing suspicious activity—does not hold if police stop decisions are the result of top-down directives.[218] The Court's constitutional framework in *Terry* is based on the assumption that a stop is experienced as "a one-off investigative incident," but the empirical literature demonstrates that "many of those who are stopped—the majority of them young men of color—do not experience the stops as one-off incidents."[219] This insight—that any given police encounter may not reflect an officer's individual investigative judgment but instead reflects top-down institutional incentives—extends to police departments that engage in programmatic stops for reasons relating to immigration control. When police officers undertake systemic immigration-investigative responsibilities, there is a greater likelihood that ground-level policing practices will reflect commitments

215. United States v. Mendenhall, 446 U.S. 544, 554-55 (1980).

216. In addition, arrests themselves trigger a host of consequences outside the criminal justice system. *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015).

217. Terry v. Ohio, 392 U.S. 1, 30-31 (1968).

218. Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 159 (2015).

219. *Id.*

and incentives that deviate from the paradigm of individual officers relying on their own investigative judgment.

In addition, structural constraints on police power have only a limited impact if the policing activity is not geared toward criminal-law enforcement. The Fourth Amendment provides only a constitutional floor; other institutional constraints curb police behavior. For instance, the process of criminal prosecution interposes a series of constraints between an officer's decision to arrest and a criminal conviction. An arrest is not tantamount to a conviction; prosecutors routinely decide not to pursue arrests. Prosecutorial discretion can shape policing behavior if police officers view stops as the first step on a path to arrest and, ultimately, to conviction. But if the goal is merely to discourage residents from living in certain places, as seen in "anti-illegal immigrant" nuisance ordinances, then there is little reason to think criminal prosecutors would offer a meaningful check on street policing practices. In some cases, police officers may engage in street stops because they want to try and turn up evidence of crime for a subsequent criminal prosecution. But in other cases, civil ends such as eviction or the threat of eviction may themselves be the goal. Given that these ends can be accomplished without ever initiating a criminal arrest, the structural checks offered by prosecutors and the criminal legal process alone will not offer a meaningful constraint on front-end policing decisions.

CONCLUSION

This Essay has sought to engage with the question of how we should view the goals of immigration enforcement in an ever-changing, multiracial, multilingual polity. Starting with the era of Chinese Exclusion, courts and lawmakers narrowed the terms of the debate by treating immigration status as though it is a binary between "legal" and "illegal," by assuming that immigration status could be ascertained through racial constructs, and by reducing the significance of front-end immigration enforcement to nothing more than a question of ascertaining who remains and who is forced to leave. This vocabulary, with its focus on seemingly binary statuses and deportation, bears little relationship to the actual demographics of the U.S. polity today, which has the largest immigrant population in the world and a constitutional membership structure that grants birthright citizenship. If immigration policies are meant to be responsive to the interests of the membership community, then they cannot be anchored to racial constructs of who is perceived to belong. Nor can immigration enforcement policies assume that immigration status at one particular time precludes full membership in the future. By considering how enforcement choices relate to the ongoing construction of the polity, we can imagine an immigration law that

privileges integration and inclusion as ongoing objectives of the law, as opposed to one that centers on deportation.