"Within Its Jurisdiction": Moving Boundaries, People, and the Law of Migration[a]

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The miseries of migration are brought "home" daily through painful graphics of individuals moving, and sometimes dying, in a search for better lives. A few numbers provide context for the families that the media shows in transit and in long-term detention camps[2] and for the fatalities documented by the International Organization of Migration's "missing migrant project."[3] In 2015, 244 million people—some 3.3 percent of the world's population—were migrants, living outside their countries of origin.[4] In the United States, an estimated 11 million individuals were resident without documents authorizing them to remain in the country.[5]

The sense that migration systems are deeply flawed is shared around the world and across the political spectrum, albeit with very different views about how to respond. In this brief essay focused on the United States, I map the transformation in the twentieth century of human movement into a crime and explore the relevance of U.S. constitutional commitments to this country's law of the border.[6] For the title, I have borrowed the phrase "within its jurisdiction" from the Constitution's Fourteenth Amendment to invite reflection not only on the meaning of its promise that no state shall "deny to any person within its jurisdiction the equal protection of the laws" but also on the role that territory plays in thinking through this country's assertions of power over and its responsibilities toward migrants.

I begin by sketching how unnatural borders are, in the sense that they are artifacts of law rather than of land. Indeed, law makes relevant different physical boundaries, as the legal import of border crossing changes. For example, entering the United States without authorization was not a federal crime until 1929, and the federal government prosecuted relatively few individuals until the 1990s.[7]

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Moreover, in the early 1940s, the U.S. Supreme Court inveighed against a Pennsylvania statute mandating the public registration of "aliens" as an anathema to the country's commitment to liberty. Today reporting requirements—imposed on employers as well as aliens—have become commonplace. The increase in the criminalization of migration is part of a broader array of techniques to stigmatize migrants.

The movement of people across territories provides one template for border analyses. But borders are constructed and transversed within law itself, and a second border site that I explore here is the permeability of legal categories. Criminal law was once thought to be discrete from immigration law; today a set of practices are aptly labeled "crim-imm," as migrants gain the valence of criminals ("illegals") and criminal infractions become the trigger for deportation.[8] Likewise, the boundary between the rights of citizens and of aliens narrows; the normalization of oversight and stigmatization of aliens makes more legally plausible forms of control over citizens.

Yet a third border that some are eager to maintain is a line between U.S. constitutional interpretation and "foreign law." Recent efforts to demonize the use of foreign law have occurred in tandem with anti-immigrant initiatives. But just as this country has its roots in and derives ongoing vitality from migrants, so too does U.S. law draw from and domesticate foreign sources. The ports of entry for non-U.S. law in this federation include all the branches of both the state and federal systems.

I close by sketching the profound liberalization of a fourth border, which is not often the subject of discussion: the unfettered movement of objects through the mail. Letters and packages once took circuitous routes and had to be paid for on delivery. But in 1874, 21 countries created what became the Universal Postal Union (UPU)—and thereby launched the second oldest international organization of governments in the world. Through modifying what were then understood to be the prerogatives of sovereignty, the founders of the UPU sought to forge a "single unit for the exchange of postal correspondence, standardized and simplified postal rates and procedures." [9]

This effort reflected the interdependent utilities that mail can have in transforming economies and interpersonal relationships. Although the mail is not often seen to be a site of politics, the UPU and national delivery systems created egalitarian and subsidized opportunities for generally uncensored interactions. The liberal core of postal exchanges is reflected in contemporary efforts by some countries to block open internet access.

In short, depending on where one trains one's eye, it is apparent that some borders are being erased while others are being put into place. My purpose in linking these domains is not to equate them but

to clarify the role that law and political imagination play in border construction. Below, I show how reliant on border crossings we are, detail the harms of the criminalization of human movement, and argue the uselessness of using any single nation-state as the unit of analysis when thinking about the migration of people, law, or objects.

I. Disentangling Territory, People, Law, and Borders

Land is the obvious starting place, for it seems to provide a natural boundary. One might assume that U.S. power—its jurisdiction—would be contiguous with the physical territory, and that persons (and law) inside or outside such territorial confines are either "in" or "out" of the United States.

Indeed, one might read the U.S. Constitution to direct that result. The Fourteenth Amendment requires that states shall not "deprive any person of life, liberty, or property without due process of law," nor "deny to any person within its jurisdiction the equal protection of the laws."[10] The Fourteenth Amendment also explains how citizenship attaches: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens . . . ."[11]

A pause to parse some of the words is in order because the meaning of the words "person" and "persons," as well as of the phrases "within its jurisdiction" and "subject to the jurisdiction" turn out to be far more variegated than a first reading might suggest. The decision to use the potentially capacious words "person(s)" and "individuals" when mandating that a state not discriminate "within its jurisdiction" is an important touchstone for protection of all human beings. Yet the text does not answer whether and what distinctions between persons and citizens are constitutionally permissible.

An example is that members of Indian tribes—born on U.S. soil—did not obtain recognition by Congress as U.S. citizens until 1924.[12] One explanation of why tribal members were not understood to have birthright citizenship is that citizenship was seen to be an exclusive relationship, making membership in both an Indian tribal polity and the United States implausible at the time.[13] In contrast, today the United States and many other countries make possible dual citizenship under specified conditions.[14]

Other examples of the disjuncture between land, persons, and legal authority range from the "extraterritorial" application of U.S. law[15] to the control imposed by U.S. outposts far from the country's shore on individuals seeking to come to the United States. For more than a century, the U.S. has deployed both public and private employees to police entry to the country through authorizing preliminary screening at places

around the world. By the 1950s, such a "preinspection" became available at several offshore airports. Moreover, federal law permits border officials to search vessels within 100 miles of our shores.[16]

In addition to keeping people *out* from afar, the federal government has the power to forcibly bring them *in*. The U.S. Supreme Court has held that courts may, constitutionally, try people whom our government has kidnapped and brought to the country because they are suspected of crimes.[17] Once in the United States, such criminal defendants have due process rights that did not, when abroad, protect them from federal government action.

For individuals who have negotiated the preliminary approvals and have entered the United States voluntarily and lawfully, constitutional law does provide a buffer. Individuals are not supposed to be deported without some form of "due process" to ensure that a particular person is legally deportable.[18] In contrast, the government can admit an individual not entitled to entry and then legally treat that person as if outside and, hence, without due process rights. One example comes from the Cuban "Marielitos," named for the port from which a group of Cubans departed by boat in the 1980s. The courts held that the United States could permit individuals escaping Cuba to enter but deem them not "within the jurisdiction" for purposes of the Fourteenth Amendment.[19] Thus, crossing the border is an important act of law production but not an invariable one.[20]

Further, being "inside" the United States does not insulate individuals from oversight by border police. Federal law authorizes the Customs and Border Protection (CBP) to apprehend people up to 100 miles inland and, if believing they have not entered legally, to impose "expedited removal" (an eerie term for deportation) unless these individuals can demonstrate that they have already been in the United States continually for two weeks.[21] The map reproduced in Figure 1 and made by the American Civil Liberties Union in 2007 detailed those additional lines; about two-thirds of the population in the United States lived then within 100 miles of land and coastal borders, making them potential subjects of federal searches to verify their status.[22]

How might one think about the people crossing borders? Should they be seen as individuals or families; women, men, and children; searchers for safety; or threats to security?[23] A host of terms—*migrant*, *immigrant*, *refugee*, *asylum seeker*, *foreigner*, *alien*, *denizen*, *guest-worker*, *undocumented*, *irregular*, *unlawful*, and *illegal*—underscore how language and politics shape the meanings of border-crossing. Law does a good deal of work as well. In the United States, migration status can affect whether a person can get a job, a driver's

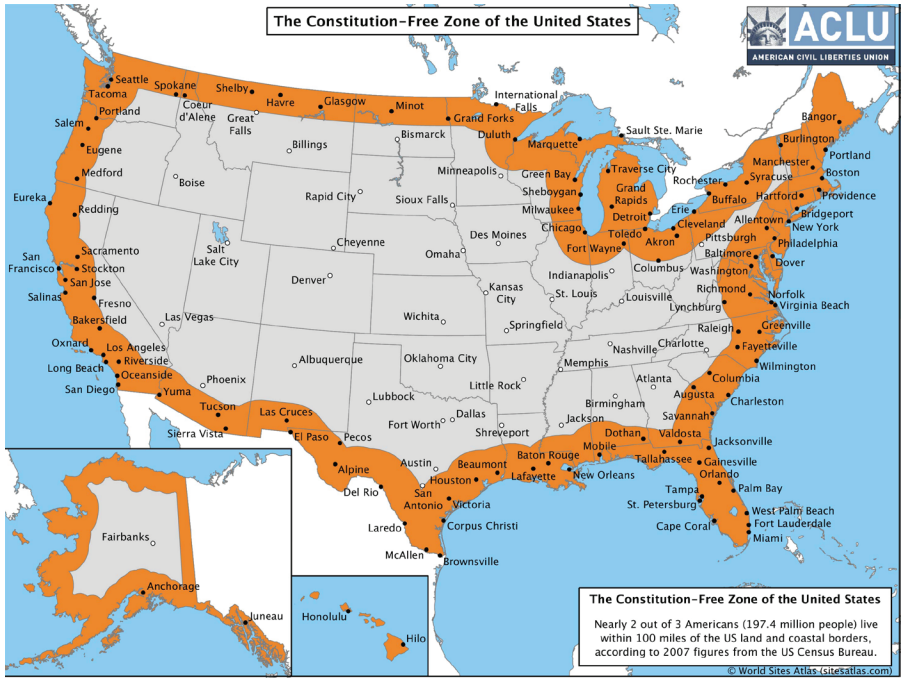

FIGURE 1. Provided courtesy of the ACLU as of 2007. See https://www.aclu.org/know-your-rights-governments-100-mile-border-zone-map

license, government benefits, and education grants, and in some localities, rent an apartment.[24]

Some of these decisions are made at the national level, and others depend on state and municipal laws. Migrants thus bump into a myriad of micro-internal boundaries across the country, as their experiences—and rights—can vary depending on where they live. New Haven, Connecticut, for example, is a "Sanctuary City," offering all residents (regardless of citizenship status) identification cards to welcome them as "active participants" in the community.[25] In contrast, a sheriff in Phoenix, Arizona was, in 2016, held in contempt by a federal court because his department had continued to harass individuals perceived to be migrants.[26]

Boundary blurring also takes place between the "citizen," often assumed to be insulated from the challenges faced by the "alien" (a category in U.S. law), and migrants. Yet the citizen/alien line turns out to make less of a difference than some citizens may think (or want). The criminal justice system provides one template. In the United States, as of 2016, more than 2 million people were incarcerated, and another 5 million were under supervision on parole or probation. The many citizens in this group resemble migrants in that they too may be subjected

to stops, searches, and seizures, cut off from government services or housing, and disenfranchised. Moreover, the revelations by Edward Snowden make vivid that all of us—citizen and alien alike—are likely under government surveillance. As government oversight of one group—prisoners or migrants—gains traction, it makes it easier to justify government control and stigmatization of others.

Thus far, I have focused on the government as the source of border construction. I do not want to neglect the agency of the people who move. As of 2015, about 41 million people (of about 316 million U.S. residents) were "foreign born."[27] Some 11 million (of the 41) were estimated to be here without the requisite documents, and 9 million lived in "mixed-status" families in which some members lacked legal authority to be in the country.[28]

Thus, just as the government moves its borders through the construction of off-site consular offices, inspection stations, interior checkpoints, kidnappings, and access to licenses, jobs, and housing, so do people reshape social and political cultures as they cross borders. One can see these changes, whether in upstate New York or Vermont close to the Canadian border and replete with French signage, or in Tex/Mex as the southern border blurs, or in downtown Minneapolis where Asian languages have gained currency. Around the country, businesses' automated phone systems inquire as to whether the caller wants directions in English or Spanish, and airlines remind passengers in more than one language about safety measures. Further, predictions about the 2016 election results were framed in terms of how former immigrants who had become citizens would vote.

To summarize this first point, the border, as well as the reach and the application of U.S. law, is made and remade rather than consisting of a natural and stable set of fixtures. A host of choices reside in what lines to draw, what meaning to make of the crossings, and how law should respond. My second point, discussed below, is the relatively recent development of turning the act of movement across borders into a crime.

II. The Criminalization and the Stigmatization of Migration

To map the shifting legal approaches to migration, I provide brief accounts of a few court rulings, issued from the 1920s to 2012, by federal judges addressing government control over migrants. In 1925 in *Flora v. Rustad*, a federal appellate court dismissed a criminal prosecution that had been brought, based on the President's executive order, against a person alleged to have entered without permission. The opinion explained:

> It has never been the policy of the Government to punish criminally aliens who come here in contravention of our immigration laws. Deportation has been the remedy. A reversal . . . ought to be based on a clear legislative declaration, and not on judicial construction of statutes which leave the subject in such uncertainty . . . . [29]

Four years later, in 1929, Congress did provide a "clear legislative declaration" by making willful entry into the United States without permission a violation of federal criminal law.[30] But the number of people prosecuted was, until the 1990s, small.

Further, federal law curbed state efforts to use their own laws to stigmatize aliens, as can be seen from a 1941 U.S. Supreme Court ruling on a challenge to a Pennsylvania statute requiring the registration of aliens, 18 or older, who had not filed a declaration of "intention to become a citizen . . . within three years." [31] Enacted in 1939 and likely aimed at its German population, Pennsylvania required that such individuals pay an annual registration fee and carry identity cards—to be produced upon request to police officers or if seeking to obtain a driver's license.[32] Violators were to be subject to a fine of no more than $100 and incarceration of no more than 60 days.[33]

As a federal judge in 1939 described the system:

> the alien is thus placed under the constant surveillance of the police power of Pennsylvania, not as any other resident might be placed upon the commission of a crime or for the good of the Commonwealth, but simply because he is an alien.[34]

The treatment of "unlawful" migrants was not then in focus; Pennsylvania's goal was to superintend immigrants regardless of how they had come to the country. In the terms of contemporary political science, Pennsylvania was trying to set migrants apart to prevent them from being incorporated into the body politic.[35]

In its 1941 decision of *Hines v. Davidowitz*,[36] the Supreme Court held that Pennsylvania had no power to impose such requirements. By then, Congress had enacted its own registration obligations—that all aliens over the age of 14 be fingerprinted. But unlike Pennsylvania's law, the federal provisions did not require aliens to be card-carrying. Indeed, fingerprints and the registrations were not to be turned over to states without permission of both the Commissioner of Immigration and the Attorney General of the United States.[37]

The Supreme Court rested its 1941 ruling on the constitutional supremacy of federal law, which preempted state law making; because the federal government had occupied the field of migration registration, states were not authorized to organize different systems or impose additional penalties. But Justice Hugo Black, writing for the Court,

went further in discussing what has come to be termed "an anti-stigmatization principle"[38] that, he posited, was constitutive of American identity. He explained that public registration laws for aliens were noxious, for they were:

> at war with the fundamental principles of our free government, in that they would bring about unnecessary and irritating restrictions upon personal liberties of the individual, and would subject aliens to a system of indiscriminate questioning similar to the espionage systems existing in other lands.[39]

But of course, one can't be starry-eyed about the 1940s, U.S. immigration policy, law's licensing of racism, and, hence, the reach of this anti-stigmatization principle. In 1882, Congress had enacted Chinese exclusion legislation, providing that "the coming of Chinese laborers to the United States be . . . suspended" and making it unlawful "for any Chinese laborer to come or, having so come . . . to remain within the United States."[40] Under the Geary Act of 1892, which continued that exclusion through 1902, Chinese laborers in the United States had to carry a "certificate of residence" or produce a "white witness" to attest they had arrived in the United States before the passage of the Act.[41] Turning to the Southern border, as Douglas Massey recounts, in the late 1920s the United States began a campaign of mass roundups and deportations of Mexicans.[42] The aspirational language in the 1941 *Hines* decision thus has to be read against the backdrop of the rise of fascism and World War II, prompting the Court to distinguish the United States—the "free government"—from the "espionage systems" with surveillance "in other lands."

Yet soon after the Supreme Court heralded constitutional commitments to "personal liberties," the attack on Pearl Harbor inspired Congress to impose curfews and require internment of anyone of Japanese ancestry. In 1944, Justice Black again wrote for the Court, but in this opinion, *Korematsu v. United States*, the majority infamously upheld a military order excluding what one of the Court's dissenters described as "all persons of Japanese ancestry, both alien and non-alien, from the Pacific Coast,"[43] and making criminal the refusal to report to an internment camp. As Justice Robert Jackson wrote in dissent, Fred Korematsu's offense was "being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived."[44]

Jumping decades forward brings this discussion to the contemporary era when, in 2012, the U.S. Supreme Court considered a challenge to an Arizona law imposing criminal penalties on migrants beyond those of federal law.[45] By then, the focus of immigration debates had shifted from Asia and Europe to Mexico. And by then, federal law looked a lot like

the Pennsylvania rule that the Court had found noxious in the early 1940s. Federal law had come to require "aliens" to carry proof of registration, to permit officials to inquire into individuals' migration status ("papers-please"), and to require employers to ascertain the status of their employees. The failure to do so was a federal misdemeanor,[46] with punishments including imprisonment, probation, or a fine.

Arizona had, however, gone further in its 2010 anti-immigrant enactment. Arizona's criminal penalties for a person who did not have registration documents were more severe; the state did not include the sanctioning option of probation.[47] Arizona had also added new crimes; federal law did not make looking for work by undocumented individuals a crime, but Arizona did. Further, the state provided new grounds for arrests and detention without a warrant—if an officer had "probable cause to believe" that a person was "removable" from the United States.[48] Federal law was less intrusive; as a general matter, such persons were to be given a "Notice to Appear," a document that itself did "not authorize an arrest."[49]

In 2012, the federal government argued the unlawfulness of Arizona's actions and insisted—as it had in *Hines*, 60 years earlier—that federal law protects migrants from harassment by states. Indeed, before the Supreme Court, the federal government characterized the Arizona law as posing a "more significant harassment problem" than had the Pennsylvania law:

> [B]ecause the policy applies to all stops and arrests whenever there is reasonable suspicion that the person is unlawfully present, it threatens to result in the unnecessary detention of lawfully present aliens, a consequence with significant foreign-policy consequences for the National Government.[50]

The five-person majority decision opinion by Justice Kennedy agreed with the U.S. government that much of what Arizona had enacted was precluded. Yet the opinion is not laced with references to America's identity as a government committed to limiting government surveillance of individuals. Even as the majority opinion speaks warmly about immigrants (the "history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here"[51]), the focal point is federal authority. State registration requirements and additional criminal penalties were impermissible not because they breached American conventions on liberty and equality or international agreements about how to treat foreigners but because federal law provided "a full set of standards:" Congress had left no "room for States to regulate."[52]

As the dissenters (Justices Scalia, Thomas, and Alito) complained, the majority both relied on and expanded the authority of the executive branch—rather than Congress—to displace state law.[53] Indeed, for the majority, it was the Executive's prosecutorial powers and control over matters that "touch on foreign relations" that precluded state decision making; some aliens ("a veteran, college student, or someone assisting . . . a criminal investigation") who federal officials had determined "should not be removed" could be swept up by state law officials, interfering with "the discretion of the Federal Government" that Congress had authorized.[54]

Yet *Arizona v. United States* also marks a victory for migrants. The decision limited states' authority to criminalize immigration[55] and therefore constrained the number of crimes for which migrants could be pursued; the number of law enforcement agents who could be dispatched; and the number of times that individuals could lawfully be stopped, questioned, and detained.[56] These constraints stem from the different enforcement capacities of the federal and state governments and the constitutional limitations on how federal authorities can enlist state and local law enforcement.

In 2012, some 66,000 federal employees focused on border control; the total included 46,000 CBP agents and 20,000 employees of Immigration Control and Enforcement (ICE).[57] States and localities employed more than 10 times that number; 765,000 individuals were "sworn" law enforcement officers.[58] Further, in a 1997 decision, *Printz v. United States*, the Court held that Congress cannot "commandeer" state law officials to participate in federal enforcement efforts—in that instance, to police access to guns.[59] When the rule of *Printz* is applied to migration, it limits what is often termed Congress's "plenary power" over immigration by curbing the authority of Congress to enlist state executive officers.

Thus, Congress cannot mandate state law enforcement of migrants, and the Supreme Court's *Arizona* decision prevents states from unilaterally deploying their own police officers to augment immigration enforcement. But the federal government can *ask* states to volunteer their efforts, and a series of federal initiatives have invited states into immigration law enforcement. Under a program in force until 2012,[60] Congress encouraged state and local law enforcement officials to enter into "287(g) agreements" with the federal government so that designated state officers, trained by the ICE, could undertake immigration law enforcement functions.[61] Even as that program was curtailed, another initiative, called "Secure Communities," welcomed local law

enforcement officials to provide the Federal Bureau of Investigation (FBI) with fingerprints of individuals arrested; those data are compared against federal databases to screen for immigration detainers.[62] And when that program drew criticism, the federal government adopted another—Priority Enforcement Program (PEP)—which continued to seek to coordinate with state officials to identify individuals in their criminal justice systems, albeit in a somewhat more limited manner.[63]

How much the current legal regime, mixing the rules of *Arizona* and *Printz*, protects migrants depends on the budget for federal law enforcement, decisions by local leaders, and court interpretations of constitutional obligations. Although the federal government reported in 2012 nationwide "activation" of its data collection system, several localities had either no systematic engagement or had declined to participate in the federal detention efforts,[64] reassured by court rulings affirming the voluntary nature of local involvement.[65] Further, a few states enacted laws (dubbed "TRUST") that directed their employees not to honor ICE detainers unless individuals had been convicted of serious crimes.[66] In addition, some localities were not interested in sustaining the expenses of detention or viewed ICE detainers as not providing the "probable cause" requirements for detention required by the Fourth Amendment.[67] Thus, both rulings by courts and judgments of local officials narrowed the pipeline for deportation in some parts of the United States. In contrast, other localities continued to search for ways to seek out migrants and send them away.

Potential limits on such local level aggression can be found in *Arizona v. United States*, as a thin version of *Hines*'s civil liberties concerns remained, with worries about "unnecessary harassment" and detention. The majority commented that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns," just as a "seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."[68]

I bring attention to the 2012 ruling to illuminate the current parameters of the federal law of migration and demonstrate the acculturation to surveillance that has taken place in the years since the 1941 *Hines* ruling. Even as federal statutory preemption now protects migrants from certain forms of harassment[69] and even as the Court has repeatedly invoked backdrop principles of constitutional law (the Fourth Amendment and the Equal Protection and Due Process Clauses) as restraints on government treatment of migrants, *Arizona v. United States* rests on federal exclusivity rather than a ruling that targeting of aliens violated constitutional principles of equality, dignity, and liberty.

The central point of the opinion was that federal power—and federal prosecutorial discretion—left no room for state criminal immigration law. The next step then is to understand more about the contours of federal immigration law.

III. Crim-Imm

Once again, context is needed to understand the changing practices vis-à-vis migrants. Figure 2 is a chart that tracks prosecutions from 1986, when fewer than 10,000 individuals were charged with immigration crimes, through 2009, when filings surpassed 90,000, to 2015, when criminal indictments numbered more than 70,000.[70]

Not "since Prohibition has a single category of crime been prosecuted in such record numbers by the federal government."[71] And to put the numbers against another baseline—that of all federal prosecutions—in the years between 2008 and 2015, immigration prosecutions have represented more than half of the annual federal criminal caseload.[72] These illegalization efforts not only shift the identity of the migrant but also of federal law and the federal courts, now awash with immigration cases. Sanctions include both incarceration and deportation. Persons convicted of a crime of "moral turpitude" are subjected to lifetime bars on re-entry unless they receive special permission to return.[73]

Detaining migrants—including many people who have not been charged with crimes—is another means of constructing alienage as criminal.[74] As Figure 3 details, in 2005 the total number detained over the course of a year was under 250,000. By 2013, the number was approaching 450,000.[75]

Bed space for people in detention rose from 18,000 in 2003 and 2004[76] to 34,000 in 2011.[77] The number of beds (not the occupancy rate) is set by statute; since 2011, Congress has continued to stipulate that the Department of Homeland Security "shall maintain a level of not less than 34,000 detention beds . . . ."[78]

Convictions and their consequences provide another metric of the conflation of immigration with criminalization. In 2010, almost 28,000 people were convicted of immigration offenses; almost all (97 percent) pled guilty within four months (Figure 4). The process is "streamlined," sometimes with bulk hearings.[79] In 2010, more than 80 percent of migrants—more than 22,000 people—convicted of a crime involving border crossing were then sent to prison, as Figure 5 details. Once incarcerated, the median prison term was 15 months.[80]

In addition to criminal prosecutions and incarceration, federal efforts have been centered on deportation, which, as noted, is now called

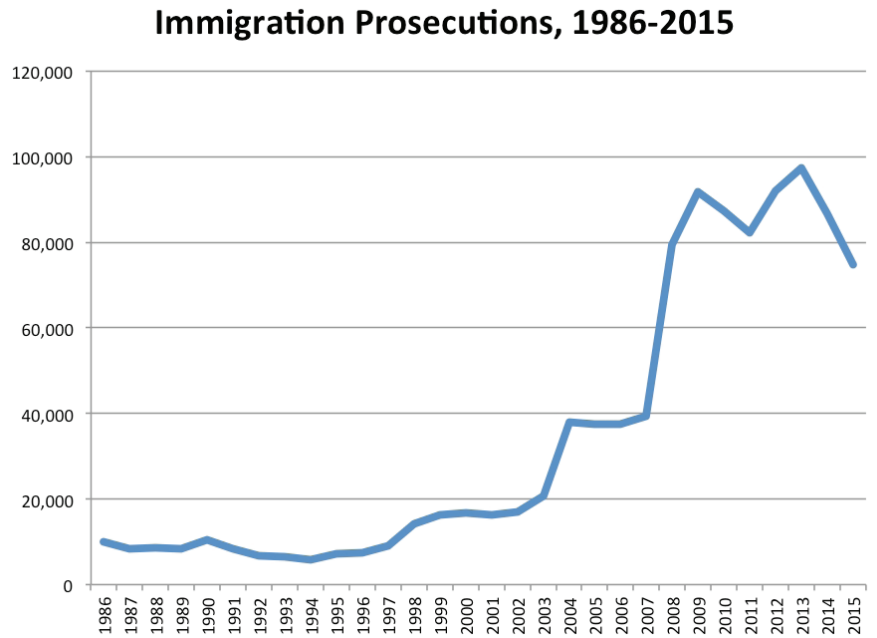

FIGURE 2. This chart updates a graph of immigration prosecutions from 1986 to 2009 published in David A. Sklanksy, "Crime, Immigration, and Ad Hoc Instrumentalism," 15 *New Crim. L. Rev.* 157, 166 fig. 1 (2012); those portions are reproduced with his permission.

"removal." In 2005, some 40,000 persons were removed,[81] mostly based on criminal convictions.[82] In 2014, more than 240,000 were deported without having committed criminal offenses; the total number sent away was about 414,000 people.[83] Figure 6 details the predicates for deportation proceedings in 2015. A 2014 report concluded that a total of 4.5 million people, many of whom had "deep ties in the United States," had been deported since 1996.[84]

In 2015, the focus of deportations turned to women and children fleeing the violence of Honduras and other parts of Central America. Despite litigation and protests, many were held in detention camps in Texas and Pennsylvania.[85] As of the spring of 2016, the federal government was pursuing efforts to remove them from the country.

Whether to think that such removals are efficacious depends on what is sought to be accomplished. Estimates, as noted, are that about 11 million people reside without documentation in the United States; some politicians call for all of them to be sent away. Whether one thinks the extensive use of deportation is moral is a discrete question. Deportation, a "civil" penalty, was described in 1926 by the jurist

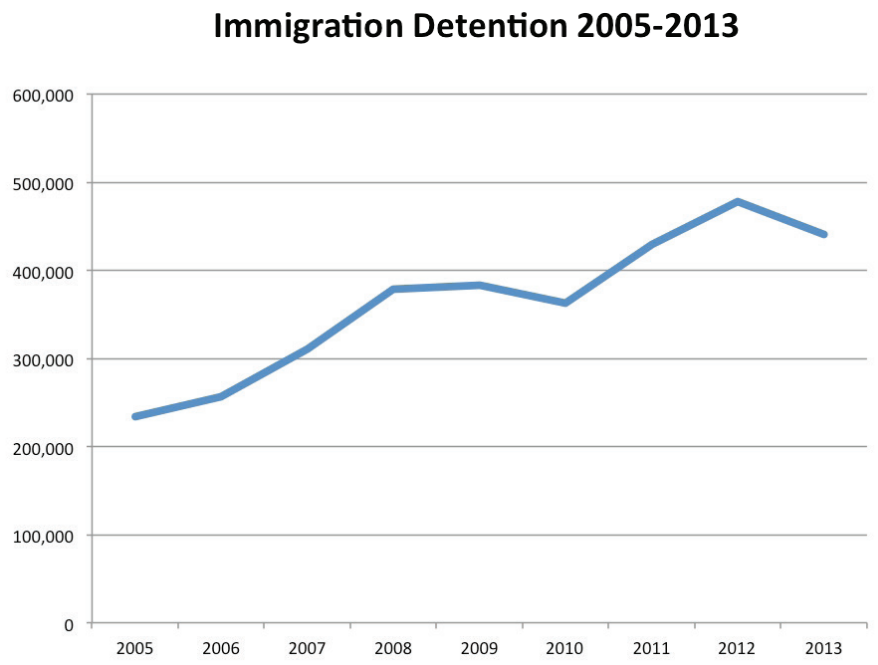

FIGURE 3. This chart combines data from several sources, as detailed in endnote 75.

Learned Hand as a "dreadful punishment, abandoned by the common consent of all civilized peoples."[86]

But Learned Hand wrote before the criminalization and sanctioning system had been put into place, and the current expansive deployment of public energy and funds aimed at unauthorized migration reflects a host of initiatives. The illegality of migration relies not only on layers of crimes,[87] prosecutorial practices, and deportation but also on the increased use of "civil" detention of migrants, the imposition of "administrative" sanctions on employers for violating immigration laws that bring third parties into the government enforcement regime, and on authorized discrimination against aliens in the receipt of benefits and selection for employment.

A change that is key to the negative valence of migration came in the context of the Immigration Reform and Control Act of 1986 (IRCA), known for its amnesty program that resulted in the legal admission of 2.7 million persons to lawful permanent residence, subject to conditions about learning English and seeking citizenship.[88] But IRCA also brought government oversight of employers, obliged by federal law to require documentation of status and risking liability if hiring unauthorized workers.[89]

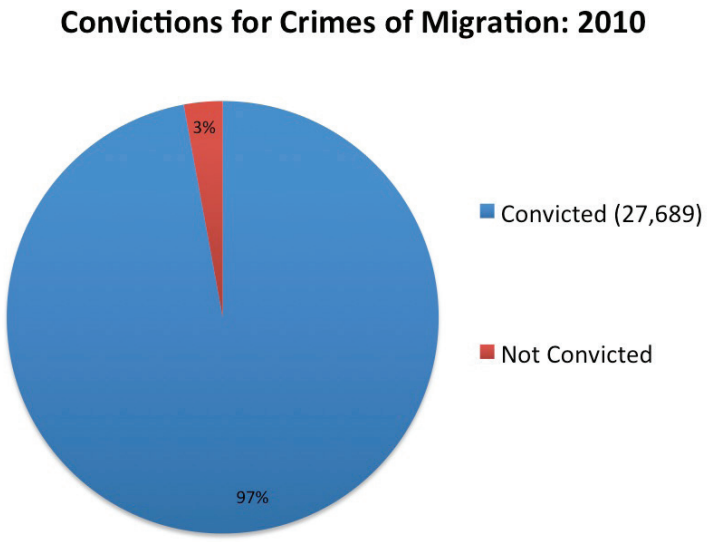

FIGURE 4. This chart uses data originally published in table format in Mark Motivans, Bureau of Justice Statistics, U.S. Dep't of Justice, Immigration in the Federal System 32 tbl. 11 (2012) (revised Oct. 22, 2013).

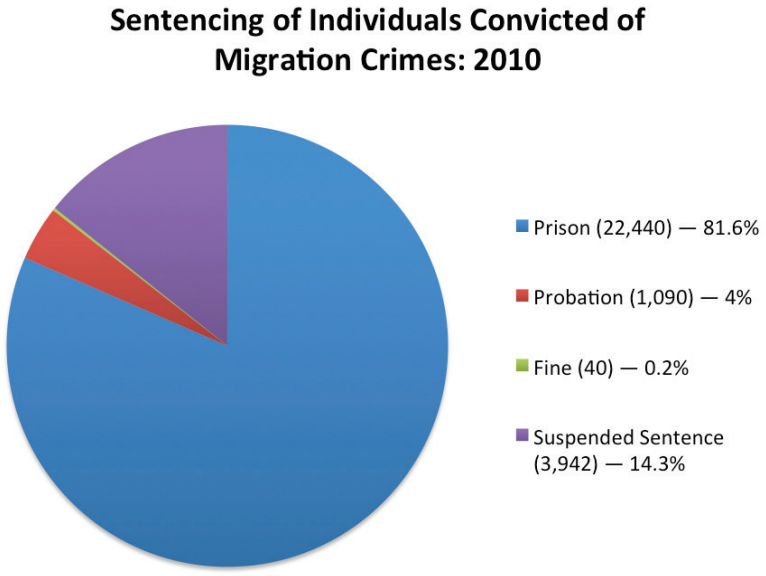

FIGURE 5. This chart uses data originally published in table format in Mark Motivans, Bureau of Justice Statistics, U.S. Dep't of Justice, Immigration in the Federal System 32 tbl. 11 (2012) (Revised Oct. 22, 2013).

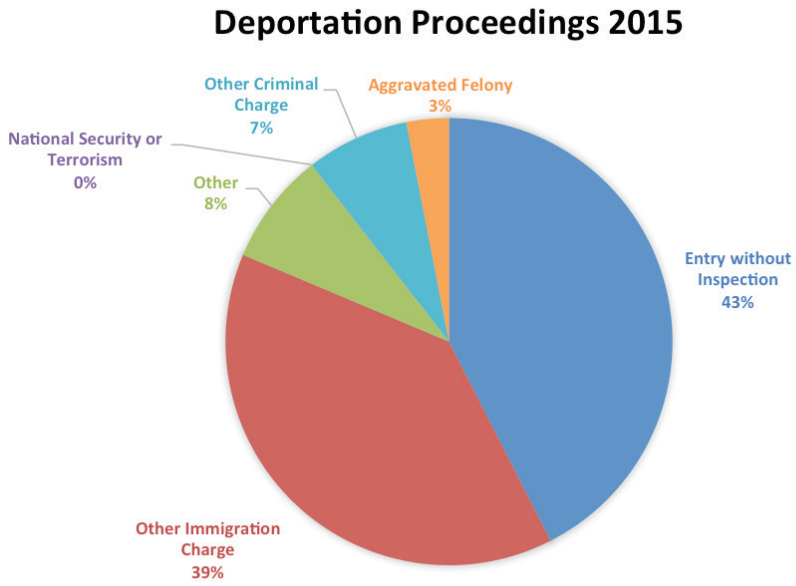

FIGURE 6. This chart reproduces a graph published in TRAC, U.S. Deportation Proceedings in Immigration Courts, http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php

A decade after Congress required employers to verify the employment authorization of prospective employees,[90] Congress expanded enforcement through civil sanctions imposed on the employer and the employee and through imposing criminal penalties on the employer.[91] Recall that in 1941, requiring aliens publicly to display their status cards was seen as harassment. By the end of the century, mandatory disclosures by employers of migrants in their employ cast shadows on both the individuals listed and the businesses using this form of labor. Shaming became commonplace, exemplified by a local newspaper in New Haven, which ran a headline in November 2012 that announced which businesses had been fined for employing undocumented individuals.[92]

Federal and state oversight of employers, coupled with legislative initiatives against immigration, obscured the import of the facts that Douglas Massey and others have documented—"that the volume of undocumented entries had . . . peaked in the late 1970s."[93] The popular press instead embraced the political narrative of "the Latino threat,"[94] fueling border budgets and barriers, such as the "full scale militarization of the busiest border sector in San Diego" through "Operation Gatekeeper."[95] Anti-immigration efforts, including 1996 federal

legislation expanding the grounds for deportation, followed by 9/11 and subsequent terrorist attacks, resulted in the data detailed above, sending more individuals away.

IV. The Constitutional Potential for Shelter

Neither the vocabulary of illegality nor hostility to migrants are inevitable; aliens did not have to become "outlaws."[96] Given that during the twentieth century, federal law came to dominate migration and that economic developments created interest groups seeking to expand the labor pool, federalization could have had a different impact. If, as the 1941 *Hines* Court had proposed, federal law had been read to prohibit the "constant harassment" and surveillance of aliens, a broader swath of state practices could have been displaced through federal law, insistent on the liberty, dignity, and equality of all persons.

Moreover, self-interest could have prompted the government to forge links between migrants and the body politic by acknowledging their contributions as taxpayers and workers and by seeking to weave them into the identity of the state. Instead, federal law itself became a source of intrusiveness by bringing immigration status into focus for employment and benefits and by enlisting state officials and private employers in monitoring compliance with federal oversight of "aliens."

During the twentieth century, more constitutional shelter for migrants seemed to be in the offing. Building on the anti-stigmatization approach in *Hines*, the Supreme Court held that restrictions on aliens purchasing land, getting fishing licenses, and being admitted to the bar were impermissible forms of discrimination.[97] In the 1970s, the Court explained that "[a]liens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate," and therefore that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."[98] In 1971, in a 5-4 ruling, the Court held that states cannot exclude undocumented children from public education. That Equal Protection analysis relied on an amalgam of the importance of education, the role of schools in preparing individuals for citizenship, and the innocence of children.[99]

Yet under current doctrine, both federal and state law *can* classify based on alienage and treat non-citizen residents, whether lawfully present or not, differently. Federal constitutional law thus enables state and federal governments to discriminate (within boundaries) on the basis of alienage. In 1976 in *Mathews v. Diaz*, the Supreme Court upheld a congressional directive that prohibited permanent resident aliens from receiving Medicare benefits until after they had lived in the

United States for five years. The Court predicated its ruling on a mix of what it deemed rationality (that individuals living for longer periods of time in the United States "may reasonably be presumed to have a greater affinity with the United States than those who [have] not"[100]) and that the line-drawing was a "task" over which Congress had authority ("the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government"[101]). More recent rulings have, under this approach, tolerated gender-based, racialized distinctions in federal immigration statutes.[102]

Moreover, even as state laws aimed at non-citizen lawful residents are generally strictly scrutinized in light of equal protection concerns,[103] state limits on who can "participate in the processes of democratic decision making" have passed muster under a lower, rational-basis standard.[104] The lines are, however, confusing. The Supreme Court has held that states cannot prevent lawfully resident non-citizens from becoming lawyers,[105] from obtaining fishing licenses,[106] or from competing for civil service positions.[107] But federal law currently permits states to preclude aliens—including those permanently resident in the United States—from government jobs that involve "discretionary decision making, or execution of policy"[108] based on a judicially created "political function" analysis. States have, the Court explained, "constitutional prerogatives" to assign only citizens to work that is related to "the process of self-government."[109] Under this approach, the Court has upheld state exclusions of lawful resident noncitizens from public school teaching jobs and from serving as police and probation officers.[110] Despite dissenting justices' criticism that the lines drawn between permissible and impermissible forms of state-based discrimination defied logic,[111] constitutional law licenses states to limit opportunities for persons fully compliant with all requirements for entry and residence and therefore to make, as well as to mark, divisions that are in tension with what *Hines* seemed to have promised.

Again, boundaries exist. Many state laws discriminating against lawful resident aliens are subjected to searching scrutiny, and although decisions related to undocumented migrants are subjected to the more forgiving rational basis analysis, some have been found to violate that standard. Illustrative is a ruling in 2014 by a federal appellate court, holding that Arizona's effort to bar "Dreamers"—but not all other undocumented migrant residents—from receiving driver's licenses was an irrational and hence, an unconstitutional, distinction.[112] Moreover, federal law provides a floor, and states that want to do more—such as provide in-state tuition for undocumented migrants in higher

education or permit them to become members of the bar or teachers —may do so.[113]

Yet, as exemplified by *Mathews v. Diaz*, the federal government has a lesser burden when treating aliens differently than citizens. Although the Supreme Court in *Hampton v. Mow Sun Wong* struck a complete ban imposed by the federal Civil Service Commission on aliens holding civil service jobs,[114] the Court assumed that, subject to due process constraints against arbitrariness, Congress or the President could impose alienage restrictions based on important national interests.[115] In contrast, the Court found insufficiently important the Civil Service's assertion of efficiency as a basis for denying aliens "substantial opportunities for employment."[116]

In short, relying on Congress's Article I powers to "establish a uniform Rule of Naturalization,"[117] the Court has generated a line of constitutional case law predicated on federal supremacy rather than rights of personhood. Therefore, and counterintuitively from the perspective of equal protection theory, both the substance of equal protection rights and the kinds of scrutiny vary with the level of government imposing the disability. The result is a patchwork of decisions in which the Court oversees state laws affecting aliens and imposes important limits on state stigmatization of aliens. Yet, while creating a federal floor, the Court has both permitted states to draw employment lines based on alienage and tolerated many federal laws imposing disabilities.[118]

Many commentators have been critical of the results. As Michael Perry explained decades ago, "[i]f it is unjust for a state to treat a person as inferior on the basis of a morally irrelevant trait, there is no conceivable basis for concluding that it is any less unjust for the federal government to do the same."[119] The Court has not, however, framed the question as one of justice. Rather, in these cases as in *Arizona v. United States*, federal authority—not equality or liberty—does the central work, leaving the federal government largely unconstrained in shaping policies making alienage the object of suspicion.

V. Demonizing "Foreign" Law

What I have sketched thus far is a substantial amount of public authority constructing the activity of migration as a harm to be sanctioned. The work of stigmatization of "the foreign" crosses a variety of domains, not always linked together. Hence, I turn briefly to another site of border making, marked by debates over the propriety of referencing and of learning from non-domestic legal systems. A national movement, invoking the slogan "Save our State"—aims to ward off the influence of "foreign law."[120]

Two competing historical legal narratives provide context. A first is that America is a country of migrants and so is our law. Take the phrase "due process of law," found in the Fifth Amendment of 1791 and in the Fourteenth Amendment of 1868. Those words and ideas were borrowed from England and France and made their way through early state constitutions into the national discourse. As the historian Charles Miller documented, the phrase "the law of the land" ("per legem terrae") can be traced to Chapter 39 of the English Magna Carta of 1215.[121] The term "process of law" ("process de ley") stems from a French phrase in an English legal document of the fourteenth century, which helped to produce the words "by due process of law" in the reissued 1354 Magna Carta.[122]

More generally, historians of the U.S. Constitution describe it as an "international document," drafted with foreign sovereigns as one of its sources and as an important audience for the result.[123] In the discussion in the Federalist Papers in the United States Constitution, the various authors refer more than 500 times to foreign law.[124] Moreover and akin to the contemporary account of the South African Constitution, aiming—as its preamble explains—to join the "family of nations,"[125] the drafters of the U.S. Constitution of 1789 wanted the country to gain recognition as a "'civilized state,' worthy of equal respect in the international community."[126]

That aspiration reflected that the founding generation was embedded in European Enlightenment ideologies and, even as they sought to generate a government with sufficient girth to compete with Europe, they shared its political and legal precepts. Using the Constitution to affiliate with the "law of nations," the drafters shaped institutional structures, such as the jurisdiction given to life-tenured federal judges, to help insulate those responsible for enforcing treaties from anti-foreign sentiments held by some sectors of the population.[127] Since the country's inception, lawmakers—from justices on the Supreme Court to the other branches of the federal government and state actors—have repeatedly drawn on and referenced non-U.S. sources in a host of arenas, including when interpreting the U.S. Constitution. [128]

A competing narrative is that the use of foreign law is illicit—that it undermines America's identity and its democracy and in particular the integrity of judicial analyses of constitutional requirements. That approach also has a long pedigree, starting soon after the Revolution. A 1799 New Jersey statute mandated that no decisions rendered in Great Britain after July 4, 1776 "shall be received or read in any court of law or equity" as "law or evidence of the law, or elucidation or explanation thereof."[129] That statute was targeted; New Jersey was Anglophobic, not xenophobic, in its interest in entrenching the

separation from the British Empire. In 1820, New Jersey repealed its formal prohibition, and English common law was and continues to be a source of American practices.

About 150 years later, the formation of the United Nations and the drafting of the Universal Declaration for Human Rights (UDHR) prompted a surge of efforts aiming to ward off foreign influences. In the early 1950s, Senator John Bricker from Ohio sought to amend the Constitution by adding the text: "No treaty or executive agreement shall be made respecting the rights of citizens of the United States protected by this Constitution . . . ."[130] His proposal lost in the Senate by one vote.

Bricker's fear of the foreign was grounded in the concern that, were the UDHR to be part of American law, it would undermine the racial and gender hierarchies then entrenched. And Bricker was *right* to understand that transnational egalitarian movements put systems of discrimination at risk. In 1946, 1947, and 1951, major organizations petitioned—unsuccessfully—the United Nations to protect people they then termed "American Negroes."

The idea that "foreign law" could be a source of liberalization remains. One example in the context of migration is the call, in 2014, by the U.N.-based Global Migration Group and the Human Rights Commissioner for the Council of Europe for the decriminalization of migration and for migrants to have the protection of domestic labor, education, and health rights.[131]

But as the discussion of the 1941 *Hines* decision illustrated, to presume foreign law's liberality is an oversimplification; at times, warding off "the foreign" aims to protect more liberal tenets of U.S. law. Yet negative attitudes toward foreign law are an important part of the contemporary political discourse. Although Bricker did not get to change the text of the Constitution, his "shadow" continues as a constraint; the United States has not ratified the Convention on the Rights of the Child, the Convention on the Law of the Sea, or the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[132]

In the twenty-first century, efforts to prevent judges from using foreign law can be found in proposed federal laws. One example was a 2004 provision labeled "The American Justice for American Citizens," instructing that:

> [n]either the Supreme Court of the United States nor any lower Federal court shall in the purported exercise of judicial power to interpret and apply the Constitution of the United States, employ the constitution, laws, administrative rules, executive orders,

> directives, policies, or judicial decisions of any international organization or foreign state, except for the English constitutional and common law or other sources of law relied upon by the Framers of the Constitution of the United States.[133]

In addition to legislators hostile to non-U.S. law, some members of the U.S. Supreme Court have also raised concerns about invoking non-domestic sources. Justice Scalia repeatedly objected to the practice; a brief summary of his position can be found in his comment in *Roper v. Simmons*, where he dissented from the majority's holding that the death penalty could not be applied to juveniles: "It is beyond comprehension why we should look . . . to a country . . . with . . . a legal, political, and social culture quite different from our own."[134]

As in the treatment of migrants, legal developments in the states play an important and formative role in the anti-foreign law movement. Several states have considered, and some have enacted, provisions seeking to limit the use of foreign law. One example is a 2012 Kansas statute instructing:

> Any court, arbitration, tribunal or administrative agency ruling or decision shall violate the public policy of this state and be void and unenforceable if the court, arbitration, tribunal or administrative agency bases its ruling or decisions in the matter at issue in whole or in part on any foreign law, legal code or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights and privileges granted under the United States and Kansas Constitutions . . . . [135]

Another provision comes by way of a 2014 referendum which amended Alabama's Constitution to provide that a "court, arbitrator, administrative agency, or other adjudicative, arbitrative, or enforcement authority shall not apply or enforce a foreign law if doing so would violate any state law or a right guaranteed by the Constitution of this state or of the United States."[136]

Both the federal proposal and the state enactments raise a host of legal questions—about separation of powers, the First Amendment, and federalism.[137] Moreover, careful readings of these texts reveal the degree to which political theater is at work, as one could understand them to require only what judges are already obliged to do, which is to interpret and apply the law of the land.

But in lieu of exploring these issues, my purpose here is to show the many places in which border-making is at work and the role played by race and ethnicity. Just as in migration debates, issues of welcoming or warding off "foreign law" are wrapped up in questions of how countries form and understand their own identity. The contemporary anti-foreign

movement (which is, ironically, itself transnational) is part of the post-9/11 surge of anti-Muslim rhetoric and actions. Indeed, in some states, laws have expressly banned reference to "Sharia."[138]

One reason that I have provided examples of hostility to foreign law from different venues—Congress, the federal judiciary, and the states—is to avoid conveying the impression that equating any level of the American polity with a particular set of political commitments would be appropriate. Indeed, I can provide a series of examples from all of these venues of the opposite attitudes, illustrated by aspirations to "bring human rights home." The pro-international law efforts include seeking to have cities and states incorporate some of the major international conventions that the U.S. has yet to ratify, such as the CEDAW and the Convention on the Rights of the Child.[139]

Moreover, unlike the anti-immigrant initiatives in Pennsylvania and Arizona, many localities and the professional groups of their leaders are advocates for migrants. The U.S. Conference of Mayors is illustrative; it supported what was called in 2013 the "Dream" Act, aiming to enable children residents to gain citizenship, and it championed legal access for agricultural workers, as well as reexamination of various barriers individuals faced in getting citizenship.[140]

Before turning to another border site, reflection is in order in thinking about the desirability of playing the "law card"—fighting over using non-U.S. law—when inscribing political identity. Given that relatively few people read court decisions, why have politicians been able to rally voters to enact provisions directing judges not to use "foreign law"? How did the idea that judges ought not to cite non-domestic sources gain traction?

In a well-known book about the creation of nation-states, Benedict Anderson explored the formation of national identity. He wrote about maps and museums, wars and the construction of a shared history, as well as census-taking as the building blocks of an "imagined community" that constitutes the state.[141] Proponents of "American Law for American Courts" add another source, by looking to law as central to the construction of identity.

In many respects, the idea of law-as-affiliation ought to be heartening.[142] In lieu of ethnic, religious, or other divides, law can be one bridge that creates identity and ties.[143] Sovereigntists such as proponents of using "American" law in "American" courts, Senator Bricker, and Justice Scalia could all be understood as putting the processes of law-generation on the table as a social and political practice. The acts of pronouncing, adhering to, reiterating, and implementing legal obligations are ways in which to make certain stances constituent of community membership.[144] Moreover, legislators in Kansas, Alabama,

and elsewhere are demonstrating that they can generate popular interest in the link of law to their state's identity.

What is disquieting about objections to foreign law is not the effort to build community through law but the commitment that distinctive legal polities are forged through unilateral law-production walled off from and inhospitable to knowledge of different legal rules.[145] That position is both descriptively wrong and normatively undesirable. Certain precepts now seen to be foundational to the United States ought only to be labeled "made in the USA" if knowing that—like other "American" products—their parts and designs are produced abroad. Yet the sovereigntist efforts also serve as reminders that branding a precept as American is an act of ownership with consequences that cosmopolitans and internationalists may too easily discount.

One can, however, embrace "American law" without being exclusive sovereigntists. Examples come (perhaps again ironically) from constitutions around the world that call for their specific legal orders to "respect," or to "consider," or to be bound by law from abroad. Mandates to judges to look to foreign law are no less sovereigntist than the provisions aiming to preclude the use of foreign law. Both kinds of obligations insist that a country's identity depends in part on how it decides on what its legal system requires. The difference is that inclusive sovereigntists call for their domestic judges to recognize jurists elsewhere as important interpreters, worthy of consideration.[146] To acknowledge such links does not underestimate the importance of identifying with and using law in demos-making. But the demos that is made is self-consciously in a reciprocal relationship with other polities, rather than walled off from them.

VI. Alternative Imaginations: Creating a "Right of Transit" Through a "Single Postal Territory"

To regulate migration need not entail its criminalization. Indeed, to respond to the challenges that migration poses requires understanding the uselessness of unilateralism. The people and problems cannot be walled off. Rather, the interdependence of economies, security, and moralities requires untying the crim-imm equation built up over the last decades. Doing so depends on imagining alternatives, and one way to invite discussions outside our current boxes is to think about the invention of another box—the post box.

Therefore, I bring one more border site into the discussion—the crossing of borders by objects, enabled by what were radical decisions by nineteenth-century sovereigns to break down barriers that limited

commercial and interpersonal exchanges. This is not the place to provide a full account of the invention of the "penny post" creating a flat rate for mail to travel internally within a country, or to detail the shift from indirect to direct routes. Rather, I provide a snapshot of a profoundly different orientation to movement across borders to excavate some of its political underbelly.

In 1873, Germany was party to 17 bilateral agreements relating to the mail. But what was "the mail," and how were items priced? In different countries, units of measurement for the pieces of paper sent varied; some countries used the ounce, others the gramme, and a few the zolloth. In some jurisdictions, mail had to be prepaid, and prices varied not only by destination but also by route and the number of sheets of paper used.

To replace this maze of rules and regulations, some two dozen countries met in Berne, Switzerland in 1874 and agreed to what became the Universal Postal Union (UPU). As the 1874 Treaty put it, the point was to form "a single postal territory for the reciprocal exchange of correspondence" with a guaranteed "right of transit . . . throughout the entire territory of the Union."[147] Doing so required "a standardized and simplified postal rates and procedures;" a "common tariff structure" independent of distance; and a "universal weight scale."[148] One could conceive of the exchange as crafting a form of international currency.

These countries also invented a once-novel institution—a "geopolitical bureaucracy,"[149] dedicated to organizing mail services, arbitrating disputes, getting uniform colors for international stamps, and developing exchange rates for currencies and statistics to provide metrics of utility. As Leonard Woolf put it in 1916, the post had worked a "revolution in the constitution of the society of nations," yet in the decades thereafter, the post enjoyed its own "placid obscurity."[150] But that invisibility ought not obscure the political incentives producing that "revolution," which ranged from economic self-interest to exporting culture, promoting literacy, and enhancing while controlling colonies' capacities to function.

The UPU is transnational, but it is rooted in national exuberance for this service, extolled in Britain as the "most majestic public education" in the world and praised in the United States for seeking to "bind the national together through the personal, educational, literary, and business correspondence of the people."[151] In Europe, the aspiration is that Member states:

> ensure . . . the permanent provision of a postal service of a specified quality at all points in their territory at affordable prices for all users . . . [such that] the universal service is guaranteed not less

> than five working days a week . . . and that it includes as a minimum . . . one delivery to the home . . . .[152]

In 2014, when the UPU celebrated its 140th anniversary, it made the link between its work and migration clear: "As borders disappear, migratory movements swell, and global trade flourishes, physical, financial and electronic postal services remain an essential part of a country's social and economic fabric."[153]

My purposes in adding the mail to migration studies are threefold. First, the oddity of talking about the mail will, I hope, undo a sense of the normalcy about the borders that are now constructed. It is no more "normal" to place a person's act of crossing a border into the category of "crime" or to permit police to stop individuals to ask for identity documents than it is "normal" to put a letter in a red box and assume that state cooperation and subsidies will result in safe transit of that item hundreds or thousands of miles through systems aiming to provide universal services to persons and entities around the world. All the more remarkable is that five or six days a week, a government employee in the United States comes to our doors—not to surveil but to hand us letters and packages.

Second, the "twilight of sovereignty" is celebrated by some cosmopolitans, arguing the unfairness of the nation-state as the unit by which rights and opportunities are allocated. It is the *eclipse of sovereignty* that is my concern. Border surveillance and postal services are both expressions of sovereign capacities, and these institutions developed along with other government services, such as police, courts, prisons, education, and health care. The motivations come from a mix of economic, political, imperial, colonial, humanitarian, and democratic agendas that prompted states to render their borders as functional as points of contact. The invention of national mail services and transnational cooperation underscores the potential that sovereignty (democratic or not) can have to create new service institutions that reshape opportunities at both the individual and aggregate levels. Thus, mail services exemplify an *inclusive* sovereignty that builds on national identity rather than the exclusive sovereigntist positions associated with Senator Bricker and advocates of "Save Our State."

Of course, the movement of individuals and families pose many more complexities than does that of objects, as the flow of people (even when labeled "human capital") entails relocations and dislocations of individuals, families, cultures, and affiliations. But migration, like the mail, is a public good, as human movement across borders (when regulated) can generate utilities akin to other forms of transnational

exchanges. Further, the movement of both people and objects is now shadowed by a pervasive sense of vulnerability and insecurity. Even as many acts of terrorism are home-grown, governments fairly understand that transnational networks amplify the threats. But the relationship of terrorism to borders is complex. Threats of terror serve to justify both closing people off as well as ignoring boundaries to enable the transnational sharing of information. Moreover, domestic internal divisions between police and foreign intelligence agencies are sometimes also elided, as can be legal rules protecting privacy.

In some respects, the structure of today's migration policy is akin to where mail practices were in the 1860s, when various bilateral or multilateral treaties paved the way for some transnational transit but were profoundly incomplete. Postal exchanges are built on the idea of reciprocal and interdependent services, even as countries have widely variant infrastructure capacities. Likewise, an ethic of interdependent reciprocity needs to inform twenty-first century migration policies, which have to take into account both cyclical and permanent movements of persons in receiving and sending countries and create durable and legitimate responses.

In short, and third, mail and migration pose different, albeit parallel, questions about the role of governments, which can be conceptualized through different political prisms. The agendas, utilities, and moralities of universal mail and migration policies could be understood in the negative light of neoliberalism, as outputs of people embedded in capital markets reliant on border-exchange, border-effacement, and border-security for economic growth. One could look at the developments over the decades (in which governments either imposed or relaxed limits on migration of people and on the movement of letters and parcels) as self-serving and criticize the failures to provide protections against exploitation of low-paid labor, to seek to ensure fair treatment of individuals and households, to craft political participatory opportunities, and to require uncensored mail and free expression.

But such a neo-liberal analysis is incomplete, for it fails to acknowledge that the capital and political expansion produced through creating "a single" collaborative unit of countries for the movement of mail has also facilitated new democratic imaginations about individual and collective rights and capabilities, as well as about the state as a provider of diverse goods and services. Putting a letter in a box in one country has no use unless countries join together to organize systems of transport, distribution, and receipt. Building a wall in one country to rebuff others and entering into bi-lateral agreements to permit limited

exchanges likewise have little utility. The problems of migrants are multi-national and so should be the responses.[154]

VII. Mapping Movements of Hope

When writing the majority decision in *Arizona v. United States*, Justice Kennedy stated that "[i]mmigration policy shapes the destiny of the Nation."[155] His comment underscores the centrality of the treatment of "others" (persons and law) to national identity and legal precepts. Yet the choice of the word "destiny" deflects attention from the role played by human agency—the "policy" with which his sentence began. Congress creates immigration policy, and the Court has a central role in making meaning of the constitutional obligations to ensure that persons not be deprived of due process and equality "within its jurisdiction."

Collaboration among sending and receiving countries on the migration of people remains utopian, and the crafting of a universal postal service is at risk of becoming a remnant of a bygone age. Unilateral responses, however, are insufficient and inadequate; failing neighboring states and failing distant states do not make anyone safe. The political utilities of joint migration policies need to be at the front of immigration reform, as does respect for the individuals whose efforts to reach safety should be at the core of the concerns.

Hence, I close with one final image, provided by the artist Bouchra Khalili who has, through video and works on paper, mapped how individuals seek to find their way to better lives. Encountering individuals at ports of trafficking and trade, Khalili asks them to describe and draw their travels—generating personalized geographies and producing alternative maps.[156] Figure 7, reproduced here, is one of eight silkscreen prints in her series *Constellations*. The white on blue background of the original invokes the cartography of the stars, and the sparse dots in this figure mark the many paths taken by one such individual, traveling without authorization and hoping to find a welcome within some jurisdiction.

FIGURE 7. Bouchra Khalili, "The Constellations, Fig. 7," from *The Constellations Series*, 8 silkscreen prints, 2011. Photo by Jean-Baptiste Béranger. Courtesy of the artist and Galerie Polaris, Paris. 2016. (Due to printing limitations, the color reproduced does not capture the original intensity and quality.)

Endnotes

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2. See, e.g., Ben Rawlence, *City of Thorns: Nine Lives in the World's Largest Refugee Camp* (New York: Picador, 2016).

3. See International Organization of Migration, *Migration Fatalities Worldwide*, missingmigrants.iom.int/latest-global-figures (last visited June 1, 2016). By June 1 of 2016, 2,774 individuals were dead and missing, and news reports soon thereafter reported another 300 deaths.

4. United Nations, Department of Economic and Social Affairs, Population Division, *International Migration Report 2015: Highlights (2016)*, available at: http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015_Highlights.pdf [hereinafter I*nternational Migration Report 2015*]. In 2015, what the United Nations terms "global forced displacement" increase; the result was that 65.3 million individuals worldwide were forced from their homes because of violence, human rights violations, persecutions, and conflict. The number of refugees increased by 1.7 million, and the number of internally displaced persons (IDP) grew by 8.6 million to result in about 41 million moving within their countries of origin. See United Nations Refugee Agency, *Global Trends: Forced Displacement in 2015*, http//222.unhcr.org/globaltrends/2015-GlobalTrends.pdf

5. DHS Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012* (2013), available at: https://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf. According to the Pew Research Center, as of 2014, "unauthorized immigrants" numbered 11.3 million, and the population had "remained essentially stable for five years" at about "3.5% of the nation's population," down from the 2007 number of 12.2 million, or 4% of the population. See Jens Manual Krogstad and Jeffrey S. Passel, "5 Facts about Illegal Immigration in the U.S.," *Pew Research Center* (Nov. 19, 2015), http://www.pewresearch.org/fact-tank/2015/11/19/5-facts-about-illegal-immigration-in-the-u-s/

6. This essay builds on my chapter, "Bordering by Law: The Migration of Law, Crimes, Sovereignty, and the Mail," in *Nomos: Immigration and Emigration*. Jack Knight ed. (New York: NYU Press, 2016).

7. As Douglas Massey details, between 1929 and 1937, wholesale deportations of almost a half million Mexicans took place without any of the procedures required by the Constitution. Douglas S. Massey, "The Mexico-U.S. Border in the American Imagination," *Proceedings of the American Philosophical Society* 160, no. 2 (2016): 160–177 [hereinafter Massey, "The Mexican Border"].

8. Concerns about this crim-imm conflation in the last decades in Europe are detailed in *Criminalisation of Migration in Europe: Human Rights Implications* (Commis-

sioner for Human Rights, Issue Paper prepared by Elspeth Guild, 2016), available at https://wcd.coe.int/ViewDoc.jsp?p=&id=1579605&direct=true

9. George A. Codding Jr., *The Universal Postal Union: Coordinator of the International Mails* (New York: NYU Press, 1964), 25.

10. U.S. Const., amend. XIV, § 1 (ratified 1868).

11. Id.

12. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253. That legislation responded to the ruling that Indian tribe members were not U.S. citizens. See *Elk v. Wilkins*, 112 U.S. 94 (1884). See generally Bethany Berger, "Birthright Citizenship on Trial: *Elk v. Wilkins* and *United States v. Wong Kim Ark*," 37 *Cardozo Law Review* 1185 (2016).

13. See generally Peter H. Schuck and Rogers M. Smith, *Citizenship Without Consent*, 72–90 (Yale University Press, 1985). A series of decisions placed Indian tribes in the position of "wards" of the federal government. Tribes were subject to federal law and positioned to be a dependent domestic sovereign; members were assumed to owe their allegiance to their tribe. See Judith Resnik, "Dependent Sovereigns: Indian Tribes, States, and the Federal Courts," *56 University of Chicago Law Review 671*, 690–701 (1989).

14. Thus, various proposals advocate multiple, disaggregated, fragmented, and varying degrees of citizenship. See, e.g., Diego Acosta Arcarazo, "Civic Citizenship Reintroduced? The Long-Range Residence Directive as a Postnational Form of Membership," *European Law Journal* 21 (2015): 200–19; Linda Bosniak, *The Citizen and the Alien: Dilemmas in Contemporary Membership* (Princeton, NJ: Princeton University Press, 2006); T. Alexander Aleinikoff, *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* (Cambridge, MA: Harvard University Press, 2002), 147–50; Peter J. Spiro, "Political Rights and Dual Nationality," in David A. Martin and Kay Hailbronner, eds., *Rights and Duties of Dual Nationals* (The Hague: Kluwer Law International, 2003), 135.

15. See, e.g., *Morrison v. National Australia Bank*, 561 U.S. 247 (2010); Restatement (Third) of Foreign Relations Law of The United States § 402–403 (1987).

16. See 8 C.F.R. § 287.1 (2016). Questions of what rights attach to which persons on what land masses are, of course, not unique to the United States. Canadian law and its development in relationship with the United States of a "Multiple Borders Strategy" that "de-territorialize the border" are analyzed by Efrat Arbel in "Bordering the Constitution, Constituting the Border," Osgoode Hall Law School Research Paper Series No. 55, http://ssrn.com/abstract=2790939 (2016).

17. This rule is known as the "Ker-Frisbie" doctrine, named after a pair of cases rejecting defendants' claims that such a seizure violated their due process rights; see *Ker v. Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952).

18. See *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 101 (1903): "[A]lthough alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States . . . [is an] arbitrary power [which cannot] exist where the principles involved in due process of law are recognized." Procedural due process constrains the process by which decisions of deportation are made; substantive due process concerns emerge around the length of time a person can be held pending deporta-

tion or held if that person has no country to which to return. See *Zadvyas v. Davis*, 533 U.S. 678 (2001).

19. See *Garcia-Mir v. Smith*, 766 F.3d 1478 (11th Cir. 1985).

20. This uncomfortable example of rights-exclusion through a legal fiction has, however, a humanitarian underbelly that paves the way for rescues at sea. In contrast, current European law provides rights to individuals as soon as they succeed in making territorial touchdowns and, hence, creates incentives to keep people off the relevant land masses.

21. Prior to the 1996 introduction of expedited removal, a person found excludable at the border by an INS officer would have had the opportunity to petition for a hearing before an immigration judge, and for further judicial review See 8 U.S.C. § 1225 (1994); 8 U.S.C. § 1252(b) (1994). In contrast, under more recent legislation, a person subjected to expedited removal has no opportunity for judicial review of his or her removal, unless he or she claims asylum or refugee, lawful permanent resident (LPR) or citizen status. See 8 U.S.C. § 1225 (2012); 8 C.F.R. § 235.3 (2016); 8 C.F.R. § 1235.3 (2016). The regulations do provide for review by a supervisory officer. See 8 C.F.R. § 235.3(b)(7) (2016). In 2004, the agency began applying these expedited procedures to all aliens whom DHS encountered within 100 miles of the border and who entered without inspection within 14 days of the encounter. See 69 Fed. Reg. 48, 877–01 (Aug. 11, 2004). An alien subject to expedited removal becomes inadmissible for 5 years. See 8 U.S.C. §1182(a)(9)(A)(i) (2012). See generally Alison Sisken and Ruth Ellen Wasem, Cong. Research Service, RL33109, Immigration Policy on Expedited Removal of Aliens (2005).

22. See *Constitution Free Zone–Map*, ACLU (2007) and available as of May 26, 2016 at http://www.aclu.org/constitution-free-zone-map

23. See generally *Migrations and Mobilities: Citizenship, Borders, and Gender* (eds. Seyla Benhabib and Judith Resnik, 2009). As of 2015, women were slightly less than half of the international migrants. See *International Migration Report 2015*, supra note 44. Twenty-eight million migrants—about 12 percent in 2013—were estimated to be between the ages of 15 and 24. See *Migration and Youth: Challenges and Opportunities* (eds. Patrick Taran and Alison Raphael, Global Migration Group, 2014).

24. Huyen Pham, "When Immigration Borders Move," 61 *Fla L. Rev.* 1115 (2009).

25. City of New Haven, "Community Services Administration, New Haven's Elm City Resident Card: My City, My Card," http://www.cityofnewhaven.com/csa/newhavenresidents/ (available since 2011).

26. See *Ortega Melendres v. Arpaio*, 2016 WL 2783715, No. CV-07-2513-PHX-GMS (D. Ariz. May 13, 2016) (findings of facts and order setting a hearing for May 31, 2016).

27. See *Current Population Survey (CPS)*, U.S. Census Bureau, http://www.census.gov/cps/data/cpstablecreator.html (as of 2015). Statistics are included under the heading "nativity" beneath the "Define Your Table" menu.

28. Pew Hispanic Center, "A Nation of Immigrants: A Portrait of the 40 Million, Including 11 Million Unauthorized," January 29, 2013, 3, www.pewhispanic.org

29. *Flora v. Rustad,* 8 F.2d 335, 337 (8th Cir. 1925). The Passport Act of 1918 had permitted the Executive to regulate entry and exit, and President Wilson relied

upon an interpretation of the federal executive's constitutional authority as Commander in Chief and related war powers to make entry without a passport punishable by criminal sanctions.

30. See Pub. L. No. 70-1018, 45 Stat. 1551, enacted March 4, 1929; the provision made entry a misdemeanor and re-entry a felony.

31. *Davidowitz v. Hines*, 30 F. Supp. 470, 476 (M.D. Pa. 1939), citing 35 Pa. Stat. Ann. §§ 1801 (West, 1939).

32. Pennsylvania also had laws prohibiting "unnaturalized foreign born residents" from fishing in the state or being "employed upon any public work." See *Davidowitz v. Hines*, 30 F. Supp., 474.

33. 312 U.S. at 59–60.

34. See *Davidowitz v. Hines*, 30 F. Supp., 474.

35. See Jennifer L. Hochschild and John H. Mollenkopf, "Modeling Immigrant Political Incorporation," in *Bringing Outsiders In: Transatlantic Perspectives on Immigrant Political Incorporation,* Jennifer L. Hochschild and John H. Mollenkopf, eds. (Ithaca, NY: Cornell University Press, 2009), 15–30.

36. 312 U.S. 52 (1941).

37. All registration and fingerprint records were "secret and confidential," available only to "such persons or agencies as may be designated by the Commissioner, with the approval of the Attorney General." See Alien Registration Act, § 34, Pub. L. No. 670, 54 Stat. 670, 674 (1940) (codified at 18 U.S.C. § 2385). The statute provided that aliens were to go to the Post Office (or other places identified by the Attorney General); the postmaster was under an obligation to "designate appropriate space" for registration. See Alien Registration Act, § 33, Pub. L. No. 670, 54 Stat. 670, 674 (1940).

38. See Lucas Guttentag, "The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment and the Civil Rights Act of 1870," *Duke Journal of Constitutional Law and Public Policy* 8 (2013): 1.

39. *Hines v. Davidowitz*, 312 U.S. 52, 71 (1941).

40. Chinese Exclusion Act, Act of May 6, 1882, ch. 126, 22 Stat. 56 (1882), at §1. See *Chae Ching Ping v. U.S.*, 130 U.S. 581 (1889); Martin Gold, *Forbidden Citizens: Chinese Exclusion and the U.S. Congress* (2012).

41. See Geary Act, Act of May 5, 1892, ch. 60, 27 Stat. 25 (1892), §6. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)(rejecting petitions for habeas corpus and upholding the plenary power of Congress and its enactment of the Geary Act). Justices Brewer, Field, and Fuller dissented; their arguments included that each of the petitioners were "persons" within the meaning of the Fourteenth Amendment and wrongfully deprived of their liberty. Id. at 732–63. See generally Hiroshi Motomura, *Americans in Waiting* (2006).

42. See Douglas Massey, "Pathways to El Norte: Origins, Destinations, and Characteristics of Mexican Migrants to the United States," *International Migration Review* 46 (2012): 3.

43. *Korematsu v. United States*, 323 U.S. 215 (1944); this passage comes from Justice Murphy's dissent at 233.

44. *Korematsu*, 323 U.S. at 242, 243 (Jackson, J., dissenting).

45. See *Arizona v. United States*, 132 S. Ct. 2492 (2012), discussed infra.

46. 8 U.S.C. §§ 1304(e) and 3561.

47. Ariz. Rev. Stat. Ann. §§ 13–1509(A), 13–2928(C), 13–3883(A)(5). See *Arizona v. United States*, 132 S. Ct. at 2501-2503 (2012).

48. *Arizona v. United States*, 132 S. Ct. at 2498 (citing Ariz. Rev. Stat. Ann. § 13-3883(A)(5)).

49. Id., 2505.

50. Brief for the United States, *Arizona v. United States*, 132 S. Ct. 2492 (2012), 2012 WL 939048, at 49.

51. *Arizona v. United States*, 132 S. Ct. at 2510.

52. One provision of Arizona's law survived the challenge to the statute "on its face." Section 2(B) required state officers to make a "reasonable attempt . . . to determine the immigration status" of any person who had been stopped, detained, or arrested for other reasons; further, if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States," an officer could keep that person under arrest until that person's "immigration status" was determined. See *Ariz. Rev. Stat. Ann.* § 11–1051(B) (2012). Moreover, if a person were stopped for a non-immigration reason (not based on "race, color or national origin . . . except to the extent permitted by the United States [and] Arizona Constitution[s]") and if consistent with the "civil rights of all persons and respecting the privileges and immunities of United States citizens," the state could detain that person until obtaining citizenship status information. See *Ariz. Rev. Stat. Ann.* § 11–1051(B), (L) (2012). The Court concluded that, although the statute was not impermissible as written, lower court judges could, on remand, consider whether those challenging the law could prove that the statute's operation imposed "adverse" consequences on "federal law and its objectives." See *Arizona v. United States*, 132 S. Ct., at 2509.

53. *Arizona v. United States*, 132 S. Ct. at 2511-2535.

54. *Arizona v. United States*, 132 S. Ct. at 2506.

55. *Arizona v. United States*, 132 S. Ct. 2492 (2012). Arizona's Support Our Law Enforcement and Safe Neighborhoods Act, known as S.B. [Senate Bill] 1070, had aimed to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States" through a policy of "attrition through enforcement" that created two new state crimes—a new state misdemeanor if aliens failed to "comply with federal alienage registration requirements," and a state misdemeanor for an "unauthorized alien to seek or engage in work in the State." See *Arizona*, 132 S. Ct. at 2497–2498. In addition, the law created two new bases for police supervision and the potential for arrest. Local law enforcement could "arrest without a warrant a person 'the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States,'" and, under Section 2(b), officers could

conduct stops, detain, or arrest "to verify the person's immigration status with the Federal Government." Id.

56. After 2012, lower courts have struck other state criminalization provisions. See, e.g., *United States v. S. Carolina*, 720 F.3d 518 (4th Cir. 2013); *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012).

57. See *Snapshot: A Summary of CBP Facts and Figures*, U.S. Customs and Border Protection (2012), available through wayback machine: https://web.archive.org/web/20121019032452/http://www.cbp.gov/linkhandler/cgov/about/accomplish/cbp_snapshot.ctt/snapshot.pdf; *Overview*, U.S. Immigration and Customs Enforcement, http://www.ice.gov/about/overview/ (last visited July 2016). In 2015, CBP employees numbered almost 60,000 and ICE had more than 20,000 employees. See https://www.cbp.gov/sites/default/files/documents/cbp-snapshot-022615.pdf

58. *Census of State and Local Law Enforcement Agencies*, 2008, U.S. Dep't of Justice, Bureau of Justice Statistics, http://bjs.ojp.usdoj.gov/content/pub/pdf/csllea08.pdf

59. 521 U.S. 898 (1997). See generally Adam B. Cox, "Expressionism in Federalism: A New Defense of the Anti-Commandeering Rule," 33 *Loy. L. A. L. Rev.* 1309 (2000).

60. After the decision in *Arizona v. United States*, the Department of Homeland Security (DHS) modified its 287(g) program and rescinded some 287(g) agreements then in effect in Arizona. See Jeremy Duda, "Homeland Security Revokes 287(g) Agreements in Arizona," June 25, 2012, http://azcapitoltimes.com

61. See 8 U.S.C. § 1357(g) (setting out requirements for 287(g) agreements); *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, Immigration and Customs Enforcement, http://www.ice.gov/news/library/factsheets/287g.htm (last visited Dec. 9, 2012). In the Department of Homeland Security's 2013 budget, the funds for 287(g) programs were reduced to $17 million, on the view that "the Secure Communities screening process is more consistent, efficient, and cost effective." DHS, FY 2013, at 16. That reduction followed criticisms by the DHS's Office of the Inspector General. See *The Performance of 287(g) Agreements*, FY 2011 Update, OIG-11-119 (Sept. 2011).

62. *Secure Communities*, Immigration and Customs Enforcement, http://www.ice.gov/secure_communities/ (click on "Archived Information," then go to the section titled "Frequently Asked Questions") (last accessed June 5, 2016).

63. See Memorandum from Jeh Johnson, Secretary of Homeland Security to Thomas S. Winkowski, Megan Mack, and Phillip A. McNamara (Feb. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf. The Priority Enforcement Program authorized ICE to request notification from state officials when releasing prisoners from detention.

64. Survey research in 237 cities focused on police department immigration policies reported that as of 2005, about half had no local policies on immigration; four percent had policies protecting unauthorized immigrants in non-criminal situations. See Doris Marie Provine, Monica Varsanyi, Paul G. Lewis, and Scott H. Decker, "Growing Tensions between Civil Membership and Enforcement in the Devolution of Immigration Control," in P*unishing Immigrants: Policy, Politics, and Injustice* 42, 51–2 (Charis E. Kubrin, Majorie S. Zatz, and Ramiro Martinez, Jr., eds., 2012). By 2014, several cities (including Philadelphia and Denver) and a few counties in western states had decided to decline to help the federal government with its deportation efforts. See generally Ming H. Chen, "Trust in Immigra-

tion Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities," 91 *Chicago-Kent Law Review* 13 (2016).

65. See *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014); *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015); aff'd, 2015 WL 4385945 (1st Cir. July 17, 2015); *Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305 (D. Or. 2014); Christopher Lasch, "Rendition Resistance," 92 *North Carolina Law Review* 149 (2013).

66. See, e.g., 2013 Cal. Stat. 4650 (codified at Cal. Gov't Code §§ 7282–7282.5 (West Supp. 2014); Conn. Gen. Stat § 54-192h (2014).

67. *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 WL 1414305 (D. Or. 2014); see also *Morales v. Chadborne*, 793 F.3d 208 (1st Cir. 2015), aff'd, 2015 WL 4385945 (1st Cir. July 17, 2015).

68. *Arizona v. United States*, 132 S. Ct. 2509.

69. Lucas Guttentag, "Discrimination, Preemption and Arizona's Immigration Law: A Broader View," 65 *Stanford Law Review Online* 1 (2012); see also Lucas Guttentag, "Immigration, Preemption and the Limits of State Power: Reflections on *Arizona v. United States*," 9 *Stanford Journal of Civil Rights & Civil Liberties* 1 (2013).

70. The data were derived by selecting prosecutions filed per fiscal year in TRAC's federal criminal enforcement database, TRAC, *Federal Criminal Enforcement: Going Deeper*, http://tracfed.syr.edu/index/index.php?layer=cri (click on "Going Deeper," select "fiscal year" and "prosecutions filed," and then click on "submit request"). TRAC obtained its data from the federal government via both informal and formal requests, for example, through the Freedom of Information Act. See TRAC, *Help: Introduction*, http://tracfed.syr.edu/trachelp/index.shtml

71. *Ingrid V. Eagly*, "Prosecuting Immigration," 104 Northwestern University Law Review 1281, 1281 (2010); see also Allegra M. McLeod, "The US Criminal-Immigration Convergence and its Possible Undoing," 49 *Am. Crim. L. Rev.* 105 (2012); Juliet P. Stumpf, "States of Confusion: The Rise of State and Local Power over Immigration," 86 *North Carolina Law Review* 1557 (2007); Stephen H. Legomsky, "The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms," 64 *Washington & Lee Law Review* 469 (2007).

72. According to data available through the TRAC criminal enforcement database, immigration prosecutions in 2008 represented 51% of the federal prosecution caseload. Since 2008, the percentage has remained above 50% and reached 57% in 2014. The data were obtained by searching for all prosecution figures and immigration prosecution figures in the TRAC database, TRAC, *Federal Criminal Enforcement: Going Deeper*, http://tracfed.syr.edu/index/index.php?layer=cri (click on "Going Deeper," select "fiscal year" and "prosecutions filed," and then click on "submit request"). See also Marc R. Rosenblum and Doris Meissner, with Claire Bergeon and Faye Hipsman, *The Deportation Dilemma: Reconciling Tough and Human Enforcement* 4 (Migration Policy Institute, April, 2014).

73. 8 U.S.C. § 1182(a)(2) (2012).

74. My focus is on the United States; parallel concerns have been raised about the growing role of detention in Europe. See Cathryn Costello, "Immigration Detention: The Grounds Beneath Our Feet," 68 *Current Legal Problems* 143 (2015).

75. John F. Simanski, Office of Immigration Statistics, Immigration Enforcement Actions: 2013, at 5 tbl.5 (Sept. 2014), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf. The data presented in Figure 3 combines data published from Simanski, Office of Immigration Statistics; John F. Simanski & Lesley M. Sapp, Office of Immigration Statistics, Immigration Enforcement Actions: 2012, at 5 tbl.5 (Sept. 2013), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012.pdf, with data in TRAC Immigration, *Detention of Criminal Aliens: What Has Congress Bought?* (Feb. 11, 2010), http://trac.syr.edu/immigration/reports/224/

76. Dep't of Homeland Security Office of Inspector General, Detention and Removal of Illegal Aliens 5 tbl.1 (April 2006), https://www.oig.dhs.gov/assets/Mgmt/OIG_06-33_Apr06.pdf

77. Consolidated Appropriations Act of 2012, Pub. L. No. 112–74, 125 Stat. 786, 980.

78. See, e.g., Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 498; Department of Homeland Security Appropriations Act, Pub. L. No. 114–4, 129 Stat. 43 (2015); Consolidated Appropriations Act, 2014 Pub. L. No. 113–76, 128 Stat. 5, Div. F, tit. 2 (2014).

79. See, e.g., Am. Immigration Lawyers Ass'n, *AILA's Take on Operation Streamline* 1 (June 2015), http://www.aila.org/infonet/aila-take-on-operation-streamline ("Individuals processed through Streamline appear before a federal magistrate in mass hearings that may have 40 or up to 80 people appearing and entering pleadings at the same time.")

80. Mark Motivans, Bureau of Justice Statistics, U.S. Dep't of Justice, Immigration in the Federal System 32 tbl. 11 (2012) (revised Oct. 22, 2013).

81. Motivans, Immigration in the Federal System, supra note 80, at 6.

82. David Sklansky, "Crime, Immigration, and Ad Hoc Instrumentalism," 15 *New. Crim. L. Rev.* 157 (2012), at 178 tbl.9, 179 tbl.10 (growth in the impact of criminal removals).

83. Dept. of Homeland Security, *Yearbook of Immigration Statistics: 2014*, at tbl.41 ("Aliens Removed by Criminal Status and Region and Country of Nationality: FYs 2005 to 2014"), https://www.dhs.gov/sites/default/files/publications/table41d_2.xls

84. Rosenblum and Meissner, supra note 72, at 1, 9.

85. Before 2001, families entering without permission were often released rather than detained. After 9/11. the federal government created family detention centers. By 2015, detention of unaccompanied minors was, however, subject to congressional directives calling for placement in the "least restrictive setting" (subject to concerns about danger and risk of flight) and to a 1997 court-based settlement related to terrible conditions for children at detention centers. When families fled Central America in 2015, ICE placed children and parents in detention, and a federal court concluded that ICE's non-release policy violated its obligations under court decrees. In July of 2016, an appellate court agreed that minors (whether arriving accompanied or unaccompanied by adults) were protected by the 1997 settlement but that their parents had no "right to release" under that particular court decree. See *Flores v. Lynch*, 2016 WL 3670046 (July 6, 2016). See also Julia Preston, "Hope and Despair as Families Languish in Texas Immigration Centers," *N.Y. Times*, June 15, 2015, at A1.

86. *United States ex rel Klonis v. Davis*, 13 F.2d 630, 630 (2d Cir. 1926). See generally Daniel Kanstroom, *Aftermath: Deportation Law and the New American Diaspora* (2012).

87. For example, unauthorized entry is one offense; speeding away from an entry point is another. See 8 U.S.C. § 1325(a), 18 U.S.C. § 758 (2012). See generally Sklansky, "Crime, Immigration, and Ad Hoc Instrumentalism," supra note 82.

88. Under IRCA, some 1.1 million people gained legal status through the Seasonal Agricultural Workers (SAWs) program, and another 1.6 million came within a more general legalization program. See Donald Kerwin, *More Than IRCA: US Legalization Programs and the Current Policy Debate* (Migration Policy Institute, Policy Brief, Dec. 2010); Nancy Rytina, *IRCA Legalization Effects: Lawful Permanent Residence and Naturalization through 2001*, Office of Policy and Planning Statistics Division, U.S. Immigration and Naturalization Service (2002).

    The 1986 enactment in the United States was part of a pattern of changing attitudes in other countries, which also moved toward "regularization" and incorporation of migrants into their polities; forms of legalization were made available in Belgium, the Netherlands, France, Spain, and Australia. Nicholas P. De Genova, "Migrant 'Illegality' and Deportability in Everyday Life," 31 *Ann. Rev. Anthropol.* 419, 420 (2002).

89. In 1952, Congress made it unlawful to "harbor" an unlawful "alien"; in 1986, Congress imposed a host of new obligations on employers. See Immigration Reform and Control Act of 1986, § 101, Pub. L. No. 99–603, 100 Stat. 3359, 3360. State laws again provided models for the new federal restrictions. Twelve states had "some kind of employer sanction laws." Hiroshi Motomura, "Immigration Outside the Law," 108 *Colum. L. Rev.* 2037, 2051 n.67 (2008). The Supreme Court had also upheld state employer sanctions. See *De Canas v. Bica*, 424 U.S. 351 (1976).

90. See 8 U.S.C. § 1373(b). See generally David Bacon and Bill Ong Hing, "The Rise and Fall of Employer Sanctions," 38 *Fordham Urban Law Journal* 77 (2010). This provision prevented local governments from withholding "information" from other governments, state or federal. See generally Cristina Rodríguez, "The Significance of the Local in Immigration Regulation," 106 *Michigan Law Review* at 601 (2008).

91. See 8 U.S.C. § 1324(a)(1)(A) (2012); 8 C.F.R. § 274a.2(b) (2012). Aliens who work without permission may be ineligible for status adjustment to become lawful permanent residents and may be "removed" for unauthorized work. See 8 U.S.C. § 1227(a) (2012); 8 C.F.R. 217.4 (2012). Individuals obtaining employment through fraud could be criminally sanctioned. See 18 U.S.C. § 1546(b) (2012).

92. Melissa Bailey, "ICE Fines Gourmet Heaven," *New Haven Independent*, Nov. 16, 2012, http://www.newhavenindependent.org/index.php/archives/entry/ice_fines_gourmet_heaven/. In 2011, the Supreme Court upheld Arizona's creation of additional sanctions on employers of undocumented immigrants, and those penalties included the possibility of losing a license to do business. See *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582 (2011).

93. See Douglas S. Massey, "How Arizona Became Ground Zero in the War on Immigrants," in Carissa Hessick and Jack Chin, eds., *Strange Neighbors: The Role of the States in Immigration Enforcement and Policy* (New York: NYU Press, 2014) [hereinafter Massey, "Arizona Became Ground Zero"], at 48.

94. Id., at 45–46 (citing Chavez).

95. Id., at 55–56.

96. See Gerald L. Neuman, "Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine," 42 *U.C.L.A. L. Rev.* 1425 (1995).

97. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (holding that a California statute prohibiting aliens who were not eligible for citizenship from obtaining commercial fishing licenses violated the Fourteenth Amendment); *Namba v. McCourt*, 204 P.2d 569 (Or. 1949) (invalidating alien land-restrictions); *Sei Fujii v. State*, 38 Cal. 2d 718, 722 (1952) (invalidating alien land-restrictions as violating the Fourteenth Amendment).

98. *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

99. See *Plyler v. Doe*, 457 U.S. 202, 207 (1982); see also Linda Greenhouse, "What Would Justice Powell Do? The 'Alien Children' Case and the Meaning of Equal Protection," 25 *Const. Comment.* 29 (2008).

100. *Mathews v. Diaz*, 426 U.S. 67, 83 (1976).

101. *Mathews*, 426 U.S. at 81.

102. The issue has been before the Supreme Court twice, and will return in the 2016–2017 term. See, e.g., *Miller v. Albright*, 523 U.S. 420 (1998); *Nguyen v. I.N.S.*, 533 U.S. 53 (2001); *Flores-Villar v. United States*, 564 U.S. 210 (2011) (per curiam), aff'g by an equally divided court; and *Lynch v. Morales-Santana*, 804 F.3d 520 (2d Cir. 2015), cert. granted, No. 15-1191, 2016 WL 1134376 (U.S. June 28, 2016). See generally Kristin A. Collins, "Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation," 123 *Yale Law Journal 2134* (2014).

103. See *Graham v. Richardson*, 403 U.S. 365 (1971) (striking down Arizona's and Pennsylvania's rules limiting welfare benefits either to U.S. citizens or resident aliens who had satisfied a residency requirement). For most of the Court, *Graham* rested on equal protection. Federal supremacy also played a role; because Congress had created a "comprehensive plan for the regulation of immigration and naturalization," which had taken indigence into account, it had occupied the field. Id. at 377.

104. *Foley v. Connelie*, 435 U.S. 291, 295–6 (1978). In 1976, the Supreme Court explained that although the "concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment" and "both Amendments require the same type of analysis," "the two protections are not always coextensive." See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). Thus, as Brian Soucek has analyzed, the approach results in non-congruence, which is to say that federal discrimination can be tolerated when state discrimination would not. See Brian Soucek, "The Return of Non-Congruent Equal Protection," 83 *Fordham Law Review* 155, 158 (2014).

105. *In re Griffiths*, 413 U.S. 717 (1973).

106. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

107. *Sugarman v. Dougall*, 413 U.S. 634 (1973).

108. *Foley v. Connelie*, 435 U.S. 291, 296 (1978).

109. *Ambach v. Norwick*, 441 U.S. 68, 74 (1979).

110. *Ambach*, 441 U.S. at 74. In 2016, New York amended its education regulations to permit the issues of certifications for teachers to provide that no qualified applicant should be denied certification "by reason of his or her citizenship or immigration status," unless ineligible for a professional license under federal law. The change also embraced individuals granted "Deferred Action for Childhood Arrivals" (DACA"), individuals brought without documentation to the country when they were children. See Regulations of N.Y. Commissioner of Education §80-1.3, (effective June 1, 2016). Those changes came after a federal appellate court had, in 2012, found unconstitutional New York's licensure laws for pharmacists; the state had permitted lawful resident aliens to be pharmacists but not other "nonimmigrant aliens." See *Dandamudi v. Tisch*, 686 F.3d 66 (2d. Cir. 2012).

111. *Ambach*, 441 U.S. at 81, 88 (Blackmun, J. dissenting, joined by Justices Brennan, Marshall, and Stevens).

112. *Arizona Dream Act Coalition v. Brewer*, 757 F. 3d 1054 (9th Cir. 2014), cert. denied sub nom. *Brewer v. Arizona Dream Act Coalition*, 135 S. Ct. 889 (2014). In 2016, the appellate court affirmed the permanent injunction and, while noting the likelihood of the Equal Protection Clause violation, rested the ruling on grounds that the state law was preempted by federal statutes so as to avoid the Equal Protection question. See *Arizona Dream Act Coalition v. Brewer,* 818 F.3d 901 (9th Cir. 2016).

113. In *Toll v. Moreno*, the Court struck Maryland's denial of in-state tuition to aliens on preemption grounds. See 458 U.S. 1 (1982). The 1996 IIRIRA limited state authority to provide tuition benefits to non-qualified aliens on the basis of residency "unless a citizen or national of the United States is eligible for such a benefit . . . without regard to whether the citizen or national is such a resident." Id. at § 1623. Given these parameters, the states that provide in-state tuition to undocumented students (17 did, as of June 2014) do so for those students who have graduated from a state high school as well as for citizens and lawful permanent residents. See *Basic Facts about In-State Tuition for Undocumented Immigrant Students*, revised June 2014, National Immigration Law Center, https://www.nilc.org/wp-content/uploads/2015/11/instate-tuition-basicfacts-2014-06.pdf (last visited Jun. 5, 2016).

114. 426 U.S. 88 (1976).

115. 426 U.S. at 103 (if and when "the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest").

116. 426 U.S. at 116.

117. U.S. Const. art. I, § 8, cl. 4.

118. As Harold Koh explained, relying on preemption "subordinates fourteenth amendment equal protection doctrine governing discrimination against resident aliens to the vagaries of federal immigration policy." Harold Hongju Koh, "Equality With A Human Face: Justice Blackmun and the Equal Protection of Aliens," 8 *Hamline Law Review* 51, 98 (1985).

119. Michael J. Perry, "Modern Equal Protection: A Conceptualization and Appraisal," 79 *Columbia Law Review* 1023, 1062 (1979).

120. See Robin Dale Jacobson, *The New Nativism: Proposition 187 and the Debate over Immigration* (Minneapolis, MN: University of Minnesota Press, 2008), xiii.

121. Charles A. Miller, "The Forest of Due Process Law," in *NOMOS XVIII: Due Process*, 3–12 (J. Roland Pennock and John W. Chapman eds., 1977).

122. The 1776 Constitution of Virginia picked up Blackstone's elaborations when it required that "no man be deprived of his liberty, except by the law of the land or the judgment of his peers," Va. Const. of 1776, art 1, § 8. Miller argued that the selection of the phrase "due process of law" for the federal Constitution aimed to embrace protections for individuals from both positive law and the common law. Miller, supra note 121 at 3, 4–5. Major renovations of the meaning of "due process" came during the twentieth century when justices read the phrase (over dissents) to not only require conformity with legally-prescribed procedures but also license independent assessments of the quality of legislative and executive procedural directives. See Judith Resnik, "Fairness in Numbers," 125 *Harvard Law Review* 78 (2011).

123. David M. Golove and Daniel J. Hulsebosch, "A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition," 85 *New York University Law Review* 923, 924-946 (2010). See also Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2010), 6–8, 257–279.

124. See David J. Seipp, "Our Law, Their Law, History, and the Citation of Foreign Law," 86 *Boston U. L. Rev.* 1417, 1429 (2006). Seipp counted 504 references to foreign places; 154 were to the British Isles. Id at n. 68.

125. The 1996 Preamble to the Constitution of South Africa provides:

> We, the people of South Africa . . . adopt this Constitution . . . so as to . . . establish a society based on democratic values, social justice and fundamental human rights . . . and build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

126. Golove and Hulsebosch, supra note 123, at 935.

127. Id., at 981–988; 993–95l; 1001–1010.

128. Judith Resnik, "Constructing the 'Foreign'": American Law's Relationship to Non-domestic Sources," in Mads Andenas and Duncan Fairgrieve, eds., *Courts and Comparative Law* (Oxford: Oxford University Press, 2015); Jackson, supra note 123.

129. New Jersey, Act of June 13, 1799, § 5 (repealed in 1820).

130. S.J. Res. 130, 82nd Cong (1952), reprinted in Duane Tananbaum, *The Bricker Amendment Controversy: A Test of Eisenhower's Political Leadership*, 222 (1988).

131. *Global Migration Group, Migration and Youth: Challenges and Opportunities, Final Chapter, Key Messages and Policy Recommendations* (2014), available at: http://www.globalmigrationgroup.org/sites/default/files/23._Key_Messages_and_Policy_Recommendations.pdf; and *Criminalisation of Migration in Europe . . .*, supra note 8.

132. Louis Henkin, "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker," 89 *Am. J. Int'l L.* 341 (1995), and Judith Resnik, "Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry," 115 *Yale Law Journal* 1564 (2006), at 1606–10.

133. The Proposed American Justice for American Citizens Act 2004, H.R. 4118, § 3, 108th Congress, 2d Session (April 1, 2004).

134. *Roper v. Simmons*, 543 U.S. 551, at 626–7 (2005) (Scalia, J. dissenting).

135. Kansas, House Substitute for Senate, enacted May, 2012, Bill no. 79 § 3.

136. Alabama, American and Alabama Laws for Alabama Courts Amendment, proclaimed ratified Dec. 2014.

137. For discussion of these issues, see Resnik, "Constructing the 'Foreign,'" supra note 128, at 463-71.

138. Voters in Oklahoma approved a constitutional amendment that specified Sharia law was not to be used. A federal appellate court found the provision unconstitutional when an Oklahoma resident argued that it violated his First Amendment rights to use religious law to distribute property in his will. See *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012).

139. See Martha F. Davis, Johanna Kalb, and Risa E. Kaufman, *Human Rights Advocacy in the United States* (St. Paul, MN: West Academic Publishing, 2014).

140. In 2012, the Secretary of Homeland Security issued a memorandum instructing that "certain young people who were brought to the country as children and know only this country as home" be permitted to stay without fearing deportation. The initiative, known as The Deferred Action for Childhood Arrivals ("DACA") program, applied to immigrants who entered before 16 years of age and were under 31 years old as of 2012 and met other criteria. See 8 U.S.C. § 1182(a)(9)B)(ii); 8 C.F.R. § 214.14(d)(3). See also note 110.

141. Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 2006, revised edition; first published in 1983).

142. Bruce Ackerman's series of books on the constitutional history provides powerful examples. See, for example, *We the People, The Civil Rights Revolution* (Cambridge, MA: Belknap Press, 2014).

143. An eloquent explanation of law as a source of identity comes from Robert M. Cover, "The Supreme Court, 1982 Term – Foreword: Nomos and Narrative," 97 *Harv. L. Rev.* 4 (1983-1983). He explored what he termed to be the jurisgenerativity of paidiac communities and how the law of the state can be jurispathic, able—through power and force—to displace law generated from other sites.

144. Judith Resnik, "Living One's Legal Commitments: Paideic Communities, Courts and Robert Cover," 17 *Yale Journal of Law and Humanities* 17 (2006). See also Jean L. Cohen, "Changing Paradigms of Citizenship and the Exclusiveness of the Demos," 14 *Int'l Sociology* 245 (1999). James Bohman, *Democracy Across Borders: From Dêmos to Dêmoi* (Cambridge, MA: MIT Press, 2007).

145. Hospitality is of course central to Kantian approaches, elaborated in this context by Seyla Benhabib to identify a textured cosmopolitanism that insists on moral

equality while permitting legal differentiation of rights generated through participation by individuals affected by the decisions. individuals. See Seyla Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* 6–19; 66–76 (Malden, MA: Polity, 2011).

146. See, e.g., Johanna Kalb, "The Judicial Role in New Democracies: A Strategic Account of Comparative Citation," 38 *Yale Journal of International Law* 423 (2013); Gary Jeffrey Jacobsohn, "The Permeability of Constitutional Borders," 82 *Tex. L. Rev.* 1763 (2004). See generally Jackson, supra note 123; Judith Resnik, "Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century," 11 *International Journal of Constitutional Law* 162 (2013).

147. 1874 Treaty of Berne, Article I, X.

148. S. D. Sargent, International Aspects of Postal Service, *J. Institute of Transport* 26 (1956).

149. David Vincent, "The Progress of Literacy," *Victorian Studies* 45 (2003): 405, 406.

150. Leonard Woolf, *International Government: Two Reports by L.S. Woolf prepared for the Fabian Research Department, together with a Project by a Fabian Committee for a Supernational Authority That Will Prevent War*, in Part II at 125 (1916).

151. See 39 U.S.C. § 101 (a) (2016).

152. Directive of the European Parliament and of the Council, 97/67/EC, 15 December 1997, Article 3 (2008).

153. Universal Post Union, "140th Anniversary: Celebrating the Spirit of Innovation," available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01997L0067-20080227

154. Calls for redrafting the 1950 Refugee Convention likewise reflect the need to include receiving and sending countries, as well as countries that seem to be less directly affected. See Hemmes Battjes, Evelien Brower, Lieneke Slingenberg, and Thomas Spijkerboer, "The Crisis of European Refugee Law: Lessons from Lake Success" (May 2016), available at SSRN: http.ssrn.com/abstract=2783247

155. *Arizona v. United States*, 132 S. Ct. 2492, 2511 (2012).

156. Thanks are due to the artist for her powerful rendition of the humanity and the hopes, and to the gallery for providing the image to use in this essay. Her installation, *The Mapping Journey Project (2008–2011)*, on view until October 2016 at New York's Museum of Modern Art, provided videos of individuals making the maps from which images such as Figure 7 were abstracted.