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Segregation by Citizenship

Emma Kaufman

SEGREGATION BY CITIZENSHIP

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For centuries, prisoners in the United States were housed together regardless of their citizenship status. That changed in 1999 when the federal government began to send noncitizens into separate prisons. Today, tens of thousands of people — more than half of all noncitizens in federal prison — live in an institution segregated by citizenship. The vast majority of these people are Mexican nationals. Nearly all of them are Latino.

The rise of the all-foreign prison raises pressing questions about federal immigration power and noncitizens' equal protection rights. Yet no legal scholarship examines these unusual institutions. Few even know they exist. Drawing on extensive data from the Bureau of Prisons, internal agency documents, interviews, and other primary sources, this Article provides the first account of the all-foreign prison. It notes that these prisons are insulated from meaningful judicial review by an alienage jurisprudence that affords deference to any federal policy characterized as migration control. And it critiques this doctrine, arguing that courts need a more coherent and defensible conception of the relationship between national sovereignty and noncitizens' equal protection rights. To that end, this Article advances a simple claim: only core immigration activities — setting rules on entry, exit, and naturalization — should count as migration control. Other species of state action, including segregating foreign national prisoners, may affect where and how immigrants live their lives. But they are not the kind of migration control that warrants deference from federal courts.

INTRODUCTION

Immigration and prisons are two of the most fraught issues in American society. Every day, headlines announce new turns in national debates over which immigrants to admit and what to do about the country's bloated prisons and jails. Today, roughly 2.3 million people live in a

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custodial institution,[1] one in three noncitizens is deportable,[2] and it is increasingly difficult to tell the difference between policing crime and regulating the border.

Yet at the most acute point of overlap between immigration and imprisonment, we know next to nothing. Despite enormous public interest in the fate of "foreign criminals," legal scholars have paid scant attention to noncitizens inside American prisons. Instead, those who study the intersection of criminal and immigration law tend to focus on the front end of the justice system — on legislatures, police, prosecutors, and courts.[3] This framework downplays the prison's central role in American immigration policy. It also obscures a remarkable development in American prison history.

For nearly two centuries, prisoners in the United States were housed together regardless of their citizenship status. Prison officials have long documented prisoners' nationalities — prison records include prisoners' "nativity" as far back as 1850 — but until recently, citizenship had little to do with where prisoners were held.[4] That changed in the 1990s when the Federal Bureau of Prisons (BOP) began to send noncitizens into separate, segregated prisons.

Initially, the all-foreign prison was an isolated experiment in central California and western New Mexico.[5] Soon, however, this model of incarceration spread. There are now ten all-foreign prisons across seven states, and the Trump Administration has announced plans to build more.[6] These prisons hold people serving criminal sentences for a range of offenses, including drug, violent, and other non-immigration crimes.[7]

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[1] Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POL'Y INITIATIVE (Mar. 14, 2018), https://www.prisonpolicy.org/reports/pie2018.html [https://perma.cc/5AAU-FUFC].

[2] Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 513 (2009) ("[O]ver *thirty percent* of all noncitizens living in the United States are deportable . . . because they have either entered illegally or overstayed their visas.").

[3] *See, e.g.*, Ingrid V. Eagly, *Prosecuting Immigrants in a Democracy*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 227 (Máximo Langer & David Alan Sklansky eds., 2017) (prosecutors); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012) (legislatures); Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87 (2013) (police); Michael T. Light, Michael Massoglia & Ryan D. King, *Citizenship and Punishment: The Salience of National Membership in U.S. Criminal Courts*, 79 AM. SOC. REV. 825 (2014) (courts).

[4] *See infra* section I.A, pp. 1388-94.

[5] *See infra* pp. 1401–02; *see also* Notice of Intent to Prepare a Draft Environmental Impact Statement (DEIS) for Housing Criminal Alien Population in Non-Federal Low-Security Correctional Facilities, 64 Fed. Reg. 20,021, 20,021–22 (proposed Apr. 23, 1999) (soliciting proposals for the first all-foreign prison).

[6] *See infra* p. 1402; Fed. Bureau of Prisons, RFP-PCC-0026, Solicitation, Offer, and Award (May 25, 2017) (on file with the Harvard Law School Library) (soliciting bids for a new all-foreign prison).

[7] *See infra* note 169 and accompanying text. This Article draws on a large data set obtained from BOP through the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012 & Supp. 2016).

These are, in other words, criminal penal institutions, not civil immigration detention centers. On any given day, they house roughly 19,000 people.[8] To put that figure in perspective, ten percent of all federal prisoners — and more than half of all noncitizens in federal prison — live in an institution segregated by citizenship.[9] The vast majority of these people are Mexican nationals.[10] Nearly all of them are Latino.[11]

The rise of the all-foreign prison raises pressing questions about the purpose of punishment, the relationship between citizenship and race, and the rights of noncitizens inside the United States. Yet no legal scholarship examines this peculiar form of imprisonment. Few even know these prisons exist. This Article offers the first assessment of America's all-foreign prisons. Drawing on a wide range of sources[12] — including archival materials, legal opinions, federal regulations, private prison contracts, penal policies, interviews, and previously undisclosed data obtained from the Bureau of Prisons through the Freedom of Information Act[13] (FOIA) — it documents the birth of the all-foreign prison. It critiques the legal framework that enabled these institutions. And it grapples with the practical and normative implications of a prison system stratified by alienage.

The Article's core claim is that, in the name of migration control, prison officials have built a second-class system of punishment for noncitizens. All-foreign prisons are not only places where foreigners are separated from the rest of the penal population. They are also stripped-

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See Letter from A. Cromer, Fed. Bureau of Prisons, to author (Jan. 30, 2018) (on file with the author) [hereinafter 2018 FOIA Materials] (providing FOIA-responsive material). Throughout this piece, the term "immigration offense" refers to a set of federal crimes related to citizenship status: smuggling or harboring undocumented noncitizens in violation of 8 U.S.C. §§ 1322–1324 (2012); unlawful entry or reentry in violation of 8 U.S.C. §§ 1325–1326; and document offenses such as using a fraudulent passport and misuse of a U.S. visa, which are prohibited by 18 U.S.C. § 1546 (2012).

[8] 2018 FOIA Materials, *supra* note 7 (listing 18,941 people in all-foreign prisons in January 2018).

[9] As of September 2018, there are 181,302 people in federal prison. *See Inmate Citizenship*, FED. BUREAU PRISONS (Sept. 29, 2018), https://www.bop.gov/about/statistics/statistics_inmate_citizenship.jsp [https://perma.cc/3TG8-9HR4]. BOP has identified 146,118 of those prisoners as U.S. citizens; 26,337 as noncitizens from Mexico, Cuba, Colombia, or the Dominican Republic; and 8847 as prisoners with "other/unknown" citizenship status. *Id.* If "other/unknown" prisoners are noncitizens, foreign nationals make up just under 20% of the total prison population and 53% of the noncitizens in federal prison live in segregated prisons. *See infra* notes 161–163 and accompanying text (discussing these figures in more detail).

[10] As of January 30, 2018, 68% of prisoners in all-foreign facilities are citizens of Mexico. *See* 2018 FOIA Materials, *supra* note 7.

[11] Eighty-nine percent of prisoners in all-foreign facilities were born in Mexico, Cuba, the Dominican Republic, Central America, or South America. *See id.*

[12] *See infra* p. 1388 (providing a comprehensive list of sources).

[13] 5 U.S.C. § 552 (2012 & Supp. 2016).

down institutions with fewer services than other federal prisons.[14] This is no accident. Under current prison regulations, which emerged alongside the all-foreign prison in the 1990s, noncitizens are exempt from education requirements; excluded from drug treatment and job training programs; and ineligible for placement in minimum-security prisons, transfer close to their homes, and early release.[15] Together, these policies have turned noncitizens into a distinct class of prisoners and encouraged prison officials to funnel foreign nationals into remote prisons with fewer resources.

At first glance, a system of separate and unequal prisons for foreigners, almost all of whom are people of color, seems like a straightforward violation of equal protection law. This is, after all, state-sponsored segregation of a suspect class.[16] Noncitizens are a classic "discrete and insular minority" — unrepresented in the political process and long subject to prejudice and restrictive legislation.[17] The Supreme Court has held, moreover, that the practice of segregating prisons by race or ethnicity deserves strict scrutiny.[18] It would be easy to add alienage to this list.

But all-foreign prisons sit at the intersection of two powerful lines of deference, which warp traditional equality doctrines. First, in cases involving alienage, courts defer to federal policies that distinguish citizens from foreign nationals on the theory that the federal government has expansive authority to regulate immigration.[19] This rule, known as the plenary power doctrine, entitles all-foreign prisons to deference as *federal* institutions. Second, in cases involving prisons, courts routinely defer to penal policies that restrict prisoners' rights, including the right to equal protection, on the ground that prisons are difficult institutions to run.[20] This rule, which I call the penal power doctrine, entitles all-foreign prisons to deference because they are *prisons*.

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[14] *See infra* p. 1409 (noting that all-foreign prisons have higher rates of solitary confinement, more deaths in custody, and fewer programs than integrated federal prisons).

[15] *See infra* pp. 1400-01.

[16] *See* Graham v. Richardson, 403 U.S. 365, 372 (1971) (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)); *see also* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that the Fourteenth Amendment applies to foreign nationals "within the territorial jurisdiction" of the United States).

[17] *See infra* pp. 1427–28. For a classic debate over the value of the *Carolene Products* framework, see Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985); and Daniel A. Farber & Philip P. Frickey, *Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CALIF. L. REV. 685 (1991). *See also* David A. Strauss, *Is* Carolene Products *Obsolete?*, 2010 U. ILL. L. REV. 1251 (2010).

[18] *See* Johnson v. California, 543 U.S. 499, 511–12 (2005).

[19] *See infra* pp. 1426–31 (discussing debates on the meaning and scope of the plenary power doctrine).

[20] *See infra* pp. 1424–26.

Scholars have critiqued these doctrines[21] but have rarely considered how they interact. This is a significant omission in a legal system that polices migration through its prisons. In practice, two discrete deference regimes — one from immigration law, the other prison law — combine to give federal prison officials broad latitude to determine how and where noncitizens can be punished.

The model of punishment they have chosen has concerning consequences. To highlight one, isolating foreign nationals introduces widespread ethnic segregation into the federal prison system. The prisoners in all-foreign facilities are overwhelmingly and disproportionately Latino.[22] In recent years, prison officials have described the all-foreign prison population as "very homogenous"[23] and "primarily Mexican."[24] The Bureau of Prisons' internal data show that Latino noncitizens are significantly more likely than non-Latino noncitizens to be held in segregated prisons.[25] And, as this Article uncovers, the Bureau referred to the precursor to the all-foreign prison — a set of specialized intake and release prisons for noncitizens — as facilities "targeted at the Mexican citizens."[26] These statements raise the specter of profiling[27] and aggravate the concern that American prison policy serves to identify and manage disfavored groups.[28]

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[21] *See, e.g.*, Cox & Rodríguez, *supra* note 2 (discussing the plenary power doctrine); Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245 (2012) (critiquing deference regimes in prison law).

[22] *See infra* pp. 1414–17.

[23] Letter from Patricia McNair Persante, Exec. Vice President, Contract Compliance, GEO Group, to Office of Inspector Gen., U.S. Dep't of Justice 2 (Aug. 9, 2016) (on file with the Harvard Law School Library).

[24] Letter from Ryan Wynne, Contracting Officer, Fed. Bureau of Prisons, to All Interested Parties 1 (Mar. 10, 2010) (on file with the Harvard Law School Library).

[25] *See infra* pp. 1414–17 (noting that 89% of the noncitizens in all-foreign prisons are Latino, as compared to 58% of the noncitizens in integrated federal prisons).

[26] *Institutional Hearing Program: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 105th Cong. 91 (1997) [hereinafter *Hearing Before Subcomm. on Immigration*] (statement of John L. Clark, Assistant Director, Community Corrections and Detention, Federal Bureau of Prisons).

[27] As explained *infra* pp. 1416–17, the overrepresentation of Latino noncitizens in all-foreign prisons is suggestive but inconclusive evidence that BOP is funneling Latino prisoners into segregated facilities. It would take additional data to conclude that, controlling for all relevant factors, ethnicity determines the likelihood that a particular noncitizen will be sent to a segregated prison. BOP declined to provide that data. *See* Letter from Ian Guy, Supervising Attorney, Fed. Bureau of Prisons (June 12, 2018) (on file with the Harvard Law School Library).

[28] *See* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2061 (2017) ("[The] other, more insidious function [of the American criminal justice system] is the management and control of disfavored groups such as African Americans, Latin Americans, the poor, certain immigrant groups, and groups who exist at the intersection of those identities."). Section II.C, *infra* pp. 1414–18, explores the relationship between race, ethnicity, citizenship status, and national origin in all-foreign prisons.

All-foreign prisons also raise a basic question about the scope of the federal immigration power. Prison officials describe these prisons as a way to support federal immigration authorities,[29] and these institutions developed from a decade-long effort to integrate the Bureau of Prisons with what was then called the Immigration and Naturalization Service (INS) and is now Immigration and Customs Enforcement (ICE).[30] But there is little evidence that all-foreign prisons facilitate deportation and good reason to insist that these prisons are not sites of migration control.

The latter point is the critical one. Under current equal protection doctrine, courts defer to any federal policy characterized as migration control, no matter who crafted it or how little it relates to the government's ability to regulate national borders.[31] Courts draw no distinctions between the many federal actors that make alienage policy. This means, for example, that prison wardens, civil servants, park rangers, officials in the Department of Health and Human Services, Congress, and the President can all lay claim to the federal immigration power, and to the deference that comes with it.

This is a crude way to allocate an extraordinary constitutional power. Governing alienage jurisprudence ignores the deep puzzle of immigration law: noncitizens are at once unequal *and* entitled to equal protection, even when the federal government acts. To make sense of that puzzle, courts need a better theory of migration control, one that distinguishes punishment from immigration regulation and limits when federal actors can invoke the immigration power to justify their policies. To that end, this Article defends a simple idea: only core immigration activities — setting rules on entry, exit, and naturalization — should count as migration control. Other species of state action, including segregating foreign-national prisoners, may affect where and how immigrants live their lives. But they are not migration control, at least insofar as the Constitution is concerned.

The Article advances this argument in four Parts. Part I describes how the all-foreign prison transformed from a pilot project into a web of separate prisons for noncitizens. Part II catalogues the consequences of this new prison system. Part III explores the constitutional framework that governs all-foreign prisons. Part IV contends that this framework is misguided and explains why all-foreign prisons cannot be justified as an instance of migration control.

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[29] *See infra* pp. 1406–07.

[30] *See infra* section I.B, pp. 1394–401. The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of the U.S. Code), eliminated INS and established three divisions — ICE, Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS) — within the new Department of Homeland Security. *Id.*

[31] *See infra* pp. 1426–31.

In mapping this terrain, this Article makes several contributions. Perhaps most important, it presents the only data of its kind on noncitizen prisoners — a largely hidden population — and provides the first comprehensive account of the prison's role in immigration enforcement. Penal institutions are often overlooked in immigration scholarship, which tends to emphasize cooperation between ICE agents and police.[32] Yet prisons were the primary site of enforcement when the pace of deportations began to rise in the 1980s.[33] Three decades later, prison-based enforcement initiatives account for nearly half of all "immigrant apprehensions," more than most other immigration-enforcement programs combined.[34] This Article aims to shift focus to the post-conviction criminal justice system, where prisons are a critical part of America's deportation regime.

In doing so, this Article brings citizenship to the foreground of debates about punishment. Scholars have long documented the relationship between prisons and both racial and economic inequality. Academics have described mass imprisonment as "the New Jim Crow,"[35] as a means to "warehouse" people of color,[36] and as a way to punish the poor.[37] Criminal law scholars have written less about citizenship.[38] To be sure, all-foreign prisons are only one small piece of mass incarceration. But over the last twenty years, prison officials have turned alienage into an organizing principle for the federal prison system. This development deserves attention as scholars consider what prisons are for.

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[32] Professor César Cuauhtémoc García Hernández's work on "immigration prisons" is one notable exception. *See, e.g.*, César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245 (2017); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. REV. 1457. Hernández argues that imprisoning noncitizens for immigration crimes is part of a broader shift toward using incarceration to effectuate immigration policy. *See* Hernández, *Creating Crimmigration*, *supra*, at 1458. To emphasize this trend, Hernández describes both civil detention centers and prisons that hold individuals convicted of federal immigration crimes as "immigration prisons." Hernández, *Abolishing Immigration Prisons*, *supra*, at 248 n.8. This Article is narrower and broader: it focuses on only *criminal* prisons, but examines *all* noncitizens convicted of crimes, not just those convicted of immigration offenses. *See supra* note 7 (defining "immigration offense").

[33] *See infra* pp. 1395–97.

[34] *See* AM. IMMIGRATION COUNCIL, THE CRIMINAL ALIEN PROGRAM (CAP) 6 (2013) (noting that the Criminal Alien Program, an initiative that sends immigration agents into prisons and jails, is "responsible for the largest number of immigrant apprehensions . . . . more than the 287(g) program, Fugitive Operations, and the Office of Field Operations combined").

[35] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); *see also* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 25–27 (2012).

[36] JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 142 (2007).

[37] LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY, at xi–xxiii (2009).

[38] For some notable exceptions, see sources cited *supra* notes 3 and 32.

Finally, this Article advances an ongoing debate about executive authority to make immigration law. For decades, legal scholarship on immigration focused on federalism: on whether states can regulate migration; when federal priorities preempt state immigration laws; and whether preemption claims better protect immigrants' rights than challenges arising from equal protection law.[39] With the emergence and rescission of high-profile programs like Deferred Action for Childhood Arrivals (DACA), this conversation has begun to shift to the federal level, and in particular to questions about the distribution of immigration power between the President and Congress.[40] This Article embraces that shift and offers a critical assessment of immigration enforcement within the executive branch. In an era of administrative governance, the most pressing questions about citizenship concern how agencies interact, what authority they possess, and when the Constitution limits the federal government's power to discriminate against noncitizens.

I. THE RISE OF THE ALL-FOREIGN PRISON

Although federal prisons classified by alienage are new, using prisons to identify foreigners is not. Prison guards started to record federal prisoners' nationalities in the mid-nineteenth century and to coordinate with immigration agents as early as 1904. It was not until the 1990s, however, that prison officials began to build a separate system of federal prisons for noncitizens. This Part tells the story of how these unusual institutions emerged. It begins with a brisk history of the prison's role in immigration enforcement before 1980. It then describes a roughly twenty-year period between 1980 and 2000 during which interactions between prison and immigration officials grew increasingly formal and routine, and norms around the use of penal institutions began to erode. This process led to the first all-foreign prison and, ultimately, to a new model of punishment I call segregation by citizenship.

A brief word on methods before I begin. This Part mines a range of archival sources, including congressional records, BOP records, census

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[39] *See, e.g.*, Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on* Arizona v. United States, 9 STAN. J. C.R. & C.L. 1, 3 (2013); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 792–95 (2008); Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51, 52–56 (1985); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 567–68 (2008); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 504–05 (2001).

[40] *See, e.g.*, Cox & Rodríguez, *supra* note 2, at 458; Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 104 (2015); Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 77 (2017); *see also* Kristin A. Collins, *Bureaucracy as the Border: Administrative Law and the Citizen Family*, 66 DUKE L.J. 1727 (2017) (examining how "lower-level agency deliberation," *id.* at 1730, has shaped immigration law).

reports, and newspaper articles, from the Founding to the present. It draws on traditional legal sources such as statutes, federal regulations, judicial opinions, and filings in litigation involving all-foreign prisons, and on less familiar materials such as prison policies, procurement records, and the contracts for nine all-foreign prisons, all of which are run by private prison companies.[41] This Part also relies on data obtained through FOIA — specifically, BOP's internal statistics on the citizenship status, country of origin, age, gender, crime of conviction, sentencing jurisdiction, and sentence length for all prisoners in segregated federal prisons. Finally, it builds from background interviews with criminal defenders and immigration attorneys who work near the Texas-Mexico border and have represented clients in all-foreign prisons.[42]

Together, these sources reveal two bureaucracies that developed in tandem from their origins in the early 1900s until their integration in the 1980s. The rise of the all-foreign prison is in many respects a story about the birth and growth of the administrative state. It is also a story about how the criminalization of immigration has changed federal prisons. In the pages that follow, I portray a prison system that has transformed from a site of corrections, in which the implicit aim was to reform prisoners and return them to the polity, into an institution dedicated to finding and sorting foreigners.[43]

A. 1850–1980: Building a Bureaucracy

Government officials began to document federal prisoners' nationalities in the 1850s.[44] At the time, there were no federal prisons; all federal prisoners were held in state prisons, which received fees for each federal inmate they agreed to board.[45] As the number of federal prisoners grew, the Secretary of the Treasury began to poll U.S. marshals for information about prisoners in their custody, and the federal government undertook a systematic effort to count prisoners for the census.[46] The 1850 Census, which was collected during a period of rapid immigration from

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[41] As noted above, this Article relies on internal statistics obtained from BOP through a FOIA request. It also draws on the contracts for nine all-foreign prisons, which BOP disclosed to Stephen Raher and which he shared with me. *See* Raher v. Fed. Bureau of Prisons, No. 09-CV-00526, 2011 WL 4832574, at *1 (D. Or. Oct. 12, 2011).

[42] I also attempted to interview prisoners in all-foreign facilities, but BOP prohibited it. *See infra* note 191.

[43] *See infra* pp. 1393–94.

[44] *See* REPORT OF THE SUPERINTENDENT OF THE CENSUS FOR DECEMBER 1, 1852, at 13–14, 29 (1853) [hereinafter SEVENTH CENSUS]; *see also* PAUL W. KEVE, PRISONS AND THE AMERICAN CONSCIENCE: A HISTORY OF U.S. FEDERAL CORRECTIONS 13 (1991).

[45] KEVE, *supra* note 44, at 1, 13.

[46] *Id.* at 13.

Europe and China,[47] was the first to include the prison population.[48] It divided prisoners only between the "native" and the "foreign born," noting that "time ha[d] not sufficed to admit of . . . more particular separation."[49] Over the next several decades, official tallies of the prison population became more granular and began to include detailed information on "[t]he foreign born element."[50]

This national effort to document the prison population coincided with the birth of federal immigration law. For the first century of American history, immigration was regulated by states.[51] With the exception of the Alien Friends Law of 1798,[52] a short-lived statute that authorized the President to deport any noncitizen "dangerous to the peace and safety of the United States,"[53] there were no federal laws restricting immigration or authorizing deportation before the end of the Civil War.[54] That changed when Congress passed the first federal immigration statute — a law intended to bar the entry of Chinese women — in 1875.[55] Sixteen years later, as immigration from southern and eastern Europe increased, Congress enacted the first federal deportation law, which authorized removal of people "likely to become a public charge" and those convicted of felonies or crimes of "moral turpitude" before entering the United States.[56]

The federal government then began to build an immigration control apparatus. In 1891, a year before Ellis Island opened, Congress created

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47 HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 15–19 (2006).

48 *See* SEVENTH CENSUS, *supra* note 44, at 29.

49 *Id.*

50 BUREAU OF THE CENSUS, DEP'T OF COMMERCE & LABOR, SPECIAL REPORTS: PRISONERS AND JUVENILE DELINQUENTS IN INSTITUTIONS 1904, at 19 (1907).

51 Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1841–44 (1993); *see also* Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1357 (2009).

52 Act of June 25, 1798, ch. 58, 1 Stat. 570.

53 *Id.* § 1. The Alien Friends Law, one of the controversial Alien and Sedition Acts, lasted only two years. *See id.* § 6. The statute empowered the President to order "dangerous" noncitizens to leave the country, authorized three years' imprisonment and deportation of anyone who refused, *id.*, and in an early reference to the prison's role in enforcing federal immigration law, permitted the President to order the removal of "any alien who may or shall be in prison," *id.* § 2.

54 *See* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 3 (1995). As Professor Hiroshi Motomura has noted, federal laws regulating the movement of "free blacks and slaves" can also be understood as early immigration laws. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 65 (2014).

55 Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974). The Page Act, which banned the entry of prostitutes, "specifically target[ed] Chinese women." Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 643 (2005). It also banned immigration of anyone convicted of a felony whose "sentence ha[d] been remitted on condition of their emigration" and authorized the deportation of "such obnoxious persons" after a hearing. § 5, 18 Stat. at 477.

56 1891 Immigration Act, ch. 551, § 1, 26 Stat. 1084, 1084.

the office of the Superintendent of Immigration, the first federal immigration enforcement agency.[57] Congress authorized the purchase of land for the first federal prisons the same year.[58] Both projects grew quickly in scope and ambition. By the early 1900s, there were three federal prisons,[59] and the newly created Bureau of Immigration and Naturalization had started to "canvass . . . all penal institutions in the United States for the purpose of discovering the number of alien prisoners detained therein."[60]

The early twentieth century was a period of intense anxiety about foreign criminals.[61] In 1907, for the first time in American history, Congress made deportation a collateral consequence of criminal conviction when it authorized the expulsion of "any alien woman or girl" identified as a prostitute within three years of entry.[62] This was a pivotal shift in American immigration law.[63] Although immigration statutes had long targeted people with criminal records from their home countries, it was not until February 1907 that crimes committed *after* entry into the United States could trigger removal. The same month, Congress formed the Dillingham Commission, an expansive national study of immigration into the United States.[64] The Commission's report contained a lengthy examination of "alien criminality"[65] and recommended that Congress amend immigration laws to make noncitizens deportable for any serious crime committed within five years of entry.[66]

States, too, began to take a keen interest in their foreign prisoner populations. As Congress debated "[h]ow to rid the country of the alien

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[57] *See id.* § 7; *see also* SALYER, *supra* note 54, at 32 (describing networks of customs collectors who enforced immigration laws at the nation's ports in the late nineteenth century).

[58] *See* Act of Mar. 3, 1891, ch. 529, 26 Stat. 839.

[59] KEVE, *supra* note 44, at 37–50.

[60] 36 U.S. IMMIGRATION COMM'N, IMMIGRATION AND CRIME, S. Doc. No. 61-750, at 179 (3d Sess. 1910) [hereinafter DILLINGHAM COMMISSION]; *see also* Act of Mar. 2, 1895, ch. 177, § 1, 28 Stat. 764, 780 (establishing the Bureau of Immigration under the Secretary of the Treasury); Act of Mar. 4, 1913, ch. 141, § 3, 37 Stat. 736, 737 (transferring the Bureau of Immigration to the new Department of Commerce and consolidating several "offices, bureaus, divisions, and branches" under its jurisdiction).

[61] JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1865–1925, at 160 (2002).

[62] *See* Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898, 900 (repealed 1917).

[63] *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 133 (2007).

[64] S. REP. NO. 81-1515, at 1 (1950) (noting that the Dillingham Commission's investigation lasted four years, "cost a little over $800,000 and necessitated the employment of over 200 persons" across the United States). *See generally* KATHERINE BENTON-COHEN, INVENTING THE IMMIGRATION PROBLEM: THE DILLINGHAM COMMISSION AND ITS LEGACY (2018).

[65] DILLINGHAM COMMISSION, *supra* note 60, at 179.

[66] *Criminal Aliens*, N.Y. TIMES, Dec. 18. 1910, at 12 ("Chairman Dillingham's Commission on Immigration would have the three-year limit extended to five years, as if that would help matters any.").

criminal class,"[67] prison officials in New York, a state that received many of the country's new immigrants, undertook a months-long "census of the prison population" and lobbied the Governor to commute prisoners' sentences so they could "be deported en masse."[68] Though it does not appear to have been adopted, the idea of segregating foreign prisoners surfaced in this period. In 1910, New York's prison superintendent proposed that noncitizens "be segregated and treated as a class" in prisons built and run by the federal government.[69] This is perhaps the first reference to an all-foreign prison in the United States.

The national debate over deportation and crime culminated in the 1917 Immigration Act,[70] which established "[t]he essential pieces of the modern [deportation] regime."[71] That statute dramatically expanded the range of crimes that could lead to deportation, permitted deportation based on a single crime for five years after entry, and made immigrants deportable for life if they were convicted of more than one offense.[72] It also appropriated federal funds to enforce immigration laws for the first time.[73] Despite the rise of federal laws directed at foreign criminals between 1875 and 1917, actual deportations remained rare — with annual numbers in the hundreds or low thousands — until the 1920s, when deportation rates increased more than tenfold.[74] The 1917 Immigration Act inaugurated this enforcement shift, in part by tying eligibility for deportation to outcomes in criminal courts.

To find and remove foreign criminals, however, the state needed a bureaucracy. The 1920s was a period of swift change in immigration law: in a span of five years, Congress criminalized illegal entry[75] and established a national quota system, ending the longstanding policy of

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[67] *Deportable Criminals*, WASH. POST, June 18, 1909, at 6.

[68] *May Send Back Convicts*, N.Y. DAILY TRIB., June 14, 1909, at 3; *see also Deport Criminal Aliens*, WASH. POST, Mar. 3, 1909, at 10.

[69] *Foreign Criminals Crowd Our Prisons*, N.Y. TIMES, Jan. 24, 1910, at 6.

[70] Act of Feb. 5, 1917, ch. 29, 39 Stat. 874 (repealed 1952).

[71] KANSTROOM, *supra* note 63, at 133.

[72] *Id.* at 133–34 (listing these and other changes in the statute); *see also* S. REP. NO. 81-1515, at 54 (1950) (describing the 1917 Act as a "radical change[]" in immigration law).

[73] Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 LAW & HIST. REV. 69, 74 (2003). Until the 1920s, border control was funded largely through head taxes on arriving immigrants. KELLY LYTLE HERNÁNDEZ, MIGRA!: A HISTORY OF THE U.S. BORDER PATROL 26, 32–33 (2010).

[74] *See* KANSTROOM, *supra* note 63, at 158 (noting that deportations increased from 2762 in 1920 to 38,796 in 1929); *see also* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 67 (2004) (tying these numbers to increased enforcement along the United States-Mexico border).

[75] Act of Mar. 4, 1929, ch. 690, § 2, 45 Stat. 1551, 1551 (repealed 1952) (making unlawful entry a misdemeanor punishable by one year in prison and a $1000 fine); *id.* § 1(a) (making unlawful reentry after deportation a felony punishable by two years' imprisonment and a $1000 fine).

"open immigration from Europe."[76] This was also a decade of expansion and professionalization for law enforcement. In 1924, Congress created and funded the first professional border patrol, a cadre of 450 immigration agents in the Department of Labor.[77] Two years later, the Census Bureau began to keep annual records of the federal prison population,[78] and the newly minted Bureau of Efficiency urged Congress to build more federal prisons.[79] By 1933, Congress had created the Federal Bureau of Prisons to oversee America's federal prisons[80] and President Roosevelt had consolidated disparate sections of the Department of Labor into the Immigration and Naturalization Service.[81]

The operations of these two agencies were not yet integrated — immigration enforcement remained piecemeal and largely focused on the country's geographic borders[82] — but as the pace of deportations increased, immigration agents turned to federal and state prison officials to find potential deportees. In 1931, the Chicago District Director of Immigration credited "increased cooperation from the Chicago police department and the state prison officials" with enabling a record number of deportations from the region.[83] Four years later, in what the *Los Angeles Times* called an "alien crime purge," President Roosevelt commuted the sentences of 151 federal prisoners to allow for their deportation from the United States.[84]

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[76] Ngai, *supra* note 73, at 74–75. The 1924 Immigration Act capped immigration at 150,000 people a year. *Id.* at 75. To put this limit in perspective, immigration before World War I averaged approximately one million people each year. *Id.* The quota system lasted until the Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

[77] H.R. Con. Res. 122, 106th Cong. (1999). For a history of border patrol before this period, see HERNÁNDEZ, *supra* note 73, at 17–32.

[78] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925–1986, at i (1989).

[79] KEVE, *supra* note 44, at 92–93.

[80] Act of May 14, 1930, ch. 274, 46 Stat. 325.

[81] Exec. Order 6166 § 14 (June 10, 1933).

[82] NAT'L COMM'N ON LAW OBSERVANCE & ENF'T, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES 34 (1931); Ngai, *supra* note 73, at 78, 82–84; *see also* KELLY LYTLE HERNÁNDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965, at 144 (2017) (describing "a string of federal jails dedicated to imprisoning immigration offenders, namely Mexicans" outside Los Angeles in the 1930s).

[83] *Alien Criminals*, Editorial, CHI. DAILY TRIB., Jan. 5, 1931, at 14; *see also Criminal Alien Bureau Lists 309 for Deporting*, N.Y. HERALD TRIB., July 12, 1931, at 8 (noting that New York's new "Police Bureau of Criminal Alien Investigation" had identified "criminal aliens" in jails and penal institutions and "delivered [them] to the immigration authorities at Ellis Island"); *cf.* John L. Coontz, *Get Out! Says Uncle Sam to Criminal Aliens*, WASH. POST, Apr. 30, 1933, at SM1 ("With a gesture of his mighty arm and a broom that sweeps the Nation, Uncle Sam is cleaning house of the alien criminal.").

[84] *Alien Crime Purge Begun*, L.A. TIMES, July 27, 1935, at 1; *see also President, for Economy, Frees 151 Aliens from Federal Prisons for Deportation*, N.Y. TIMES, July 27, 1935, at 1. President Roosevelt had to commute prisoners' sentences because, with limited exceptions, noncitizens could

Public records of cooperation between INS and prison officials recede in the 1940s and 50s. Facing a shortage of workers during World War II, the federal government invented the Bracero Program, a plan to admit temporary guest laborers from Mexico that would last twenty-two years and bring millions of migrants into the United States.[85] In the mid-1940s, immigration enforcement shifted toward regulation of these migrant "guest workers"[86] and toward the arrest and detention of Japanese, German, and Italian noncitizens.[87] Though many immigrants were detained and deported during this period — and conditions in immigration detention facilities were often brutal — prisons were not yet permanent detention sites.[88] Indeed, holding detainees in prisons was controversial. When Ellis Island closed in the early 1950s, INS attempted to transfer all immigration detainees into federal prisons, but rescinded its plan when politicians and prison officials objected.[89] The distinction between imprisonment and detention loomed large in debates over where to house Ellis Island's inhabitants. In 1954, Jacob Javits, then a New York representative to Congress, "protested the use of prisons" on the ground that detaining noncitizens in penal institutions was "disruptive . . . of our social concept of the purposes of a prison."[90]

There are two ways to understand this objection. As Javits argued to the press, housing detainees in prisons scrambled the distinction between criminal and civil incarceration, casting all immigrants as criminals.[91] Confining detainees in prisons also violated prevailing norms around the use of penal institutions. The mid-twentieth century was the height of the rehabilitative ideal, a theory of punishment in which prisons serve to reform criminals through individualized, therapeutic

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not be deported until they completed their prison terms. This "imprisonment-before-deportation rule" remains in effect today. *See infra* note 183.

85 HERNÁNDEZ, *supra* note 73, at 101; Cox & Rodríguez, *supra* note 2, at 485–90. The Bracero Program ended in 1964. HERNÁNDEZ, *supra* note 73, at 101.

86 KANSTROOM, *supra* note 63, at 221; Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. L. REV. 1281, 1352 (2010) (noting that 1950s immigration prosecutions focused on so-called "wet-back" cases in which "the federal government charged thousands of laborers, gave them little or no jail time, and sent them home").

87 KANSTROOM, *supra* note 63, at 207.

88 *See* Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, 578–79 (1998).

89 Joseph J. Ryan, *Detained Aliens Lodged in Hotel as U.S. Ends Housing Them in Jail*, N.Y. TIMES, Dec. 10, 1954, at 1. Angel Island Immigration Station, Ellis Island's West Coast analogue, closed in 1940. *See History of Angel Island Immigration Station*, ANGEL ISLAND IMMIGR. STATION FOUND., https://www.aiisf.org/history/ [https://perma.cc/29YN-KLB9].

90 Ryan, *supra* note 89.

91 *Id.* ("[Javits] asked if aliens were some kind of 'second-class human beings not entitled to the normal amenities of a civilized social order.'").

treatment.[92] This conception of punishment presumed prisoners' eventual release and reintegration into the United States.[93] Holding detainees — a class of people not yet admitted into the polity, who might ultimately be expelled — in prisons undermined this vision of "corrections" and conflicted with dominant assumptions about the relationship between prisons and American society.

Thus, well into the twentieth century, prisons remained separate from immigration detention centers and only indirectly involved in border control. This was the status quo until 1980, when the relationship between imprisonment and immigration regulation took a turn.

B. 1980–1999: Turf Battles

If one had to pick a date when the integration of INS and BOP began, it would be April 1980.[94] That month, the Mariel boatlift brought more than 100,000 Cuban immigrants to the shores of southern Florida.[95] In response to mass emigration from Cuba and rising numbers of Haitian immigrants fleeing the Jean-Claude Duvalier regime into the United States,[96] INS built Krome Avenue Detention Center, the first federal immigration detention facility since Ellis Island.[97] Krome soon crept into prisons. After several high-profile riots and escapes at the detention center, and reports that a number of Mariel refugees had been released from Cuban prisons, BOP requested funds for "a separate [federal] prison for illegal alien felons,"[98] and the government began to move "Mariel Cubans" into federal and state prisons and local jails.[99]

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[92] *See* CHARLES BRIGHT, THE POWERS THAT PUNISH: PRISON AND POLITICS IN THE ERA OF THE "BIG HOUSE," 1920–1955, at 306–07 (1996); Edgardo Rotman, *The Failure of Reform: United States, 1865–1965*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 169, 169 (Norval Morris & David J. Rothman eds., 1995). I do not mean to endorse the rehabilitative ideal, nor to suggest that it was ever in fact achieved, but rather to highlight the conflict between a model of punishment in which prisoners are presumed reformable and one in which they are presumed deportable.

[93] BRIGHT, *supra* note 92, at 307 ("[T]he implied destination of those banished from society for a term of imprisonment was always release and re-inclusion. The proofs of rehabilitation that were required for parole . . . were all marks of normalization, signs that once criminally deviant souls could be returned to the folds of society . . . .").

[94] For an argument that the federal government's attitude toward immigrants began to shift in the 1970s during the Nixon Administration, see Cybelle Fox, *Unauthorized Welfare: The Origins of Immigrant Status Restrictions in American Social Policy*, 102 J. AM. HIST. 1051, 1053 (2016).

[95] *See* Palma v. Verdeyen, 676 F.2d 100, 101 (4th Cir. 1982) (describing the Mariel boatlift).

[96] Cox & Rodríguez, *supra* note 2, at 492–93 (noting that, in 1980 alone, 24,530 Haitians fled "Baby Doc" Duvalier's Haiti for the United States, *id.* at 493).

[97] *See* Simon, *supra* note 88, at 579. I am referring here to long-term, permanent detention centers. For a history of detention in jails and short-term border patrol facilities along the U.S.-Mexican border before 1980, see generally HERNÁNDEZ, *supra* note 73.

[98] William E. Gibson, *Senate OKs $7.1 Million for an Alien Felon Prison*, SUN SENTINEL, Nov. 2, 1985, at 3A.

[99] *Criminals at Krome Make Camp a Prison for Refugees*, ORLANDO SENTINEL, Nov. 29, 1985, at C1 ("There are nearly 3000 Mariel Cubans in federal lockups, [and] another 2500 in state and

The Mariel boatlift marked the beginning of a significant change in the criminal justice system. In the early 1980s, as mandatory minimum sentences and harsh drug laws started to drive dramatic increases in prison populations[100] and politicians decried an influx of "undesirable" immigrants,[101] criminal justice agencies began to formalize their relationship with INS. Local sheriffs and state prosecutors in New York and California reached out to the federal government to "request[] closer coordination" with immigration authorities[102] and some state prison officials started to submit lists of self-identified foreign-born prisoners to immigration agents.[103] INS responded by shifting its focus to prisons. By 1985, INS had concluded that "the most efficient way to address the criminal alien problem [was] to work within the prison system," where potential deportees were easy to find.[104] For the immigration agency, prisons offered a ready solution to a new and growing social problem. Prisons, in turn, began to look less like the reformatories Jacob Javits imagined and more like one of many interchangeable tools for immigration enforcement.

Congress encouraged this development with the passage of two laws, the Immigration Reform and Control Act of 1986[105] (IRCA) and the Anti-Drug Abuse Act of 1988.[106] IRCA, which introduced employer sanctions into immigration law, also included a brief provision requiring the Attorney General to "begin any deportation proceeding as expeditiously as possible" after a noncitizen is convicted of a deportable offense.[107] In response to this mandate, INS created two programs,[108]

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local jails."); *Krome's Mariels, Other Inmates, Staff Seek Relief*, SUN SENTINEL, Nov. 28, 1985, at 23B (noting that Cuban refugees at Krome would "be transferred to a federal prison"); *see also 8 Cubans from Mariel Boat Lift Are Released from Minnesota Prisons*, STAR TRIB., May 19, 1988, at 48.

100 *See* THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS: 1925–2015, at 1–3 (2017).

101 *See* KANSTROOM, *supra* note 63, at 227.

102 U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-86-58BR, CRIMINAL ALIENS: INS' INVESTIGATIVE EFFORTS IN THE NEW YORK CITY AREA 15 (1986) [hereinafter GAO, D'AMATO REPORT] (describing coordination between INS and the New York County District Attorney's office); *see also* George Ramos, *INS Opens Drive to Deport Alien Inmates of U.S. Jails*, L.A. TIMES, July 31, 1986, at SD1 (recounting the Los Angeles County Sheriff's Office's effort to coordinate with INS).

103 *See, e.g.*, GAO, D'AMATO REPORT, *supra* note 102, at 11.

104 *Id.* at 10.

105 Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

106 Pub. L. No. 100-690, § 7341, 102 Stat. 4181, 4469 (codified as amended in scattered sections of the U.S. Code).

107 § 701, 100 Stat. at 3445.

108 MARC R. ROSENBLUM & WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42057, INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 12 (2012).

which continue today: the Institutional Hearing Program (IHP), a "coordinated effort" in which immigration judges adjudicate deportation proceedings inside prisons,[109] and the Alien Criminal Apprehension Program (ACAP), an initiative in which teams of immigration agents enter prisons and jails to find potential deportees.[110] These programs built immigration enforcement — contact with INS agents and actual immigration courts — into the prison system. Both began as small pilot projects[111] and existed alongside other ad hoc measures to identify incarcerated noncitizens eligible for deportation.[112]

IRCA was soon followed by the Anti-Drug Abuse Act, a signature piece of President Reagan's "war against crime."[113] Although it is rarely viewed as an immigration law, the Anti-Drug Abuse Act had lasting effects on noncitizens in the United States. Most notably, it created "aggravated felonies," a set of criminal offenses that render noncitizens presumptively deportable.[114] The initial list of aggravated felonies was short,[115] but the creation of this category of offenses established noncitizens convicted of crimes as an especially easy group of people to deport. The Anti-Drug Abuse Act also prioritized prison-based immigration enforcement by requiring the Attorney General to hold removal proceedings in "correctional facilities" and to "assure[] expeditious deportation . . . following the end of the alien's incarceration for the underlying sentence."[116] Shortly after the law's passage, INS reported to Congress that it had directed its resources toward prisons rather than trying to

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109 FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT 5111.04, at 1 (2006).

110 *See* ROSENBLUM & KANDEL, *supra* note 108, at 12. These two programs were consolidated into the Criminal Alien Program in 2006. AM. IMMIGRATION COUNCIL, *supra* note 34, at 2; *see also* U.S. IMMIGRATION & CUSTOMS ENF'T, FACT SHEET: CRIMINAL ALIEN PROGRAM (2008), https://www.ice.gov/doclib/news/library/factsheets/pdf/cap.pdf [https://perma.cc/2B4F-9MDB].

111 *See* U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-88-3, CRIMINAL ALIENS: INS' ENFORCEMENT ACTIVITIES 30 (1987) (noting that ACAP would be "piloted in . . . Chicago, Los Angeles, Miami, and New York" until INS received additional funding); U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-79, CRIMINAL ALIENS: PRISON DEPORTATION HEARINGS INCLUDE OPPORTUNITIES TO CONTEST DEPORTATION 5 (1990) (describing the early Institutional Hearing Program).

112 *See, e.g.*, INS v. Nat'l Immigration & Naturalization Serv. Council, No. ARBIHS07207, 1990 WL 1107403, at *2 (July 23, 1990) (Keisler, Arb.) (noting that INS has "temporarily detailed" immigration officers to thirty-day "tour[s] of duty" in federal prisons); Patrick McDonnell, *INS Effort to Include Interviews with Inmates*, L.A. TIMES, Aug. 1, 1986, at 1 ("INS agents seeking aliens who could be deported will attempt to interview each foreign-born person among the 125,000 suspects booked annually in jails in San Diego . . . .").

113 Gerhard Peters & John T. Woolley, *Ronald Reagan: Radio Address to the Nation on Crime and Criminal Justice Reform*, AM. PRESIDENCY PROJECT (Sept. 11, 1982), http://www.presidency.ucsb.edu/ws/index.php?pid=42952 [https://perma.cc/3JN9-Q79W].

114 Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342, 7347, 102 Stat. 4181, 4469, 4471–72.

115 The first aggravated felonies were murder, drug trafficking, and firearms trafficking. *Id.* § 7342.

116 *Id.* § 7347.

find "aliens when they initially come into contact with the criminal justice system."[117] The prison was thus the central enforcement site as the convergence of criminal and immigration law — a phenomenon now known as "crimmigration" and most often associated with the police — began to unfold.[118]

INS's integration into prison systems deepened in the 1990s. In two laws passed in 1996 — the Anti-Terrorism and Effective Death Penalty Act[119] (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act[120] (IIRIRA) — Congress vastly expanded the list of aggravated felonies and other criminal convictions that give rise to deportation[121] and made it more difficult for noncitizens convicted of crimes, including long-term permanent residents, to appeal deportation orders.[122] Congress also funded a broad effort to identify incarcerated noncitizens, first by conditioning federal funding on each state's promise to inform INS when a noncitizen is convicted under state law,[123] then by doubling INS's enforcement budget[124] and creating a "criminal alien tracking center" within the immigration agency.[125] States with large immigrant populations (and the most expensive prison systems) engaged in a parallel identification project. In the mid-nineties, Departments of Correction in Florida, New York, and California developed computer systems to track "suspected or confirmed" noncitizens in prisons[126] and

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117 *Criminal Aliens: Hearing Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 101st Cong. 55 (1989) (statement of Lowell Dodge, Director, Administrator of Justice Issues, General Government Division, U.S. General Accounting Office).

118 Professor Juliet Stumpf coined the term "crimmigration" in 2006. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

119 Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of the U.S. Code).

120 Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8, 18, and 28 U.S.C.).

121 In April 1996, AEDPA made more than ten new crimes "aggravated felonies." § 440(e), 110 Stat. at 1277–78. Six months later, IIRIRA expanded the term "aggravated felony" and amended existing immigration laws to subject noncitizens convicted of firearm offenses and almost all drug offenses to deportation. *See* Pub. L. No. 104-208, § 321, 110 Stat. 3009-627 to -628. As a result, conviction for any misdemeanor or felony controlled substance offense other than a single conviction for simple possession of thirty grams or less of marijuana renders a noncitizen eligible for deportation. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (2012). For a full list of aggravated felonies, see 8 U.S.C. § 1101(a)(43). Note that, after IIRIRA, immigration statutes refer to both deportation and exclusion at the border as "removal."

122 AEDPA precludes relief from removal for noncitizens convicted of aggravated felonies, controlled substance violations, firearms offenses, and other crimes. *See* § 440(a), 110 Stat. at 1276–77.

123 *See* Immigration Act of 1990, Pub. L. No. 101-649, § 507, 104 Stat. 4978, 5050–51.

124 *Hearing Before Subcomm. on Immigration*, *supra* note 26, at 2 (statement of Rep. Lamar Smith).

125 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130002, 108 Stat. 1796, 2023.

126 *See Hearing Before Subcomm. on Immigration*, *supra* note 26, at 62 (statement of Kelly Tucker, Correctional Services Administrator, Florida Department of Corrections) (noting that the

the Texas Department of Criminal Justice used "inmate labor" to build an INS facility "on prison grounds."[127]

Although the effort to find and deport imprisoned noncitizens picked up considerable steam in the nineties, it would be a mistake to portray this process as seamless. INS's push into prison systems was met with resistance, particularly from prison officials in states that bore the cost of imprisoning noncitizens. Between 1992 and 1994, six states — Arizona, California, Florida, New Jersey, New York, and Texas — sued INS, seeking reimbursement for confining "alien" prisoners.[128] These suits were ultimately dismissed,[129] but they prompted the federal government to expand the Institutional Hearing Program[130] and to fund the State Criminal Alien Assistance Program (SCAAP), a scheme under which states receive federal money if they report the numbers of noncitizens they imprison.[131] These promises prompted further disputes: in

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Florida prison system counts "suspected or confirmed aliens" in its custody); *see also id.* at 60 (statement of Joe Sandoval, Secretary, California Youth and Adult Correctional Agency) (describing California's "criminal alien flagging project"); *id.* at 73–75 (statement of Anthony J. Annucci, Deputy Comm'r and Counsel, New York State Department of Correctional Services) (stating that New York counted all "alien inmates," *id.* at 74, and had recently "provided the INS with limited access to its on-line computer database," *id.* at 73).

127 *Id.* at 80 (statement of Catherine C. McVey, Assistant Director, Programs and Services Division, Texas Department of Criminal Justice).

128 Arizona v. United States, 104 F.3d 1095, 1096 (9th Cir. 1997) (Arizona); California v. United States, 104 F.3d 1086, 1089 (9th Cir. 1997) (California); Texas v. United States, 106 F.3d 661, 664 (5th Cir. 1997) (Texas); Padavan v. United States, 82 F.3d 23, 25–26 (2d Cir. 1996) (New York); New Jersey v. United States, 91 F.3d 463, 465 (3d Cir. 1996) (New Jersey); Chiles v. United States, 69 F.3d 1094, 1096 (11th Cir. 1995) (Florida).

129 States brought these suits under a variety of provisions, including 8 U.S.C. § 1365 (2012) (authorizing the Attorney General to reimburse states for imprisoning "any illegal alien or Cuban national who is convicted of a felony"); 8 U.S.C. § 1229(d) (requiring the Attorney General to begin deportation "as expeditiously as possible after the date of the conviction"); the Guarantee Clause; and the Tenth Amendment. All were dismissed as nonjusticiable or for failure to state a claim, rulings appellate courts affirmed. *See* sources cited *supra* note 128. These early suits over immigration policy are often overlooked in debates about states' power to depart from federal immigration priorities and the federal government's take care duties under Article II, Section 3. *See, e.g.*, Texas v. United States, 809 F.3d 134, 146 n.3 (5th Cir. 2015) (declining to decide whether the Deferred Action for Parents of Americans (DAPA) program violated the Take Care Clause), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

130 *See Hearing Before Subcomm. on Immigration*, *supra* note 26, at 73 (statement of Anthony J. Annucci, Deputy Comm'r and Counsel, New York State Department of Correctional Services) ("[I]n the early 1990s, the department had commenced a lawsuit against the Federal Government . . . . [A]s a means of resolving the lawsuit to the mutual satisfaction of both sides, [Attorney General Janet Reno offered] to enhance the IHP in New York . . . ."); *see also id.* at 13 (statement of Norman J. Rabkin, Director, Administration of Justice Issues, U.S. General Accounting Office) ("Since 1994, INS has focused its efforts on improving IHP operations in BOP and in seven states — Arizona, California, Florida, Illinois, New Jersey, New York, and Texas . . . .").

131 Congress created SCAAP in 1986, then funded and expanded it in 1994. *See* IRCA, Pub. L. No. 99-603, § 501, 100 Stat. 3359, 3443 (1986) (directing the Attorney General to reimburse states "for the costs incurred . . . for the imprisonment of any illegal alien or Cuban national" convicted of a felony); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20301, 108 Stat. 1796, 1823–24 (expanding federal reimbursement); *see also* Ann Morse, *The State Criminal*

1997, the New York State Department of Corrections held a month-long "shutdown" of prison-based immigration courts, arguing that the Department of Justice had not paid money due under SCAAP.[132]

States also objected to federal pressure to reorganize their prison systems. If the battle over foreign national prisoners was about the costs of federal immigration policy, it was also about institutional authority. As INS began to expand into penal institutions in the mid-1990s, the Agency urged states to "consolidate the foreign-born population" into fewer prisons.[133] Texas obliged, merging "[m]ultiple intake, hearing, and release sites for foreign-born inmates . . . into [a] single site" with permanent INS staff.[134] States with different immigration politics, however, refused to incorporate border control into prison management.[135] Florida argued that transferring all noncitizens into one prison presented security concerns.[136] New York agreed to process most of the "foreign-born inmate population" at two intake sites, but declined to "make a further commitment" until it "s[aw] the productivity that was promised" by INS.[137] California objected that housing "inmates who contest deportation" together "represent[ed] an additional work load" for prison officials and "compromise[d] [the state's] inmate classification and management policies."[138]

INS had fewer "[t]urf battles"[139] with BOP, which proved a more willing partner in the integration of prison and immigration policy. In 1996, the two agencies signed an agreement creating eleven intake sites for noncitizens known as "enhanced IHP" prisons.[140] These prisons, which were modeled on a "joint [BOP]-INS contract facility" opened in

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Alien Assistance Program (SCAAP), NAT'L CONF. STATE LEGISLATURES (Apr. 13, 2013), http://www.ncsl.org/research/immigration/state-criminal-alien-assistance-program.aspx [https://perma.cc/9S6J-GQSJ] ("Originally authorized by [IRCA], the program was not funded until the Violent Crime Control and Law Enforcement Act of 1994 . . . .").

132 *See Hearing Before Subcomm. on Immigration*, *supra* note 26, at 6 (statement of Rep. Lamar Smith).

133 *Id.* at 32 (statement of Paul Virtue, Executive Associate Comm'r, Programs, U.S. Immigration and Naturalization Service); *see also id.* at 13 (statement of Norman J. Rabkin, Director, Administration of Justice Issues, U.S. General Accounting Office) (noting that "INS had wanted" states to "consolidate their IHP sites" and to "reduce the number of release sites" for noncitizen prisoners).

134 *Id.* at 36 (statement of Paul Virtue, Executive Associate Comm'r, Programs, U.S. Immigration and Naturalization Service).

135 *See id.* at 13 (statement of Norman J. Rabkin, Director, Administration of Justice Issues, U.S. General Accounting Office).

136 *Id.*

137 *Id.* at 93 (statement of Anthony J. Annucci, Deputy Comm'r and Counsel, New York State Department of Correctional Services).

138 *Id.* at 57 (statement of Joe Sandoval, Secretary, California Youth and Adult Correctional Agency).

139 *Id.* at 6 (statement of Rep. Lamar Smith).

140 *Id.* at 54 (statement of John L. Clark, Assistant Director, Community Corrections and Detention, Federal Bureau of Prisons).

Arizona in 1994, boasted built-in immigration courtrooms and permanent "office space for INS."[141] Initially, BOP sent noncitizens to these prisons for immigration hearings at the start of their sentences, then transferred them to other prisons "to free up beds."[142] In 1997, one of BOP's Assistant Directors described IHP prisons as facilities "targeted at the Mexican citizens."[143]

BOP's willingness to work with INS coincided with an increase in the number of noncitizens in federal prisons. Federal prosecutions for immigration crimes began to rise in the late 1990s, as immigration policy took a punitive turn and the penalties for immigration violations grew increasingly harsh.[144] Between 1986 and 1996, Congress passed at least six laws expanding sanctions for immigration crimes, including the maximum prison sentence for illegal reentry.[145] As a result, the foreign national population in federal prisons ballooned, from just over 7000 in 1989 to more than 20,000 by 1994.[146] In the face of this shift in the prison population, and growing political pressure to coordinate with INS,[147] BOP built migration control into its intake and release processes.

The Agency also began to see noncitizens as a set of prisoners who would be deported at the end of their prison terms and thus ought not receive services aimed at reforming prisoners before their release. Between 1988 and 2000, BOP made noncitizens ineligible for drug treatment programs[148] and, in most instances, for "nearer release" transfers, which place prisoners closer to their families;[149] exempted foreign nationals from literacy and math requirements that trigger access to basic

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[141] *Id.* at 55; *see also* FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, *supra* note 109, attachment A (listing IHP sites).

[142] *Hearing Before Subcomm. on Immigration*, *supra* note 26, at 55 (statement of John L. Clark, Assistant Director, Community Corrections and Detention, Federal Bureau of Prisons).

[143] *Id.* at 91 (statement of John L. Clark, Assistant Director, Community Corrections and Detention, Federal Bureau of Prisons).

[144] David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 165–67 (2012). Prosecutions for other crimes remained "far more constant." *Id.* at 167; *see also* Eagly, *supra* note 86, at 1353 fig. 4 (charting the immigration caseload between 1923 and 2009).

[145] Sklansky, *supra* note 144, at 165.

[146] Pierre Thomas, *One Out of Four Federal Prisoners Not a U.S. Citizen*, WASH. POST, Nov. 25, 1994, at A1 (citing BOP statistics); *see also* U.S. SENTENCING COMM'N, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, ch. 4, at 79–80 (2011) (tracing the federal prison population between 1995 and 2010).

[147] *See Hearing Before Subcomm. on Immigration*, *supra* note 26, at 8 (statement of Norman J. Rabkin, Director, Administration of Justice Issues, U.S. General Accounting Office) (describing INS's effort to induce prison officials to "make the processing of aliens more efficient").

[148] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-320, BUREAU OF PRISONS: ELIGIBILITY AND CAPACITY IMPACT USE OF FLEXIBILITIES TO REDUCE INMATES' TIME IN PRISON 32 (2012) ("Prior to a 1996 BOP policy change, inmates with detainers could complete the [drug treatment] program . . . .").

[149] FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT 5100.07, ch. 10, at 4 (1999). Many of these restrictions apply to "inmates with detainers." *See, e.g.*, *id.*; U.S.

education programs;[150] and proposed a rule excluding noncitizens from all postsecondary and occupational education programs before concluding that foreign nationals could participate in such programs, but only if "resources are available after participation by inmates" without detainers.[151] BOP also "categorically excluded" deportable noncitizens from early release following successful completion of a drug treatment program[152] and clarified that noncitizens were ineligible for placement in halfway houses.[153]

In short, in a flurry of policies during the 1990s, BOP limited noncitizens' access to a range of rehabilitative programs. These policies marked the culmination of a decade-long effort to incorporate immigration enforcement into prison management and to single out noncitizens as a separate — and less deserving — class of federal prisoners. Once the Bureau had identified this exceptional population, it revived an idea from the early twentieth century: prisons segregated by citizenship status.

C. 1999–2018: Segregated Prisons

The Bureau of Prisons created all-foreign prisons in 1999. In April of that year, the Agency announced that it was considering "housing [the] criminal alien population in [private] low-security" prisons[154] called "Criminal Alien Requirement" — or CAR — facilities.[155] The Bureau

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GOV'T ACCOUNTABILITY OFFICE, *supra* note 148, at 30–32. Given that nearly all noncitizen prisoners are subject to immigration detainers, detainer restrictions effectively exclude noncitizens from these programs. *See* Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Pursuant to Executive Order on Public Safety, Department of Justice Releases Data on Incarcerated Aliens (May 2, 2017), https://www.justice.gov/opa/pr/pursuant-executive-order-public-safety-department-justice-releases-data-incarcerated-aliens-0 [https://perma.cc/87SA-8EB9] (noting that, as of March 2017, 99.9% of the noncitizens in BOP custody were either under ICE investigation for possible removal, subject to a final removal order, or charged but not yet ordered deported); *see also* LENA GRABER & AMY SCHNITZER, NAT'L IMMIGRATION PROJECT, THE BAIL REFORM ACT AND RELEASE FROM CRIMINAL AND IMMIGRATION CUSTODY FOR FEDERAL CRIMINAL DEFENDANTS 3 (2013) ("In practice, ICE routinely issues an immigration detainer . . . almost immediately upon learning of a noncitizen's placement in criminal custody.").

150 *See* Control, Custody, Care, Treatment and Instruction of Inmates; Minimum Standards for Administration, Interpretation, and Use of Education Tests, 53 Fed. Reg. 10,202 (Mar. 29, 1988) (codified at 28 C.F.R. § 544.11(a)(3)) (making testing requirements inapplicable to "[s]entenced aliens with a deportation detainer").

151 Occupational Education Programs, 68 Fed. Reg. 65,169, 65,169 (Nov. 19, 2003) (codified at 28 C.F.R. 544) (finalizing a rule proposed on July 17, 2000).

152 *See* United States v. Lopez-Salas, 266 F.3d 842, 848 (8th Cir. 2001).

153 *See* United States v. Restrepo, 999 F.2d 640, 642–43 (2d Cir. 1993).

154 Notice of Intent to Prepare a Draft Environmental Impact Statement (DEIS) for Housing Criminal Alien Population in Non-Federal Low-Security Correctional Facilities, 64 Fed. Reg. 20,021, 20,021 (proposed Apr. 23, 1999).

155 OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT OF THE FEDERAL BUREAU OF PRISONS CONTRACT NO. DJB1PC007 AWARDED TO REEVES COUNTY, TEXAS TO OPERATE THE REEVES COUNTY DETENTION CENTER I/II PECOS, TEXAS 2 (2015) [hereinafter OIG, REEVES AUDIT].

then began to solicit bids from companies interested in operating prisons for noncitizens.[156] In June 1999, Corrections Corporation of America won the first contract and started to construct CAR prisons in California City, California, and Milan, New Mexico.[157] BOP planned to fill these facilities with noncitizens transferred from federal prisons in Arizona, California, New Mexico, Oklahoma, and Texas.[158]

Twenty years later, this model of incarceration is entrenched in the federal prison system. There are now ten CAR prisons, all of which are low-security institutions[159] run by for-profit corporations.[160] CAR prisons are located in seven states: California, Georgia, Mississippi, North Carolina, Oklahoma, Pennsylvania, and Texas.

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156 *See id.*

157 Judith Greene, *Bailing Out Private Jails*, AM. PROSPECT, Sept. 10, 2001, at 23, 27. Corrections Corporation of America rebranded as CoreCivic in October 2016. Dave Boucher, *CCA Changes Name to CoreCivic amid Ongoing Scrutiny*, TENNESSEAN (Oct. 28, 2016, 11:22 AM), http://tnne.ws/2eDwkI5 [https://perma.cc/2KZE-FR79].

158 Greene, *supra* note 157, at 27.

159 BOP's inmate classification system has five security levels: minimum, low, medium, high, and administrative. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT 5100.08, ch. 1, at 1 (2006). Administrative prisons are "institution[s] with a special mission" such as "medical/mental health." *Id.* ch. 2, at 1.

160 As of January 2018, the CAR facilities were: Adams County Correctional Center in Natchez, Mississippi; Big Spring Correctional Center in Big Spring, Texas; D. Ray James Correctional Facility in Folkston, Georgia; Giles W. Dalby Correctional Facility in Post, Texas; Great Plains Correctional Facility in Hinton, Oklahoma; McRae Correctional Facility in Helena, Georgia; Moshannon Valley Correctional Center in Philipsburg, Pennsylvania; Reeves County Detention Center III in Pecos, Texas; Rivers Correctional Institution in Winton, North Carolina; and Taft Correctional Institution in Taft, California. 2018 FOIA Materials, *supra* note 7. Three corporations — CoreCivic, GEO Group, and Management and Training Corporation — operate all CAR prisons. *See Contract Prisons*, FED. BUREAU PRISONS, https://www.bop.gov/about/facilities/contract_facilities.jsp [https://perma.cc/7WG3-66LV].

Figure 1: All-Foreign Prison Locations

Together they hold 18,941 people,[161] which is approximately 10% of the total federal prison population[162] and 53% of the noncitizen prisoner population.[163] Most foreigners in federal prison thus live in institutions segregated by alienage.

These numbers are slightly lower than they were several years ago. After BOP and INS invented them in 1999, "criminal alien" prisons expanded at a steady clip[164] until 2015, when the Obama Administration

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161 2018 FOIA Materials, *supra* note 7.

162 As of September 2018, the total federal prison population was 181,302. *See Inmate Citizenship*, *supra* note 9.

163 *See supra* note 9. Two caveats concerning BOP statistics are necessary. First, BOP's public data on citizenship divide prisoners into only six categories: citizens of (1) the United States; (2) Mexico; (3) Cuba; (4) Colombia; (5) the Dominican Republic; and (6) prisoners whose citizenship status is "other/unknown." *Inmate Citizenship*, *supra* note 9. The claim that 53% of noncitizens live in segregated prisons assumes that prisoners whose citizenship status is "other/unknown" are noncitizens. It is possible that some of these prisoners are U.S. citizens, but that number is unlikely to be very large given that BOP currently imprisons nationals from at least 131 total countries, including thousands of prisoners from countries other than Mexico, Cuba, Colombia, and the Dominican Republic. *See* 2018 FOIA Materials, *supra* note 7. Second, prison statistics suffer from inherent limitations: it is not clear how BOP collects citizenship data, and prison populations change daily no matter how accurate statistics are.

164 *See* OIG, REEVES AUDIT, *supra* note 155, at 3 tbl.2 (listing fourteen CAR prisons with a total population of 26,801 in February 2015); *see also* E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011, at 13 (2012) (noting that 18% of the federal prison population was in private facilities in 2011).

terminated the contracts for two prisons.[165] Two more closures followed,[166] and all CAR prisons seemed poised to shut their doors after the Obama Justice Department announced that it would no longer use private prisons.[167] The Trump Administration, however, reversed this policy and began to solicit bids for new all-foreign prisons in May 2017.[168]

The prisoners in all-foreign facilities are serving time for a range of criminal offenses. According to BOP's internal statistics, 53% of CAR prisoners were convicted of a drug crime, 32% committed an immigration offense, and 8% were sentenced for a violent offense.[169] These figures are consistent with the broader federal prison population, in which 47% of noncitizens are serving a sentence for a drug-related crime, 43% are serving time for an immigration offense, and 10% have been sentenced for some other criminal offense.[170]

CAR prisoners hail from a wide range of countries — 131 in total.[171] The vast majority, however, are from a small set of countries.

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[165] Willacy County Correctional Center in Raymondsville, Texas, and Northeast Ohio Correctional Center in Youngstown, Ohio, closed in 2015. *See* John Burnett, *Closure of Private Prison Forces Texas County to Plug Financial Gap*, NPR (Mar. 26, 2015, 3:49 AM), https://www.npr.org/2015/03/26/394918220/closure-of-private-prison-forces-texas-county-to-plug-financial-gap [https://perma.cc/5BR5-GU5D]; Stephen Koff, *Federal Prison in Youngstown Might Not Feel Effects of Private-Prison Phase-Out*, CLEVELAND.COM (Aug. 19, 2016, 1:08 PM), https://www.cleveland.com/metro/index.ssf/2016/08/federal_prison_in_youngstown_u.html [https://perma.cc/H3ZF-7AQT].

[166] In 2016, BOP declined to renew its contracts with Corrections Corporation of America for Cibola County Correctional Center in Milan, New Mexico, and Eden Detention Center in Eden, Texas. *See* Dan Boyd, *Cibola County Prison Closing Will Impact 300 Workers*, ALBUQUERQUE J. (Aug. 3, 2016, 10:33 PM), https://www.abqjournal.com/819694/closure-of-cibola-county-prison-could-affect-300-employees.html [https://perma.cc/TJQ9-WTCT]; Michael Marks, *After Eden's Prison Closes, What's Next for This Small Texas Town?*, TEX. STANDARD (May 5, 2017, 10:27 AM), https://www.texasstandard.org/stories/after-edens-prison-closes-what-comes-next-for-this-small-texas-town/ [https://perma.cc/2B8J-URB9].

[167] Sally Q. Yates, *Phasing Out Our Use of Private Prisons*, U.S. DEP'T OF JUSTICE ARCHIVES (Aug. 18, 2016), https://www.justice.gov/archives/opa/blog/phasing-out-our-use-private-prisons [https://perma.cc/S6RT-RVX9].

[168] Fed. Bureau of Prisons, *supra* note 6.

[169] *See* 2018 FOIA Materials, *supra* note 7. The figure for "immigration offenses" includes offenses BOP lists under the category "immigration" (6171 of 18,941 prisoners), but not convictions for "fraud/bribery/extortion" (885) or "counterfeit/embezzlement" (23). *See id.*; *see also supra* note 7 (defining "immigration offense"). The term "violent offense" includes convictions for crimes involving weapons or explosives (599), homicide and aggravated assault (137), burglary or larceny (453), sex offenses (310), and robbery (60), but not convictions for national security offenses (7) or involvement in a continuing criminal enterprise (7). *See* 2018 FOIA Materials, *supra* note 7.

[170] MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, IMMIGRATION OFFENDERS IN THE FEDERAL JUSTICE SYSTEM, 2010, at 35 (2013).

[171] 2018 FOIA Materials, *supra* note 7. In addition, BOP data show that 725 prisoners in CAR facilities are U.S. citizens sentenced in Arizona, California, or Washington, D.C. *Id.* All but three of those prisoners are in Rivers or Taft Correctional Institution. *Id.*; *see also* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS 9 n.21 (2016) [hereinafter OIG, REVIEW OF CONTRACT PRISONS]. It is unclear why there are U.S. citizens in these two "criminal alien requirement" pris-

Those born in Colombia, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, or Mexico constitute 87% of the all-foreign prison population.[172] Close to 70% were born in Mexico.[173]

Figure 2: Noncitizen Prisoners' Nationalities

The Bureau of Prisons sends prisoners from all over the United States to CAR facilities. All-foreign prisons hold people sentenced in every one of the country's ninety-four district courts, including those in the Virgin Islands, the Northern Mariana Islands, Puerto Rico, and Guam.[174] Again, though, a handful of jurisdictions drive this prison system. More than half of all CAR prisoners were sentenced in one of

ons, and their presence raises questions about when an institution is actually "segregated." I describe CAR prisons as segregated by alienage because they were built specifically to imprison foreigners, are described in BOP contracts as prisons for "non-U.S. citizens with deportation orders," and house only a small number of U.S. citizens. *See infra* pp. 1406–07 and sources cited *infra* note 178. Note that the U.S. citizen population is omitted from Figure 2.

172 *See* 2018 FOIA Materials, *supra* note 7. These are statistics on prisoners' place of birth, not citizenship status. This figure (87%) remains the same using citizenship data.

173 *See id.* (listing 12,944 prisoners born in Mexico of 18,929 prisoners with recorded birthplaces). Prisoners born in the Dominican Republic — the second-largest group — constitute only 4% of the population. *Id.* (listing 697 prisoners born in the Dominican Republic). Again, place of birth and citizenship are different, although they often align. For instance, there are only 12,921 Mexican citizens and 695 citizens of the Dominican Republic in all-foreign prisons. *Id.* Section II.C discusses the slippage between these concepts, *infra* pp. 1414–18.

174 2018 FOIA Materials, *supra* note 7. CAR prisons also hold one prisoner sentenced by the U.S. Army and 273 prisoners sentenced in District of Columbia Superior Court. *Id.*

six courts along the southern border.[175] No other jurisdiction comes close to the numbers delivered by these few.[176]

Figure 3: Sentencing Jurisdictions for CAR Prisoners

To the extent that BOP offers a public rationale for all-foreign prisons, the Agency describes segregated penal institutions as a way to facilitate border control. In early environmental impact statements, for instance, the Bureau presented all-foreign prisons as part of an effort to "support[] . . . the Immigration and Naturalization Service in the rapidly increasing requirements for the detention of . . . aliens awaiting hearings and/or release or repatriation to their countries of origin."[177] Procurement documents reiterate this cooperation rationale and emphasize that

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[175] *See id.* As of January 2018, the most represented sentencing jurisdictions in CAR prisons were the Southern District of Texas (3230 of 18,768 prisoners for whom BOP had sentencing data), the District of Arizona (2148), the Western District of Texas (1721), the Southern District of California (1107), the Southern District of Florida (980), and the Middle District of Florida (875). *Id.* Prisoners from these six jurisdictions constitute 54% of the CAR prison population. *See id.*

[176] *See id.* The only other jurisdictions to send more than 300 prisoners to CAR facilities were the Northern District of Texas (521), the Central District of California (419), the District of New Mexico (371), the Southern District of New York (364), the Eastern District of California (348), and the Eastern District of Texas (328). *See id.* Most (58%) jurisdictions sent fewer than 100 prisoners to CAR facilities. *See id.*

[177] Notice of Intent to Prepare a Draft Environmental Impact Statement (DEIS) for Housing Criminal Alien Population in Non-Federal Low-Security Correctional Facilities, 64 Fed. Reg. 20,021, 20,021–22 (proposed Apr. 23, 1999); *see also* Notice of Availability of the Finding of No Significant Impact, 79 Fed. Reg. 57,978, 57,979 (Sept. 26, 2014); Notice of Cancellation of the Programmatic Environmental Impact Statement for Housing the Criminal Alien Population in Non-Federal Low-Security Correctional Facilities, 65 Fed. Reg. 30,622 (May 12, 2000). Note, however, that the U.S. government almost never repatriates foreign-national prisoners. Emma Kaufman,

all-foreign prisons are supposed to house sentenced "non-U.S. citizens with deportation orders."[178] But the history of these facilities suggests a less systematic, more path-dependent story. All-foreign prisons appear to have been born of convenience, the logical outgrowth of a new approach to foreigners in which prison services became a privilege of citizenship.

There is, moreover, little evidence that segregating foreign nationals makes it meaningfully easier to identify noncitizens convicted of crimes. Prisoners sent to all-foreign prisons will already have been identified by immigration authorities through Secure Communities, a program in which law enforcement agencies share data with ICE,[179] or the Criminal Alien Program (CAP), an extensive screening initiative that grew out of the cooperative enforcement programs created in the late 1980s.[180] Under CAP, ICE now sends teams of immigration agents from 171 field offices into "more than 4300 federal, state, and local jails" and claims to check the immigration status of all "self-proclaimed foreign-born nationals . . . within [BOP] facilities."[181] BOP also provides lists of all "foreign-born inmates in its custody" to ICE on "a daily basis."[182] Immigration authorities are thus likely to know that a prisoner is eligible for removal well before he arrives in an all-foreign prison.

Nor is there much evidence that these prisons facilitate deportation. With limited exceptions, noncitizens must serve their full criminal sentences before being deported.[183] Although it could, in theory, streamline the removal process to concentrate noncitizens in specific prisons at the end of their sentences and to deport them directly from those penal institutions, BOP does not appear to use all-foreign prisons this way. These are long-term prisons, in which the average sentence is six

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Extraterritorial Punishment, 20 NEW CRIM. L. REV. 66, 80 (2017) (stating that the Department of Justice denied 97% of repatriation applications between 2005 and 2010).

178 *See, e.g.*, Fed. Bureau of Prisons, RFP-PCC-0022, Performance Work Statement 3 (June 26, 2013) (on file with the Harvard Law School Library); *see also* Fed. Bureau of Prisons, RFP-PCC-0025, Solicitation, Offer, and Award (Apr. 18, 2017) (on file with the Harvard Law School Library). In some environmental impact statements, BOP also describes CAR prisons as a response to prison overcrowding, but it is unclear how segregating prisoners reduces the prison population. *See, e.g.*, Notice of Intent to Prepare a Draft Environmental Impact Statement, 76 Fed. Reg. 3925, 3925 (Jan. 21, 2011).

179 *See* Cox & Miles, *supra* note 3, at 93.

180 *See* AM. IMMIGRATION COUNCIL, *supra* note 34, at 1–2. CAP developed from ACAP and IHP, the cooperative enforcement programs created in response to IRCA. *See supra* pp. 1395–96.

181 AM. IMMIGRATION COUNCIL, *supra* note 34, at 5.

182 Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *supra* note 149.

183 8 U.S.C. § 1231(a)(4) (2012); *see also* Peter H. Schuck, *Immigrant Criminals in Overcrowded Prisons: Rethinking an Anachronistic Policy*, 27 GEO. IMMIGR. L.J. 597, 636–41 (2013) (discussing the "imprisonment-before-deportation rule," which Congress created in 1917, *id.* at 636). AEDPA reaffirmed this rule in 1996 and created a narrow exception in cases where the Attorney General deems it "appropriate" to permit early release of a noncitizen convicted of a nonviolent offense other than an immigration offense or certain aggravated felonies. Schuck, *supra*, at 640–41.

years.[184] Close to a quarter of all CAR prisoners are serving ten years or more[185] and three are serving life terms.[186] Some prisoners, moreover, are citizens of countries to which deportation is unlikely, including Cambodia, Guinea, Sierra Leone, and Syria.[187] When prisoners can be deported, BOP instructs prison officials to transfer noncitizens "close to the eventual area of deportation"[188] as their removal dates near and lists both all-foreign and integrated prisons as noncitizen "release sites."[189] In interviews, immigration attorneys reported that most CAR prisoners are sent to immigration detention centers at the end of their prison sentences.

None of these accounts indicates that CAR prisons are last-stop institutions in a coordinated deportation regime. Instead, all-foreign prisons represent a new model of prison management — less a means to facilitate deportation than an emergent penology in which noncitizens are punished differently than citizens of the United States.

II. THE CONSEQUENCES OF SEGREGATION

Segregating prisons by alienage has consequences, both for prisoners and for the prison system as a whole. Some are concrete: for example, prisoners in all-foreign facilities live in harsh conditions with higher rates of prison violence and reduced access to family and counsel. This new prison system also has a more abstract — though no less important — impact on the dynamics of race and ethnicity behind bars.

This Part examines the practical effects of segregation by citizenship. First, though, it is critical to underscore just how little we know about all-foreign prisons. These are remarkably closed institutions, even by prison standards. There are few public reports on CAR facilities and almost all the information that exists resulted from years of FOIA litigation.[190] My own effort to understand these prisons has involved cold calls to prisons, interviews, forays into federal court dockets, three FOIA requests, and an eight-month effort to obtain approval to write letters

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184 *See* 2018 FOIA Materials, *supra* note 7. Note that this figure excludes three prisoners with life sentences (which would make the average higher) and 173 prisoners for whom sentence data is "missing." *Id.*

185 *Id.* (listing 4375 prisoners (23%) with sentences of 120 months or more).

186 *Id.*

187 *See id.*; *see also* Ron Nixon, *Trump Administration Punishes Countries That Refuse to Take Back Deported Citizens*, N.Y. TIMES (Sept. 13, 2017), https://nyti.ms/2y07s3s [https://perma.cc/QPG5-GR8V] (listing countries that refuse to accept the return of their nationals); Vivian Yee, *6900 Syrians Win Permission to Stay in the U.S., for Now*, N.Y. TIMES (Jan. 31, 2018), https://nyti.ms/2Fyh6OR [https://perma.cc/2E2G-W8B9].

188 FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, *supra* note 109, at 10.

189 *Id.* attachment A.

190 *See supra* note 41; *infra* note 191.

to prisoners, which ultimately failed.[191] Even if BOP permits communication, moreover, no all-foreign prison offers access to TRULINCS, an email system that exists in all other federal prisons.[192] Nonetheless, it is possible to get a glimpse of life inside an all-foreign prison. The picture that emerges is bleak.

A. Conditions of Confinement

The three best sources on conditions in all-foreign prisons are a four-year study by the DOJ Inspector General;[193] articles by an investigative journalist who obtained 9000 pages of BOP medical records after a FOIA suit;[194] and a report by the ACLU National Prison Project, which conducted twelve site visits and 270 interviews at CAR prisons in 2013 and 2014.[195] Each describes all-foreign prisons as institutions with unusually poor healthcare; overcrowding; higher rates of solitary confinement, lockdowns, and deaths in custody than comparable BOP institutions; and a dearth of rehabilitative programs such as drug treatment and education courses, which are offered in other federal prisons.[196] An immigration attorney who has represented clients in two all-foreign prisons told me that CAR facilities lack law libraries, training and educational programs, and recreational equipment.[197]

There is also evidence that all-foreign prisons are violent places to live and work. In 2012, "a Correctional Officer was killed and 20 people were injured during a riot at the Adams County Correctional Center" in Natchez, Mississippi, which began when 250 prisoners protested "low-

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191 To permit me to write to prisoners, the Institutional Review Board (IRB) at the University of Chicago required me to obtain approval from the Bureau of Prisons, which denied my request. Letter from Judi Simon Garrett, Assistant Dir. for Info., Policy, & Pub. Affairs, Fed. Bureau of Prisons, to author (Apr. 12, 2018) (on file with the Harvard Law School Library). When pressed for explanation, BOP said that research on noncitizens is not generalizable to the whole prison population and therefore "fails to contribute to the advancement of knowledge about corrections"; that asking prisoners where they would like to be housed "doesn't make sense" because prisoners have no choice in housing placements; and that even "if everything [were] perfect and the [BOP's internal] IRB approved [my study], the Agency wouldn't approve it." Telephone Call with Dr. Jody Klein-Saffran, Researcher, Office of Research & Evaluation, Fed. Bureau of Prisons (Apr. 18, 2018). BOP also warned that letters I sent without their approval would be confiscated and reported to the Agency's central office. *Id.*

192 *See TRULINC Locations*, FED. BUREAU PRISONS, https://www.bop.gov/inmates/trulincs.jsp [https://perma.cc/JC2A-5GJM].

193 *See* OIG, REVIEW OF CONTRACT PRISONS, *supra* note 171, at i–iii.

194 *See, e.g.*, Seth Freed Wessler, *A Guide to Our Investigation of Deaths Inside Immigrant-Only Prisons*, INVESTIGATIVE FUND (Jan. 28, 2016), https://www.theinvestigativefund.org/blog/2016/01/28/guide-investigation-deaths-inside-immigrant-prisons/ [https://perma.cc/A3K2-SZMM].

195 *See* ACLU, WAREHOUSED AND FORGOTTEN: IMMIGRANTS TRAPPED IN OUR SHADOW PRIVATE PRISON SYSTEM 13 (2014).

196 *See* sources cited *supra* notes 193–195.

197 Interview with Anonymous Immigration Attorney (Nov. 7, 2017).

quality food and medical care."[198] In 2015, BOP transferred 2800 prisoners out of Willacy County Correctional Center, an all-foreign prison in Texas, after an uprising "rendered the facility uninhabitable."[199] The same year, the DOJ Inspector General reported that a now-closed CAR facility in Pecos, Texas, had too few staff for its security and medical needs.[200] That prison was the site of two riots between 2008 and 2009, during which prisoners set the institution on fire.[201]

These reports are unsurprising given the connection between prison programs and prison violence. For years, criminologists and sociologists have argued that "chronic idleness" increases the risk of prison violence and that educational and occupational programs reduce it.[202] BOP itself has frequently stated that idleness leads to prison "disruptions."[203] It makes sense, then, that prisons with fewer programs would be especially volatile. These prisons are not only separate from the rest of the prison system. In practice, and perhaps by design, they are worse than other prisons.

All-foreign prisons are also remote. Few are near a city with an active pro bono immigration bar,[204] and as noted above, even email access to these institutions is curtailed. This isolation affects prisoners' ability to litigate their immigration cases. Attorneys who have visited all-foreign facilities report that prisoners rarely have legal representation.[205] Instead, if they contest deportation, prisoners represent themselves — often in video teleconference hearings, which are an increasingly common alternative to in-person adjudication of immigration

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198 OIG, REVIEW OF CONTRACT PRISONS, *supra* note 171, at 2; *see also* Affidavit of Casey Markovitz, United States v. Lopez-Fuentes, No. 12-mj-00160 (S.D. Miss. Aug. 8, 2012), ECF No. 1.

199 Kenneth R. Rosen, *Inmates to Be Transferred After Riot at Texas Prison*, N.Y. TIMES (Feb. 21, 2015), https://nyti.ms/1zXkNm3 [https://perma.cc/2E88-RL9X].

200 OIG, REEVES AUDIT, *supra* note 155, at ii–iii.

201 *Id.* at i; *see also* Janet DiGiacomo, *Texas Riot Quelled; Inmates Damage Building*, CNN (Feb. 1, 2009), http://www.cnn.com/2009/US/02/01/texas.prison.riot/index.html [https://perma.cc/D4A4-K2SQ].

202 *See* Craig Haney, *The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions*, 22 WASH. U. J.L. & POL'Y 265, 275 (2006) (collecting research on the "negative psychological and behavioral effects" of idleness).

203 *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-893, BUREAU OF PRISONS: IMPROVED EVALUATIONS AND INCREASED COORDINATION COULD IMPROVE CELL PHONE DETECTION 12 (2011) (quoting BOP's views on idleness).

204 *See* ACLU, *supra* note 195, at 56 n.212 (noting that the State Bar of Texas listed no pro bono immigration attorneys near any of five CAR prisons in Texas); *see also Where You Live Impacts Ability to Obtain Representation in Immigration Court*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Aug. 7, 2017), http://trac.syr.edu/immigration/reports/477/ [https://perma.cc/D3C5-RXNW] (mapping geographic disparities in the odds of obtaining immigration representation).

205 *See* ACLU, *supra* note 195, at 56.

cases.[206] Professor Ingrid Eagly's work on immigration detention indicates that televideo cases are more likely to result in deportation than in-person immigration hearings.[207] This finding suggests that the outcomes of CAR prisoners' cases may be worse than if they had better access to lawyers and in-person immigration courts.

All-foreign prisons also isolate noncitizens from their families in the United States.[208] As a matter of policy, BOP attempts to hold prisoners within 500 miles of the location where they have the most "community and/or family support."[209] Noncitizens, however, are often held much farther from home. BOP expressly exempts prisoners with detainers (including long-term legal residents) from its 500-mile rule, which means that noncitizen prisoners can be transferred anywhere in the country.[210] The Agency's internal data show that, on average, CAR prisoners are held 737 miles from the place where they were sentenced and that more than half of all CAR prisoners are held over 500 miles from home.[211] By contrast, the average distance between integrated prisons and prisoners' sentencing jurisdiction is 517 miles and only a third of the prisoners in integrated facilities are more than 500 miles from home.[212] It

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[206] *See* Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 934 (2015); *see also* Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Attorney General Sessions Announces Expansion and Modernization of Program to Deport Criminal Aliens Housed in Federal Correctional Facilities (Mar. 30, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-expansion-and-modernization-program-deport-criminal [https://perma.cc/YC62-CKDG] (announcing an initiative to "increase each [prison] facility's [televideo] capabilities").

[207] Eagly, *supra* note 206, at 937.

[208] There are no good statistics on how many CAR prisoners have family members in the United States. Anecdotally, immigration attorneys report that most long-term permanent residents have family in the country and that prisoners charged with illegal reentry are less likely to have U.S.-citizen family members. Nationally, an estimated 4.5 million U.S.-citizen children live with an unauthorized immigrant parent. RANDY CAPPS ET AL., IMPLICATIONS OF IMMIGRATION ENFORCEMENT ACTIVITIES FOR THE WELL-BEING OF CHILDREN IN IMMIGRANT FAMILIES 7 (2015) (reporting data from ICE). And in 2013, ICE deported approximately 72,000 parents of U.S.-citizen children. *Id.* at 1.

[209] FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, *supra* note 159, ch. 7, at 4.

[210] *Id.*; *see supra* note 149 (explaining why a detainer exemption will cover almost every noncitizen in federal prison).

[211] *See* 2018 FOIA Materials, *supra* note 7. The median distance between CAR prisoners' place of sentencing and prison placement is 516 miles. *See id.* These figures are based on BOP data on CAR prisoners' place of sentencing and Google Maps searches of the distance between each CAR prison and the country's 94 district courts. When mapping distances between prisons and sentencing jurisdictions, I opted for the shortest driving distance, or where necessary, flying distance. These statistics omit the one prisoner in Great Plains Correctional Institution who was sentenced by the U.S. Army. They also assume that prisoners were sentenced close to home. Although this assumption is unlikely to be accurate in all cases, sentencing jurisdiction is the best proxy I have for home given the available data.

[212] These are figures from a separate study I am currently conducting on the federal prison system. In response to a new FOIA request, BOP has provided me with data on all federal prisoners' sentencing jurisdictions. *See* Letter from Sarah Lilly, Fed. Bureau of Prisons, to author (Mar. 7, 2018) (on file with the author). An initial review of that material indicates that the median distance

would take a more detailed study of the entire federal prison system to conclude that citizens are held closer to home than foreign nationals, but these figures raise the prospect of a penal estate in which noncitizens are purposefully concentrated in the most remote penal institutions and are disproportionately far from their families as a result.[213]

Of course, isolation from family, access to counsel, and idleness are problems endemic to American prisons, not just all-foreign prisons. And there may be practical benefits to incarceration in an all-foreign facility. Ethnographic research in European prisons suggests that housing prisoners facing deportation together can encourage prisoners to share information and develop coping strategies.[214] Penal institutions are complex ecosystems, in which questions of prisoner welfare are dynamic and opaque.[215] There is, however, little question that all-foreign prisons are meant to be spare institutions. These prisons were built, from the very beginning, on the idea that foreigners are entitled to less.

B. Two-Track Criminal Justice

The rise of the all-foreign prison also raises more structural concerns about the criminal justice system. As Part I demonstrated, these prisons emerged alongside policies preventing early release of foreign national prisoners and restricting their access to a host of prison services, including drug treatment, occupational training, and educational programs.[216] Together, these policies make noncitizens less costly to incarcerate and more certain to serve their full prison sentences.[217]

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between integrated prisons and prisoners' sentencing jurisdictions is 319 miles and that 36% of prisoners in integrated facilities are more than 500 miles from home. *See id.* To be clear, these are prison-level data, not data on individual prisoners, which BOP declined to provide. *See id.* Data on integrated prisons include the noncitizens in those facilities. *See id.*

213 I assume here that most federal prisoners come from cities and that most prisons are outside urban centers. Several studies suggest that prisoners disproportionately come from cities, and indeed, from particular city blocks. *See, e.g.*, BENJAMIN FORMAN, LAURA VAN DER LUGT & BEN GOLDBERG, BOS. INDICATORS PROJECT, THE GEOGRAPHY OF INCARCERATION 6–9 (2016) (mapping incarceration rates in Boston); *see also* SPATIAL INFO. DESIGN LAB, COLUMBIA UNIV. GRADUATE SCH. OF ARCHITECTURE, PLANNING AND PRES., THE PATTERN: MILLION DOLLAR BLOCKS (2008) (mapping incarceration patterns in Phoenix, Wichita, New Orleans, and New York). If these assumptions are correct, exempting noncitizens from the 500-mile rule would make it easier to keep U.S. citizens close to home.

214 EMMA KAUFMAN, PUNISH AND EXPEL: BORDER CONTROL, NATIONALISM, AND THE NEW PURPOSE OF THE PRISON 129 (2015).

215 For studies of the relationship between custodial conditions and prisoner welfare, see MARY BOSWORTH, INSIDE IMMIGRATION DETENTION (2014); and ALISON LIEBLING, PRISONS AND THEIR MORAL PERFORMANCE: A STUDY OF VALUES, QUALITY, AND PRISON LIFE (2004).

216 *See supra* pp. 1400–01, 1409.

217 *See* OIG, REVIEW OF CONTRACT PRISONS, *supra* note 171, at 12 ("[T]he average annual costs in the BOP institutions and the contract [all-foreign] prisons per capita were $24,426 and $22,488, respectively.").

This approach to noncitizens has troubling implications. The political economy of punishment is far too complex to argue that all-foreign prisons are driving a boom in the prosecution of foreign nationals.[218] But it is worth noting that BOP has made a subset of prisoners cheaper and easier to incarcerate and worth asking whether this development could skew federal criminal law enforcement toward crimes committed by foreigners rather than those that are most pervasive or severe.

Consider the characteristics of this prison population: noncitizens can be held in stripped-down, low-security facilities; they can be transferred anywhere in the United States; they serve their entire sentences; and they lack the ability to vote. Such prisoners may be especially attractive to criminal justice stakeholders with organized lobbies, including private prison companies, which typically receive a "unit price per inmate" for each prisoner they hold.[219] To the extent that the costs of imprisonment affect front-end criminal justice policy — and some evidence suggests that they do[220] — there is a distinct incentive to favor the prosecution and incarceration of foreigners. Noncitizens' relative political powerlessness, meanwhile, makes the threat of legal distortions particularly acute.

At a more basic level, the all-foreign prison reflects a shift at the tail end of a system in which foreign nationals are already treated differently at key stages of the criminal process, including bail and sentencing. The

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[218] For discussions of the political economy of punishment, see NICOLA LACEY, THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES (2008); SIMON, *supra* note 36.

[219] OIG, REEVES AUDIT, *supra* note 155, at 9. Most CAR contracts provide a fixed sum with a bonus "price per inmate" once the prison reaches a certain capacity. *Id.* at 8–9. One contract from 2007, for example, provides for base compensation of $4 million per month with a bonus of $16.87 "unit price per inmate that only applies when the daily population of inmates exeeds 90 percent" of capacity. *Id.* at 9. Low-cost prisoners with fixed terms may also be attractive to public prison officers, who have organized unions and "rely on the continued strength of the prison industry for their job security." Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 93 (2016).

[220] For reports on prison lobbies, see Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NPR (Oct. 28, 2010, 11:01 AM), https://n.pr/9paAzO [https://perma.cc/G49Q-MD9M], which draws on "hundreds of pages of campaign finance reports, lobbying documents and corporate records" to describe the private prison industry's lobbying power. *See also* Joshua Page, *Prison Officer Unions and the Perpetuation of the Penal Status Quo*, 10 CRIMINOLOGY & PUB. POL'Y 735, 736 (2011) ("[P]rison officer unions and their allies have fiercely and effectively resisted . . . major efforts to *downsize prisons*."). And for some limited but potentially relevant evidence that prison costs can affect prosecution patterns, see Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 HARV. L. & POL'Y REV. 327, 345 (2014), which found that California's prison realignment "requir[ing] counties to internalize the costs of conviction and sentencing" encouraged prosecutors to rethink whether to seek custodial sanctions. *See also* Aurélie Ouss, Incentive Structures and Criminal Justice 17 (Dec. 2017) (on file with the Harvard Law School Library) (finding that shifting the cost burden of juvenile incarceration to counties from states resulted in a drop in incarceration).

Bail Reform Act of 1984[221] requires temporary detention of noncitizens who pose a flight risk,[222] and practitioners report that noncitizens are less likely both to seek and to receive bail.[223] As to sentencing, in a study published in 2014, sociologists found that noncitizens in federal court are "far more likely to be incarcerated and sentenced for longer periods" than U.S. citizens,[224] a "punishment gap" that widened in districts with a "larger influx" of noncitizens in recent years.[225] This research hints at the emergence of an entirely separate justice system for foreigners, of which the all-foreign prison is only one small part.

C. Ethnic Segregation Reinvented

Finally, all-foreign prisons build ethnic segregation into the federal prison system. Some context helps to explain how notable this development is. Federal prisons were segregated by race until the 1950s.[226] During the 1970s and 80s, the Bureau developed Sentry, a computerized system to track prisoners' demographic data,[227] and then began to publish policies requiring "racial balance" in prison housing.[228] In a 1980 directive, for example, BOP expressed its "intent that one racial group should not be assigned to one particular work detail or to one housing unit."[229] That policy instructed officials to be "alert to the racial" distribution of prisons and to "make new designations attempting to keep these proportions in balance."[230] More recent prison regulations prohibit racial and national origin discrimination in prison housing,[231] and as of 2006, BOP claimed to monitor "the racial composition of its institutions . . . as necessary to ensure that the [prisons do] not become de facto segregated."[232]

All-foreign prisons represent a marked departure from this half-century trend toward prison integration. Although these institutions are

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221 Pub. L. No. 98-473, tit. 2, ch. 1, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§ 3141-3150 (2012)).

222 18 U.S.C. § 3142(d). This provision does not apply to lawful permanent residents. *Id.* § 3142(d)(1)(B).

223 GRABER & SCHNITZER, *supra* note 149, at 1 ("[N]oncitizen defendants who do make bail are often transferred to immigration custody instead of being released. This practice is so common that some noncitizens do not seek bail because they fear such a transfer.").

224 Light, Massoglia & King, *supra* note 3, at 841.

225 *Id.* at 840; *see also id.* at 840–42.

226 MARY BOSWORTH, THE U.S. FEDERAL PRISON SYSTEM 130 (2002).

227 KEVE, *supra* note 44, at 235.

228 FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT 5100.1 § 3, at 2 (1980) (capitalization omitted).

229 *Id.*

230 *Id.*

231 *See, e.g.*, 28 C.F.R. § 551.90 (2018).

232 Brief for the United States as Amicus Curiae Supporting Petitioner at 25, Johnson v. California, 543 U.S. 499 (2005) (No. 03-636).

formally classified by alienage, almost all of the prisoners inside them are Latino. As of January 2018, 89% of CAR prisoners were born in Mexico, the Dominican Republic, Cuba, or Central or South America.[233] In 2016, GEO Group, the company that runs the largest number of all-foreign prisons, described CAR facilities as "very homogenous, with 72.1% being from Mexico and the majority of the rest being from a few Central American countries."[234] The same year, another prison contractor reported that "90% of the inmates in [all-foreign prisons] are Mexicans,"[235] and in contract solicitations, the Bureau has stated that CAR prisoners are "primarily Mexican."[236]

In thinking through these figures, it is important to distinguish race, ethnicity, alienage, and national origin. The fact that CAR prisoners are "primarily Mexican" does not necessarily mean they are all the same race, ethnicity, or citizenship status. A person born in Mexico could, for example, be a naturalized American citizen who identifies as white or a British citizen who identifies as black and Jewish. One could imagine endless combinations to illustrate the differences between a "social system that uses skin color as the criterion for classification,"[237] identification with a particular set of cultural practices, place of birth, and legal citizenship status.

But it is also crucial to acknowledge the slippage between these concepts. The terms "race" and "nation" were used interchangeably throughout the nineteenth century.[238] When government officials began to record immigrants' nationalities in the early 1900s, they referred not to Irish, Chinese, Polish, or Italian *nationals*, but to the Irish, Chinese, Polish, and Italian *races*.[239] The first federal immigration statutes were explicitly racist,[240] and federal immigration law retained race-based restrictions until 1965.[241] Race and nationality, in other words, have long

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233 *See* 2018 FOIA Materials, *supra* note 7.

234 Letter from Patricia McNair Persante, *supra* note 23, at 2.

235 Letter from Scott Marquardt, President, Mgmt. & Training Corp., to Deputy Assistant Inspector Gen., U.S. Dep't of Justice 1 (Aug. 9, 2016) (on file with the Harvard Law School Library).

236 Letter from Ryan Wynne, *supra* note 24, at 1.

237 TUKUFU ZUBERI & EDUARDO BONILLA-SILVA, WHITE LOGIC, WHITE METHODS: RACISM AND METHODOLOGY 10 (2008).

238 NGAI, *supra* note 74, at 23.

239 *See id.* at 25.

240 *See, e.g.*, Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2154–58 (2014) (providing a primer on "racially nativist" immigration laws, *id.* at 2154); Louis Henkin, Essay, *The Constitution and United States Foreign Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 855 (1987) (connecting early federal immigration law to "growing 'nativism,' racism, and xenophobia"); Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 529 (describing the "now-obvious racist premises" of early federal immigration laws).

241 IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 37 (1996).

been related. Today they remain deeply interwoven features of individual identity.[242]

If prisoners born in Mexico, Cuba, and Central and South America *are* Latino, then Latino noncitizens appear to be significantly overrepresented in all-foreign prisons. According to BOP statistics, 75% of all noncitizens in federal prisons are from Mexico, Colombia, Cuba, or the Dominican Republic.[243] Yet nearly 90% of the noncitizens in CAR prisons are from those countries.[244] This is a stark contrast, particularly given that the offenses for which noncitizens have been sentenced are roughly the same in segregated and integrated prisons.[245] These figures indicate that BOP may be sending Latino noncitizens to segregated prisons at disproportionately high rates relative to non-Latino noncitizens. Of course, this is only suggestive evidence of profiling. Drawing conclusions about whether, all else equal, Latino noncitizens are more likely to be segregated would require much more detailed information on individual prisoners, which BOP declined to provide.[246] But it is fair to say that the proportion of Latino noncitizens is higher in segregated than in integrated prisons. This statement raises concerns about profiling, which are amplified by the fact that prison officials described early all-foreign prisons as institutions "targeted at the Mexican citizens"[247] and until the 1980s referred to noncitizens in policy documents not as "aliens" but as "Mexican aliens."[248]

Separately, BOP's data also show that the use of CAR prisons reduces the overall number of Latino prisoners in integrated prisons by five percent.[249] This figure, unlike the previous ones, *includes* U.S. citizens — the point here is that, in populating CAR prisons, BOP pulls

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[242] For a classic account of intersectionality, see Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). For a recent critique, see Janel Thamkul, Comment, *The Plenary Power–Shaped Hole in the Core Constitutional Law Curriculum: Exclusion, Unequal Protection, and American National Identity*, 96 CALIF. L. REV. 553 (2008).

[243] *See Inmate Citizenship*, *supra* note 9.

[244] *See* 2018 FOIA Materials, *supra* note 7.

[245] *See supra* p. 1404. There is not, for example, a greater percentage of "immigration offenders" in CAR facilities than in integrated prisons. *See supra* p. 1404.

[246] To determine whether Latino noncitizens are more likely to be segregated than similarly situated non-Latino noncitizens, one would need to control for relevant factors such as sentence length, release date, security classification, and proximity to home — which, in turn, requires data on individual prisoners. BOP rejected a FOIA request for that data. *See* Letter from Ian Guy, *supra* note 27.

[247] *See Hearing Before Subcomm. on Immigration*, *supra* note 26, at 91 (statement of John L. Clark, Assistant Director, Community Corrections and Detention, Federal Bureau of Prisons).

[248] FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, CHANGE NOTICE CN-4 TO PROGRAM STATEMENT 5100.1 (1981).

[249] *Compare Inmate Ethnicity*, FED. BUREAU PRISONS (Sept. 29, 2018), https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp [https://perma.cc/3UE9-M3AF] (stating that 32.2%

Latino prisoners out of other prisons and thereby reduces the number of Latino people in the rest of the prison system. This is, in other words, a claim about the disparate impact CAR prisons have on Latino prisoners rather than a claim about profiling among noncitizens. Both sorts of claims illustrate the close connection between alienage and ethnicity.

To be clear, not all CAR prisoners are from Mexico, Central America, or South America. All-foreign prisons hold people born in Israel, Iraq, Nepal, Norway, Japan, Russia, and the United Kingdom, to name just a few countries.[250] Even if every CAR prisoner were Latino, moreover, courts would not necessarily treat these as prisons segregated by ethnicity. Over the last forty years, courts have built a stringent intent requirement into equal protection doctrine, foreclosing disparate impact claims and frustrating efforts to combat racial bias in the criminal justice system.[251] Absent evidence that BOP purposefully built or uses all-foreign prisons in order to isolate Latino prisoners, a court would almost certainly evaluate these prisons as an instance of alienage rather than racial or ethnic classification. Part III examines how this conceptualization of the all-foreign prison affects its legality.

Here the point is that, even if they are not the product of invidious intent to segregate Latino prisoners, BOP's alienage policies have introduced widespread ethnic segregation into the federal prison system. This development raises questions about how BOP identifies which noncitizens to send to all-foreign prisons and undermines the Agency's prohibition on national origin discrimination in prison housing.[252]

The birth of the all-foreign prison also sharpens critiques of American criminal justice, which tend to focus on race. There is no question that imprisonment, and in particular mass incarceration, is intimately tied to racial inequality.[253] But the emergence of a second-class prison system for foreigners suggests that, to understand the use of penal institutions, scholars ought to think not only about race but also about citizenship, and more to the point, about the links between the two. At least in one

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of the total federal prison population is Hispanic), *with* 2018 FOIA Materials, *supra* note 7 (showing that 27% of people in integrated prisons are Hispanic).

[250] *See* 2018 FOIA Materials, *supra* note 7.

[251] Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 782 (2011); *see also* Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1225–31 (2018). *But see infra* note 285 (discussing variation in when courts are willing to infer discriminatory intent).

[252] *See* 28 C.F.R. § 551.90 (2018).

[253] For a sample of the large body of writing on mass incarceration and race, see Forman, *supra* note 35; Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53 (2011); Tracey L. Meares, Reaction Essay, *Mass Incarceration: Who Pays the Price for Criminal Offending?*, 3 CRIMINOLOGY & PUB. POL'Y 295 (2004); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

corner of the justice system, alienage now determines the location, conditions, and duration of incarceration. This new mode of punishment complicates the relationship between imprisonment and race, and as Part III explains, shifts legal debates about segregation onto extremely unsettled ground.

III. THE CONSTITUTIONALITY OF SEGREGATION

At first pass, prisons segregated by alienage seem like an obvious violation of equal protection principles. Noncitizens are an identifiable, formally marginalized, and historically disfavored group — or as the Supreme Court put it in 1971, a "prime example of a 'discrete and insular' minority for whom . . . heightened judicial solicitude is appropriate."[254] For more than a century, courts have treated criminal prosecution and punishment as forms of state action that give rise to alienage-neutral rights, including the right to counsel and a jury trial.[255] And courts have long been skeptical of prison policies that result in racial or ethnic segregation.[256] All-foreign prisons are in deep tension with these equality norms.

Yet these prisons also sit at the intersection of powerful strains of judicial deference, which alter equality doctrines. As prisons, these institutions are protected by what I call the *penal power doctrine*, a transsubstantive rule under which courts defer to prison officials in cases involving prisoners' constitutional rights.[257] As federal institutions, they are insulated by the *plenary power doctrine*, a rule that limits judicial review of alienage classifications drawn by the federal government.[258] These doctrines shift power to prison administrators and produce an equal protection jurisprudence that has remarkably little to say about segregation by citizenship.

This Part explores the constitutionality of all-foreign prisons, which is a question of first impression. It begins by examining why these institutions seem so objectionable, an intuition I link to the legacy of *Brown v. Board of Education*[259] and the doctrinal distinction between deportation and punishment. It then explains how deference doctrines shield all-foreign prisons from meaningful judicial review, a problem Part IV will argue that courts ought to fix.

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[254] Graham v. Richardson, 403 U.S. 365, 372 (1971) (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

[255] *See infra* notes 267–270 and accompanying text.

[256] *See infra* section III.A, pp. 1419–24.

[257] *See infra* pp. 1424–26.

[258] *See infra* pp. 1426–31.

[259] 347 U.S. 483 (1954).

A. Equality Norms

All-foreign prisons clash with two distinct strands of constitutional law. First, they depart from a century of cases suggesting that citizenship status is irrelevant to a person's treatment in the criminal justice system. The inaugural case in this line of doctrine is *Wong Wing v. United States*,[260] an 1896 challenge to a statute that subjected Chinese nationals "found unlawfully in the United States" to hard labor in prison without a jury trial.[261] Reasoning that a year of hard labor in the Detroit House of Correction constituted "infamous punishment," the Supreme Court held that the Fifth and Sixth Amendments applied to Wong Wing and required "a judicial trial to establish the guilt of the accused."[262]

Wong Wing is typically cited as the first case to extend criminal procedure rights to noncitizens.[263] For these purposes, however, the most interesting feature of the case is the Court's reliance on a sharp distinction between punishment and deportation. To reach the conclusion that Wong Wing was entitled to a trial, the Supreme Court turned to *Fong Yue Ting v. United States*,[264] a case from three years earlier in which the Court had held that, because it was not punishment, deportation failed to implicate the "provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments."[265] The upshot of this holding, the Court concluded, was that the imposition of punishment *does* trigger constitutional protections, alienage notwithstanding.[266]

The idea that punishment — or the threat of criminal punishment — requires alienage-neutral rights has percolated in American law ever since. Based on this proposition, courts have held or implied that noncitizens are entitled to *Miranda* warnings when arrested for a crime,[267]

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[260] 163 U.S. 228 (1896).

[261] *Id.* at 229–30.

[262] *Id.* at 237–38.

[263] *See, e.g.*, Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 824 (2007) (citing *Wong Wing* as the case that "guarantee[d] criminal process protections to noncitizens charged with crimes"); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1689 (1992) (describing *Wong Wing* as "the original extension . . . of criminal procedure to aliens"); *cf.* David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 370 (2003) (noting that, as a textual matter, criminal procedure rights apply to "persons" rather than "citizens").

[264] 149 U.S. 698 (1893).

[265] *Wong Wing*, 163 U.S. at 236 (quoting *Fong Yue Ting*, 149 U.S. at 730).

[266] *Id.* at 236–37.

[267] United States v. Henry, 604 F.2d 908, 914 (5th Cir. 1979) ("[A]n alien who is within the territorial jurisdiction of this country, whether it be at the border or in the interior, in a proper case and at the proper time, is entitled to those protections guaranteed by the Fifth Amendment in criminal proceedings which would include the *Miranda* warning.").

cannot be compelled to testify against themselves in criminal proceedings,[268] have a right to effective criminal counsel,[269] and are covered by the "Eighth Amendment, the ex post facto clause, the double jeopardy clause, and other attendant criminal protections."[270]

There are both narrow and broad ways to understand these cases. *Wong Wing* and its progeny can be read simply to establish that noncitizens bear a certain bundle of procedural rights (and potentially lack others) when charged with a crime. Professors Eric Posner and Adam Cox describe the case this way.[271] In this view, noncitizens have only the basic procedural rights courts have already afforded them, and it remains unclear whether substantive rights like equal protection and postconviction rights like freedom from cruel and unusual punishment apply to foreign nationals in the criminal justice system.

But the holding in *Wong Wing* did not stem from a conclusion about noncitizens' individual rights. It flowed from a theory of punishment, and specifically, from the idea that punishment is different from deportation in ways that require alienage-neutral protections to ensure its legitimacy. The Court's reliance on a categorical distinction between punishment and deportation suggests a broader equality principle: any time the state is punishing someone, alienage is irrelevant to constitutional limits on the exercise of state power. On this account, citizens and foreigners enjoy the same rights when the state decides to punish them because punishment brings a person into the political fold, which is to say, punishment instantiates a relationship between the state and the criminal that makes alienage immaterial to the Constitution's reach. *Wong Wing*, in other words, was not about whether noncitizens had particular procedural rights. The case was about the structural conditions

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[268] United States v. Balsys, 524 U.S. 666, 671 (1998) (noting that "[r]esident aliens" are protected by the Self-Incrimination Clause of the Fifth Amendment in criminal proceedings).

[269] Padilla v. Kentucky, 559 U.S. 356, 366 (2010) (applying the Sixth Amendment's guarantee of effective criminal counsel to a noncitizen).

[270] *See* Hinds v. Lynch, 790 F.3d 259, 264 (1st Cir. 2015) ("[B]ecause removal is not intended to punish, federal courts have consistently held that the Eighth Amendment, the ex post facto clause, the double jeopardy clause, and other attendant criminal protections do not apply to orders of removal."). *Hinds* does not extend criminal procedure protections to noncitizens; it concludes that those protections do not extend to deportation proceedings because deportation is not punishment. *Id.* As in *Wong Wing*, the negative implication of this holding seems to be that these protections would apply if punishment were at issue. But of course, a court could conclude that noncitizens are not protected by the Eighth Amendment. Section III.C, *infra* pp. 1432–33, explores just how underdetermined noncitizens' rights are. Here the critical point is that courts consistently rely on a distinction between punishment and deportation when interpreting the scope of noncitizens' constitutional rights.

[271] Adam B. Cox & Eric A. Posner, *The Rights of Migrants: An Optimal Contract Framework*, 84 N.Y.U. L. REV. 1403, 1412 (2009) (citing *Wong Wing* for the proposition that noncitizens enjoy "basic rights" including "the right to criminal process," which "[i]n principle . . . could be denied" or diminished).

the Constitution attaches to the state's authority to punish, regardless of who is subject to that punishment.[272]

From this perspective, *Wong Wing* has much in common with a different line of cases. In a series of decisions stretching back to the early 1960s, courts have limited racial and ethnic segregation in penal institutions. Most of these cases arose in state prisons, which courts began to desegregate in the aftermath of *Brown v. Board of Education*.[273] In early prison desegregation cases, the Supreme Court upheld orders integrating penal institutions, but left open the possibility that racial classification might be necessary for prison security in some circumstances.[274]

That suggestion set the stage for *Johnson v. California*,[275] a 2005 equal protection challenge to California's prison system.[276] *Johnson* began when a pro se prisoner named Garrison Johnson objected to the state's unwritten policy of segregating prisoners during the first sixty days of their incarceration.[277] The policy at issue — which prison officials defended as a means "to prevent violence caused by racial gangs" — segregated prisoners not only by race but also by ethnicity and nationality "within each racial group."[278] By the time the case reached the Supreme Court, the question was whether the policy was subject to strict scrutiny.[279] The Court held that it was,[280] and the California Department of Corrections abandoned its policy on remand.[281]

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[272] Immigration scholars adopt this interpretation when they argue that immigration and criminal law are separate spheres of government authority. *See, e.g.*, Eagly, *supra* note 86, at 1294 ("In the criminal law context, however, *Wong Wing* is regarded as absolute."); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007) (distinguishing between an immigration law model with relaxed constitutional protections and a "criminal justice model" that "operates under stringent constitutional and sub-constitutional constraints"); *see also* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 53 (2006) ("[T]he [*Wong Wing*] Court concluded that what was at stake . . . was *not* immigration regulation but criminal punishment, and that invocation of the government's plenary power in the immigration sphere was therefore off the mark.").

[273] *See, e.g.*, Washington v. Lee, 263 F. Supp. 327, 329 (M.D. Ala. 1966) (invalidating Alabama statutes "requiring segregation by race in the state, county and city penal facilities"), *aff'd* 390 U.S. 333 (1968) (per curiam); *see also* Lamar v. Coffield, 951 F. Supp. 629, 630 (S.D. Tex. 1996) (describing the history of a Texas prison desegregation suit initiated in the early 1970s).

[274] Lee v. Washington, 390 U.S. 333 (1968) (per curiam) (upholding an order integrating Alabama penal facilities); *id.* at 334 (Black, J., concurring) (clarifying that security needs might justify segregation).

[275] 543 U.S. 499 (2005).

[276] *Id.* at 502. The policy in *Johnson* segregated prisoners both upon their initial entrance to prison and after any transfer within the prison system. *Id.*

[277] *Id.* at 503.

[278] *Id.* at 502.

[279] *Id.*

[280] *Id.* at 515.

[281] Settlement and Release Agreement at 2, Johnson v. California, 336 F.3d 1117 (9th Cir. 2003) (No. 01-56436) ("[The California Department of Corrections and Rehabilitation (CDCR)] has begun

It is important not to overstate *Johnson*'s impact. The case decided only the appropriate standard of review and in practice has not prevented racial and ethnic segregation in American prisons. It remains common for prison officials to lock all prisoners of one race or ethnicity in their cells in response to incidents of prison violence, a practice courts have generally upheld so long as the lockdown is not "extended [or] indefinite."[282]

Still, *Johnson* marked a critical moment in equal protection law. The case brought strict scrutiny into prisons, institutions that courts typically police reluctantly.[283] The Court, moreover, applied strict scrutiny to a prison policy in which "Japanese-Americans [were] housed separately from Chinese-Americans, and northern California Hispanics [were] separated from Southern California Hispanics."[284] The *Johnson* opinion elided distinctions between race, ethnicity, and nationality, which may simply reflect a flat-footed conception of race, but nonetheless suggests that its holding extends beyond racial classification to more subtle, race-adjacent forms of prison segregation.[285]

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formulating and implementing a plan by which inmates shall be housed at CDCR reception centers without using race as the determinative housing criterion . . . .").

[282] *In re* Morales, 152 Cal. Rptr. 3d 123, 127 (Cal. Ct. App. 2013) (affirming an injunction against "extended" race-based lockdowns in Pelican Bay prison but permitting prison officials to "separate inmates on the basis of ethnicity . . . [o]n a short-term emergency basis" (alteration in original)). In practice, "extended or indefinite" appears to mean something more than a few weeks and less than several months. *Compare, e.g.*, Fischer v. Ellegood, 238 F. App'x 428, 434 (11th Cir. 2007) (holding that a race-based lockdown of unclear duration — plaintiff alleged several weeks; defendants argued several days — did not violate the Equal Protection Clause because it ended "after jail officials thought the threat of racial violence had passed"), *and* Labranch v. Yates, No. 09-cv-00048, 2012 WL 3838380, at *11 (E.D. Cal. Sept. 4, 2012) (recommending summary judgment for defendants on an equal protection challenge to a month-long lockdown of "Northern and Southern Hispanics," *id.* at *10, in Pleasant Valley State Prison), *with* Armstead v. Virga, No. 11-cv-1054, 2012 WL 2577562, at *6 (E.D. Cal. July 3, 2012) ("Plaintiff's allegations in the amended complaint regarding being subject to an eleven month race-based lockdown state a colorable Equal Protection claim."), *adopted in full*, 2012 WL 6004205 (E.D. Cal. Nov. 29, 2012). For a critique on post-*Johnson* prison housing policy in California, see also Philip Goodman, "*It's Just Black, White, or Hispanic": An Observational Study of Racializing Moves in California's Segregated Prison Reception Centers*, 42 L. & SOC'Y REV. 735 (2008).

[283] Courts (mostly) declined to regulate prisons until the 1960s, and as section III.B explains, *infra* pp. 1424–32, they have since reviewed prison policy with great deference. *See* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 30–34 (1998) (describing the "Hands-Off Era" between 1776 and 1960 during which courts declined to review prisoner complaints or otherwise supervise prison management); Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 365–69 (2018) (discussing prisoners' rights jurisprudence before the 1970s). For a classic example of the hands-off approach to prisons, see *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790 (1871), in which prisoners are referred to as "slave[s] of the State," *id.* at 796.

[284] *Johnson*, 543 U.S. at 502; *see id.* at 506.

[285] Lower courts have interpreted *Johnson* this way, consistently applying its holding to ethnic and other forms of prison segregation. *See supra* note 282 (collecting cases). Although I suspect most courts would treat all-foreign prisons as sites of alienage classification with a disparate impact

The *Johnson* Court also adopted a surprisingly institutional conception of the harm at issue in prison segregation. In the dominant account of equal protection, the problem with segregation is the stigma it imposes on the segregated individual.[286] In *Johnson*, by contrast, the Court focused on the ways in which racial and ethnic segregation threatened "the integrity of the criminal justice system."[287] The *Johnson* majority stressed that racially segregated prisons undermined "public respect" for criminal law[288] and frustrated courts' "efforts to eradicate racial prejudice from our criminal justice system."[289]

This is not to say that *Johnson* renders all-foreign prisons unconstitutional. For reasons explained below, I suspect that most courts would hold that it does not. But *Johnson* does capture courts' deep suspicion about prison policies that produce racial or ethnic segregation. That suspicion may be motivated by an aversion to any racial classification; there is no question that *Johnson* is part of an anticlassification canon that includes cases on voting rights[290] and affirmative action.[291] Critically, though, *Johnson* also appears to be driven by a concern that segregating prisons has unacceptable expressive effects because of the longstanding, vexed relationship between imprisonment and race.[292] Like *Wong Wing*, *Johnson* presents the criminal justice system as a domain in which formal inequality is especially harmful to the law's legitimacy.

Scholars seldom analyze these lines of doctrine side by side. It is unusual to compare nineteenth-century immigration law with twenty-first-century precedent on prison segregation. But both *Johnson* and

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on Latino prisoners, courts remain deeply divided about when to infer discriminatory intent. *See* Huq, *supra* note 251, at 1215 ("[T]he federal judiciary has not homed in upon a single definition of discriminatory intent. Nor has it developed a consistent approach to the evidentiary tools through which discriminatory intent is substantiated."). For a relevant case on this issue, see *Hernandez v. Texas*, 347 U.S. 475, 476–78 (1954), which held that, given "community norm[s]" in Jackson County, Texas, "persons of Mexican descent" were a separate class entitled to Fourteenth Amendment protection, *id.* at 478.

286 *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1472–73 (2004) (describing the traditional anticlassification account of segregation's harm).

287 *Johnson*, 543 U.S. at 511.

288 *Id.*

289 *Id.* at 512 (quoting McCleskey v. Kemp, 481 U.S. 279, 309 (1987)).

290 *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 643 (1993).

291 *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion).

292 *See generally* RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS (2015); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 566–84 (2003). Of course, cases like *McCleskey v. Kemp*, 481 U.S. 279, suggest that the Court is not nearly serious enough about the race-related expressive effects of the criminal justice system. In this respect, *Johnson* is an outlier — a case in which the Supreme Court embraced an expressive, institutional conception of racism's harm.

Wong Wing are, at base, about the sort of equality the Constitution requires when the government places a person in prison. These cases reflect entrenched norms against conditioning the quality of punishment on race, alienage, or ethnicity. Indeed, they imply that discrimination on those bases is particularly problematic when it coincides with the power to punish — or, to use the *Johnson* Court's language, when it takes place "[i]n the prison context, when the government's power is at its apex."[293] Together, these cases suggest a theory of punishment in which imprisonment is the sort of extraordinary state action that gives rise to a heightened, affirmative duty to police inequality.

As the emergence of the all-foreign prison demonstrates, however, this is a latent equality principle — a background norm in two areas of law dominated, above all, by deference to government officials.

B. Deference Doctrines

Perhaps no two bodies of law are more preoccupied with deference than prison and immigration law. In both fields, anxiety about the proper role of the judiciary has become a transsubstantive principle that shapes analysis of constitutional rights.

To begin with prison law, in cases involving prisoners' constitutional claims, courts apply a species of deference known as *Turner* review. The Supreme Court invented this doctrine in *Turner v. Safley*,[294] a 1987 case concerning Missouri prison regulations that restricted inmate-to-inmate correspondence and prohibited marriage absent permission from a prison warden.[295] The Court upheld the correspondence restriction and invalidated the marriage regulation.[296] In the process, it introduced a two-step standard for assessing prisoners' constitutional claims. Under that standard, courts first ask whether the claimed right is "inconsistent with [a person's] status as a prisoner or with the legitimate penological objectives of the corrections system."[297] If the right survives incarceration, courts consider whether its restriction is "reasonably related to legitimate penological interests."[298]

In practice, the *Turner* test is a highly deferential form of rational basis review that displaces governing constitutional doctrines when prisoners sue the state. Courts have applied *Turner* to a wide variety of

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[293] *Johnson*, 543 U.S. at 511.
[294] 482 U.S. 78 (1987).
[295] *Id.* at 81–82.
[296] *Id.* at 91.
[297] *Id.* at 95 (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)).
[298] *Id.* at 89.

prisoners' constitutional claims, including due process and equal protection cases involving fundamental rights[299] and First Amendment challenges to restrictions on visitation,[300] prayer,[301] and the receipt of mail.[302] In most cases, *Turner* review leads courts to uphold penal policies. As Professor Sharon Dolovich puts it, "it is a rare case decided under *Turner* in which the plaintiff ultimately prevails."[303] In the context of these cases, *Johnson* was an aberration, a triumph for "normal" equal protection analysis in an institution where constitutional doctrine usually looks very different than it would outside prison walls.[304]

The Supreme Court has never articulated a clear rationale for its deferential approach to prison policy. In *Turner* itself, the Court vacillated between a technocratic account in which courts defer to prison officials' expertise in prison administration and a stronger theory of restraint in which "separation of powers concerns" make prisoners' rights

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[299] *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) ("To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights."); Stojanovic v. Humphreys, 309 F. App'x 48, 52 (7th Cir. 2009) ("Prisoners retain their right to equal protection; nonetheless, where the disparate treatment is not based on a suspect class, like race, a prison may treat inmates differently if the unequal treatment is rationally related to a legitimate penological interest."); Baranowski v. Hart, 486 F.3d 112, 123 (5th Cir. 2007) ("*Turner* applies with corresponding force to equal protection claims." (quoting Freeman v. Tex. Dep't of Criminal Justice, 369 F.3d 854, 863 (5th Cir. 2004))); Victoria W. v. Larpenter, 369 F.3d 475, 484–85 (5th Cir. 2004) (assessing whether prison policies requiring court orders for abortions were reasonably related to legitimate penological interests); Goodwin v. Turner, 908 F.2d 1395, 1398 (8th Cir. 1990) (reviewing restrictions on the "fundamental right to procreate" under *Turner*); Monmouth Cty. Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 333–44 (3d Cir. 1987) (applying *Turner* to prison policies restricting access to abortions).

[300] *See, e.g.*, Overton v. Bazzetta, 539 U.S. 126, 136 (2003) (upholding a Michigan prison policy imposing limits on visitation and banning all visits to prisoners by minors other than their children, stepchildren, grandchildren, or siblings).

[301] *See, e.g.*, Williams v. Sec'y of Pa. Dep't of Corr., 450 F. App'x 191, 195 (3d Cir. 2011) (upholding a Pennsylvania prison policy banning any prayer involving "ritual or display," *id.* at 196, in prison kitchens).

[302] *See, e.g.*, Parkhurst v. Lampert, 418 F. App'x 712, 715 (10th Cir. 2011) (upholding a prohibition on the receipt of bulk mailings). Note that different — but again deferential — tests apply to prisoners' Eighth Amendment and procedural due process claims. Prison officials are liable under the Eighth Amendment only when officials are "deliberate[ly] indifferen[t]" to the "sufficiently substantial" risk of harm. Farmer v. Brennan, 511 U.S. 825, 843 (1994). A prisoner can state a due process claim only if a prison policy imposes an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 484 (1995).

[303] Dolovich, *supra* note 21, at 246.

[304] The *Johnson* majority expressly rejected the argument that *Turner* review applied to race-based prison policy. Johnson v. California, 543 U.S. 499, 513 (2005). Justices Thomas and Scalia, typically skeptics of racial classification, dissented on the ground that prisons are one place where institutional management trumps colorblindness. *See id.* at 524 (Thomas, J., dissenting).

something closer to a political question.[305] Courts have also treated deference to state prison officials as a principle of federalism[306] and in many cases simply invoke ideas about the inherent dangerousness of penal institutions to justify judicial restraint.[307] These disparate ideas result in a prisoners' rights jurisprudence in which deference becomes its own transsubstantive rule — call it the penal power doctrine — under which prison administrators may infringe recognized constitutional rights in ways that other state actors cannot.

In this respect, prison law is much like immigration law. The corollary to the penal power doctrine is the plenary power doctrine, which holds that the federal government enjoys exclusive and expansive authority to regulate immigration. The precise contours of this doctrine are a matter of endless debate,[308] but it is generally understood to stand for two principles. First, the federal government enjoys sole authority to regulate migration and set naturalization policies.[309] Professor Cristina Rodríguez calls this the "federal exclusivity principle."[310] Second, judicial review is relaxed when the government is exercising its immigration power.[311] The plenary power doctrine thus has both horizontal and vertical dimensions — it is a federalism doctrine that limits state and local control over immigration and a separation of powers doctrine that restrains courts' involvement in political branch decisions on immigration policy.

Note here that I have described judicial review as relaxed rather than nonexistent. The plenary power doctrine has evolved from its nineteenth-century origins, when government decisions on the admission and deportation of noncitizens were essentially nonjusticiable, into a doctrine of deference toward federal government entities that make and enforce immigration laws.[312] Today, the doctrine has more bite in substantive

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[305] Turner v. Safley, 482 U.S. 78, 85 (1987); *see also* Thornburgh v. Abbott, 490 U.S. 401, 407–08 (1989) (referring to those outside prisons, including courts, as "laymen" who lack the "expertise of [prison] officials," *id.* at 407).

[306] *See, e.g.*, *Turner*, 482 U.S. at 85 ("Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.").

[307] *See, e.g.*, *In re* Long Term Admin. Segregation of Inmates Designated as Five Percenters, 174 F.3d 464, 469 (4th Cir. 1999) ("In the difficult and dangerous business of running a prison, frontline officials are best positioned to foresee threats to order and to fashion responses to those threats.").

[308] *See, e.g.*, Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 378–81 (2004) (discussing the doctrine's scope); Rodríguez, *supra* note 39, at 613 (describing the "mountain of scholarly commentary" on the plenary power doctrine's meaning).

[309] Rodríguez, *supra* note 39, at 613.

[310] *Id.*

[311] *Id.*

[312] *See* Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 58–59 (2015); Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 SUP. CT. REV. 1, 49; Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 14–18 (1984).

than procedural challenges to immigration decisions — courts have long recognized and policed procedural rights in immigration hearings[313] — and application of the doctrine is inconsistent even in cases involving the substance of immigration law.[314] The plenary power doctrine is therefore plenary in name only. Nonetheless, it persists as a sort of rebuttable presumption that courts ought to hesitate before applying normal standards of review in immigration cases.[315]

Critically for these purposes, the plenary power doctrine also endures as a theory of judicial review in equal protection cases on alienage. As noted at the outset, equal protection law on noncitizens is plagued by a basic conceptual problem: foreign nationals are *both equal and unequal* to citizens.

On one hand, noncitizens have strong moral, legal, historical, and practical claims to equality. As a moral matter, noncitizens are humans who differ from citizens only in that they lack legal membership. One might think foreigners' humanity entitles them to equality in all but the narrowest set of cases where alienage distinctions are most justifiable. As a legal matter, a noncitizen in the United States is subject to the country's laws and is thus, as Justice Brennan put it, "one of the governed."[316] If law derives its legitimacy from consent — if the Constitution is a social contract — noncitizens' accountability to American law should bring with it that law's protections. Professor Gerald Neuman calls this the "mutuality of obligation" argument for noncitizens' equality.[317]

As an historical matter, foreigners are some of the oldest "folk devils" in American society.[318] Throughout United States history, noncitizens have been targeted for restrictive laws, detained, interned, and otherwise

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313 *See* Motomura, *supra* note 263, at 1632–45; Rodríguez, *supra* note 39, at 613 (describing the plenary power doctrine as "a theory of judicial review over immigration decisions, where courts police process, but substance is considered a political question").

314 *See, e.g.*, Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017) (applying heightened scrutiny to a "gender-based differential in the law governing acquisition of U.S. citizenship by a child born abroad"); *see also* Kim, *supra* note 40, at 106–13 (collecting cases in which courts applied normal standards of review to substantive challenges to immigration decisions).

315 One recent example here is *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018), in which the Court took an extremely deferential approach to review of the Trump Administration's travel ban. *See* Adam Cox, Ryan Goodman & Cristina Rodríguez, *The Radical Supreme Court Travel Ban Opinion — But Why It Might Not Apply to Other Immigrants' Rights Cases*, JUST SECURITY (June 27, 2018), https://www.justsecurity.org/58510/radical-supreme-court-travel-ban-opinion-but-apply-immigrants-rights-cases/ [https://perma.cc/NW62-K3G9] (noting that *Trump v. Hawaii* represented an expansion of the plenary power doctrine).

316 United States v. Verdugo-Urquidez, 494 U.S. 259, 284 (1990) (Brennan, J., dissenting).

317 GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 7 & n.a, 8 (1996).

318 I borrow this term from Stanley Cohen, who used it to describe groups cast as deviant outsiders, against whom a common morality and shared social order becomes clear. STANLEY COHEN, FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS 10 (1972).

identified as an unwelcome class.[319] As Part II explained, this history dovetails with the story of American racism, which, of course, includes a period in which African Americans were denied legal protection on the ground that they were not citizens of the United States.[320] Given the makeup of immigrant populations, it is extremely difficult to disentangle attitudes toward foreigners from beliefs about race. Noncitizens' claim to equal protection can be located in these overlapping histories of American xenophobia and racism, and, more broadly, in the concern that governments often use the concept of citizenship to subordinate disfavored groups.[321]

Finally, as a practical matter, one might support noncitizens' equality on the grounds that inequality can distort the legal system — recall the discussion of skewed incentives from Part II — and impose harms on United States citizens with foreign family members. The latter argument, in particular, has had traction in recent debates over citizens' standing to challenge immigration laws.[322]

The point is not that these four arguments are infallible but rather that there are compelling reasons to think noncitizens should be entitled to equal treatment in the United States. The Supreme Court has recognized as much: the Equal Protection Clause has applied to foreign nationals since 1886,[323] and more than four decades ago a unanimous Court deemed noncitizens a suspect class.[324]

On the other hand, noncitizens are by definition unequal. To be a noncitizen is to lack the rights that come with full membership in a polity. Only those who embrace open borders can admit of no licit distinctions between citizens and foreigners. Assuming the nation-state, and limits to the resources that can be delivered through it, the question is not whether but how much alienage discrimination is constitutional. Immigration law is in this sense a body of discrimination law, which makes it very difficult to determine when discrimination on the basis of citizenship is unlawful.

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[319] For accounts of this history, see KANSTROOM, *supra* note 63; MOTOMURA, *supra* note 54; and NGAI, *supra* note 74.

[320] *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 403–04 (1857).

[321] *See* Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POL'Y 1, 10–14 (2013).

[322] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2415–16 (2018) (concluding that U.S. citizens have standing to challenge the exclusion of their relatives); Cox, *supra* note 308, at 375 (arguing that American "[c]itizens do have legally cognizable interests in the substance of immigration law").

[323] *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

[324] Graham v. Richardson, 403 U.S. 365, 372 (1971) (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

Courts have resolved this conflict by resorting to "categorical federalism."[325] Under prevailing equal protection doctrine, federal laws and policies that distinguish citizens from foreign nationals receive rational basis review, while state alienage classifications are subject to strict scrutiny.[326] In other words, the Fifth and Fourteenth Amendments are noncongruent in alienage cases.[327] The standard rationale for this doctrine is that the federal government, unlike states, has a uniquely "national interest" in regulating immigration.[328] The plenary power doctrine thus delivers an equal protection jurisprudence in which federal actors may discriminate in ways that states and localities cannot.

This approach to equal protection turns alienage cases into federalism cases, often with odd results. Take, for example, the contrast between *Graham v. Richardson*,[329] in which the Supreme Court invalidated state laws conditioning benefits on citizenship,[330] and *Mathews v. Diaz*,[331] which upheld citizenship-based restrictions on eligibility for federal benefits on the ground that equal protection analysis "involves significantly different considerations" when "it concerns the relationship between . . . aliens and the Federal Government."[332] Or consider the ongoing debate over which standard of review ought to apply to alienage classifications in cooperative state-federal programs like Medicaid.[333] As these cases illustrate, equal protection analysis of alienage begins not

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[325] Judith Resnik, Essay, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 619–20 (2001) (describing a mode of reasoning in which laws are described as "about" one subject and then, on that ground, deemed to fall within the exclusive province of one level of government).

[326] Korab v. Fink, 797 F.3d 572, 577–78 (9th Cir. 2014) (first citing *In re* Griffiths, 413 U.S. 717, 719–22 (1973); and then citing Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976)). There are several exceptions to this rule. Where a classification applies to a "political function," state laws receive rational basis review. Cabell v. Chavez-Salido, 454 U.S. 432, 439–40 (1982); *see also* Ambach v. Norwick, 441 U.S. 68, 74 (1979). Several circuit courts have also applied rational basis scrutiny to state alienage classifications after finding that Congress had authorized states to adopt distinctions based on alienage. *See, e.g.*, *Korab*, 572 F.3d at 583–84 (reviewing Hawaii's "discretionary decision" to revoke Medicaid benefits from noncitizen residents); Soskin v. Reinertson, 353 F.3d 1242, 1255 (10th Cir. 2004) (reviewing a Colorado law making certain noncitizens ineligible for Medicaid).

[327] *See* Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After* Adarand Constructors, Inc. v. Peña, 76 OR. L. REV. 425, 426–27 (1997); Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 FORDHAM L. REV. 155, 171 (2014).

[328] *Hampton*, 426 U.S. at 100.

[329] 403 U.S. 365.

[330] *Id.* at 376.

[331] 426 U.S. 67 (1976).

[332] *Id.* at 84–85.

[333] *See* Korab v. Fink, 797 F.3d 572, 584–87 (9th Cir. 2014) (Bybee, J., concurring and concurring in the judgment) (summarizing this debate); *see also* Bruns v. Mayhew, 750 F.3d 61, 66 (1st Cir. 2014) (describing alienage restrictions on Medicaid in Maine as a "Gordian knot of federal and state legislation").

with a question about the harm at issue in state-sponsored discrimination, but with a question about which level of government chose to discriminate. This is an unusually structural way to conceptualize equal protection rights.

Courts, moreover, engage in almost no analysis of the distinctions *between* federal actors. The dominant, noncongruent approach to equal protection means that any federal government entity imposing an alienage classification is entitled to rational basis review.[334] The Supreme Court hinted at a limit to this rule in *Hampton v. Mow Sun Wong*,[335] a 1976 case in which the Court invalidated a Civil Service Commission (CSC) regulation restricting federal civil service jobs to United States citizens.[336] In an enigmatic decision, the *Hampton* Court held that the regulation violated the Due Process Clause because the CSC — an agency with "no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies"[337] — lacked authority to draw alienage distinctions.[338] Although *Hampton* is typically read as a nondelegation case, the decision contains soaring language that suggests a more robust limit on which types of agencies can claim the benefits of the plenary power doctrine.[339] The case, however, remains an exception to the general rule:

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[334] *See Bruns*, 750 F.3d at 66 ("[C]ongressional disparate treatment of aliens is presumed to rest on national immigration policy rather than invidious discrimination." (citing *Mathews*, 426 U.S. at 79–80)); Hamad v. Gates, 732 F.3d 990, 1005–06 (9th Cir. 2013). Although courts could limit deferential review to alienage classifications drawn by Congress, they have not done so, instead describing the immigration power as vested in "the political branches" of the federal government. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 225 (1982) (quoting *Mathews*, 426 U.S. at 81).

[335] 426 U.S. 88 (1976).

[336] *Id.* at 116–17.

[337] *Id.* at 114.

[338] *Id.* at 116 (noting that the national interests that might "justify the exclusion of noncitizens from the federal service" could not "reasonably be assumed to have influenced," *id.* at 104, an agency whose "only concern . . . is the promotion of an efficient federal service," *id.* at 114). The *Hampton* complaint also named as defendants the Postal Service, the General Service Administration, and the Department of Health, Education, and Welfare. *Id.* at 92 n.3. Justice Stevens noted that none of those agencies could "reasonably be assumed" to have been influenced by the national interests that constitute the immigration power. *Id.* at 104–05.

[339] After the Supreme Court decided *Hampton*, President Ford issued an executive order imposing the same alienage classification, which lower courts upheld and the Supreme Court declined to review. *See* Citizenship Requirements for Federal Employment, 41 Fed. Reg. 37,303 (Sept. 3, 1976); *see also* Mow Sun Wong v. Hampton, 435 F. Supp. 37, 46 (N.D. Cal. 1977), *aff'd sub nom.* Mow Sun Wong v. Campbell, 626 F.2d 739 (9th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); Aziz Z. Huq, *The Institution Matching Canon*, 106 NW. U. L. REV. 417, 431–35 (2012) (discussing *Hampton* and its afterlife). This history makes the nondelegation reading of *Hampton* compelling. Nonetheless, *Hampton*'s broad language suggests that, in striking down the CSC regulation, the Court was concerned not only with statutory authorization but also with the Agency's institutional purpose. *See Hampton*, 426 U.S. at 101–03 ("We do not agree . . . that the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens. . . . When the Federal Government asserts an overriding national interest as justification for a discriminatory rule . . . due process requires that there

courts take a categorical approach to the federal immigration power, extending the authority to do migration control — and the deference that comes with it — to anyone with a federal job.

All-foreign prisons sit at the crosshairs of these deference doctrines. These prisons are protected from standard judicial review both as prisons and as sites of federal immigration policy, that is, both by the penal power doctrine and by the plenary power doctrine. As a result, alienage discrimination that would be hard to justify in many other contexts (imagine separate and worse state hospitals or public schools for foreigners) would face much less demanding scrutiny if challenged in court. Perhaps for this reason, advocacy organizations that one might expect to challenge the all-foreign prison have not done so.[340]

To be clear, a court would not have to uphold all-foreign prisons under existing precedent. There is a colorable case that these institutions violate equal protection law, particularly if you take seriously the equality principle embedded in *Wong Wing* and the *Johnson* Court's suggestion that ethnic segregation of prisons threatens the integrity of the criminal justice system. All-foreign prisons bear an uncomfortable resemblance to prisons segregated by race and, for that matter, to the internment camps that gave rise to *Korematsu v. United States*,[341] a case in the anticanon of constitutional law.[342] The origins and population of these prisons make it strange to conceptualize them solely as sites of alienage classification.

Even when framed that way, moreover, the stated justification for all-foreign prisons — facilitating deportation — is weak given that they hold some prisoners for decades (or life) and exist alongside expansive programs to identify and deport noncitizens convicted of crimes. Rational basis with bite, or even a straightforward analysis that takes the history of these prisons into account, would be enough to conclude that segregation by citizenship is less a means of border control than a new philosophy of punishment. The claim is not that all-foreign prisons have

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be a legitimate basis for presuming that the rule was actually intended to serve that interest."); *id.* at 115 (noting that negotiating treaties and incentivizing naturalization "are not matters which are properly the business of the Commission"). This discussion of agencies' "proper business" hints at a richer theory of how the Constitution limits immigration power in the administrative state than courts usually recognize. Indeed, on this more expansive reading, *Hampton* would support a much more robust set of horizontal limits on the federal immigration power.

340 By contrast, noncitizens have challenged their ineligibility for rehabilitative programs and early release, but courts have avoided the deep question these policies raise by holding that prison regulations classify prisoners not by alienage but "as those who have ICE detainers against them and those who do not." *See* Gallegos-Hernandez v. United States, 688 F.3d 190, 196 (5th Cir. 2012); *see also* McLean v. Crabtree, 173 F.3d 1176, 1185 (9th Cir. 1999).

341 323 U.S. 214 (1944).

342 *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (stating that *Korematsu* "has been overruled in the court of history"); *see also* Richard A. Primus, Essay, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245 (1998) (identifying the anticanon); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 400–02 (2011) (discussing *Korematsu*'s uneasy place within it).

to survive rational basis review, though it is worth being honest about just how deferential the *Turner* standard is in practice.

This Part advances a more modest and perhaps more troubling observation about the state of constitutional doctrine: fifty years after courts began to desegregate prisons, and notwithstanding a large body of law attaching constitutional significance to the distinction between punishment and deportation, it remains entirely plausible for a court to hold that the intentional isolation of foreign national prisoners, which results in ethnic segregation of federal prisons, does not offend the Constitution at all.

C. Federal Prison as Foreign Land

Ultimately, deference doctrines leave foreign national prisoners' rights underdetermined. From legal opinions, it is unclear when prisons can be segregated; whether alienage discrimination in prison housing violates equal protection; and even whether noncitizens are protected from cruel and unusual punishment.[343] In prison regulations, by contrast, the government has taken specific positions on each of these issues. As Part I demonstrated, federal prison officials have spent the last decade making increasingly fine-grained decisions about when noncitizens are entitled to equal treatment in penal institutions — to education, early release, proximity to home, and integrated housing.

This is constitutional interpretation through prison policy. All-foreign prisons are a vivid example of administrative constitutionalism, a form of legal development in which administrative actors construct the Constitution's meaning.[344] These prisons offer a window into the way that bureaucrats (here, prison officials) determine the rights and benefits associated with citizenship status, and thus regulate the terms of membership in the American polity. In restricting a growing number of the "benefits" of punishment to citizens, the Bureau of Prisons has developed its own interpretation of the constitutional right to equal protection and its own equality norms. The Agency has, in other words, filled in the gaps where courts have been reluctant to clarify the scope of noncitizens' substantive rights. From this perspective, foreign national pris-

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[343] *See supra* note 270.

[344] *See* Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013). One might ask whether these officials are interpreting the Constitution or merely ignoring it, confident that courts will not police their choices. Following Professors Gillian Metzger and Kristin Collins, I take an expansive approach to the processes and decisions that count as administrative constitutionalism on the ground that government actors elaborate constitutional meaning both when they interpret the Constitution explicitly and when their policies effectively shape the content of constitutional rights. *See* Collins, *supra* note 40, at 1731–32; Metzger, *supra*, at 1900. For those who prefer the narrower brand of administrative constitutionalism, the core point holds: deference doctrines give prison officials tremendous authority to decide when foreign national prisoners are entitled to equal treatment.

oners' equal protection rights are not nearly as underdetermined as constitutional doctrine makes them seem. Instead these rights are elaborated, often in great detail, by the administrative officials who decide when and how citizenship status matters to people's interactions with the state. The real effect of deference doctrines, then, is that federal prison officials become enormously important interpreters of the Constitution.

In courts, meanwhile, federal prisons start to look like foreign territory. The penal power doctrine and the plenary power doctrine distort judicial review — which is not to say that courts altogether decline to review federal prison policy on noncitizens, but rather that deference doctrines make courts' first question whether traditional constitutional principles ought to apply to exceptional plaintiffs in an exceptional institution. Take the *Turner* doctrine: the first step of that test asks whether the right in question survives incarceration, which means, of course, that some (and in practice many) rights do not.[345] Similarly, the plenary power doctrine assumes that the Constitution carries less force when invoked by a noncitizen. This framework for constitutional analysis is familiar from cases involving extraterritorial application of the Constitution, a context in which courts often debate the Constitution's reach. Courts have long been divided over whether and how constitutional rights apply in places like Mexico,[346] England,[347] Bagram Air Base,[348] and Guantanamo Bay.[349] The suggestion here is that, although we typically conceive of prisons as domestic criminal justice institutions, constitutional doctrine treats the all-foreign prison as equally foreign land.

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[345] *See supra* pp. 1424–26.

[346] *See, e.g.*, Hernandez v. Mesa, 137 S. Ct. 2003, 2007–08 (2017) (declining to decide whether a "cross-border incident in which a United States Border Patrol agent standing on United States soil shot and killed a Mexican national standing on Mexican soil," *id.* at 2004, violated the victim's Fourth or Fifth Amendment rights); United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990) (holding that the Fourth Amendment does not apply "to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country"); Rodriguez v. Swartz, 899 F.3d 719, 731 (9th Cir. 2018) (holding that a Mexican national on Mexican soil had a Fourth Amendment right to be free from unreasonable use of deadly force by an American Border Patrol agent standing across the border in the United States).

[347] *See, e.g.*, Reid v. Covert, 354 U.S. 1, 3–5 (1957) (holding that the Fifth and Sixth Amendments extended to a U.S. citizen military spouse tried for the murder of her husband on an American air base in England).

[348] *See, e.g.*, Al Maqaleh v. Gates, 605 F.3d 84, 98 (D.C. Cir. 2010) ("[The writ of habeas corpus] does not extend to the Bagram confinement [of detainees] in an active theater of war in a territory under neither the *de facto* nor *de jure* sovereignty of the United States and within the territory of another *de jure* sovereign.").

[349] *See, e.g.*, *id.* at 90–94 (summarizing habeas cases concerning Guantanamo Bay, from Rasul v. Bush, 542 U.S. 466 (2004), to Boumediene v. Bush, 533 U.S. 723 (2008)).

IV. TOWARD A THEORY OF MIGRATION CONTROL

Part III described a doctrinal minefield in which a deeply concerning form of custody receives two kinds of judicial deference. As *Johnson* demonstrates, one of these deference regimes — the penal power doctrine — sometimes yields, and famously did so when prison segregation was at issue.[350] But even if courts relaxed their prison exceptionalism, all-foreign prisons would still be protected by an expansive conception of the federal immigration power. Notwithstanding the Supreme Court's decision in *Hampton v. Mow Sun Wong*, courts have never clarified which types of federal action constitute migration control, nor have they limited which agents of the federal government may invoke the plenary power doctrine to justify their policies. This approach extends plenary power all the way across the administrative state, not just to federal prisons but to all federal alienage rules. The authority to regulate migration thus becomes one of the broadest federal powers, and noncitizens' right to equal protection recedes any time the federal government acts.

This Part advances an alternative theory of migration control, one that helps to square equal protection concerns about prison segregation with the fact that some alienage discrimination is necessary in a nation-state. Below, I explain why a formal definition of migration control is a better solution to the puzzle of noncitizens' simultaneous equality and second-class status than the "federalism-tinged" equal protection doctrine courts now use.[351] I then defend a simple claim: the immigration power is at issue only when the government decides who may *enter*, *exit*, and *naturalize*. This means that all-foreign prisons are not an instance of migration control, at least not the kind of migration control that warrants deference from federal courts.

A. Why Theory?

At first, a formal theory of migration control may sound counterproductive. Academics tend to use terms like "migration control," "border control," and "immigration regulation" capaciously to describe many sorts of state action directed at noncitizens. The insight driving this approach is that state power is diffuse. Certainly, provisions in the Immigration and Nationality Act[352] setting out who may enter the country and who must be deported are examples of migration control. But so too are university policies on whether immigrants qualify for in-state

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[350] *See supra* pp. 1421–24.

[351] *See* Soucek, *supra* note 327, at 158.

[352] Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C.).

tuition,[353] workplace rules on whether employees must speak English,[354] and prison policies categorizing federal prisoners by citizenship status. All of these legal rules are forms of social control that regulate migrants' status and mobility.

Adam Cox has articulated an incisive version of this point.[355] In a powerful piece exploring the distinction between immigration and alienage rules — a distinction that shapes the way immigration law is conceptualized and taught[356] — Cox argues that there is no meaningful difference between laws governing admission and expulsion (immigration rules) and those governing noncitizens' treatment inside the country (alienage rules) because both affect immigrants' conduct.[357] To illustrate his claim, Cox uses the example of an immigration law that "privileges migrants who will work in a particular industry."[358] Such a law, Cox explains, might encourage immigrants to pursue certain careers in order to obtain admission to the United States.[359] Conversely, a law restricting immigrants' access to public benefits — a quintessential alienage law — might disincentivize migration into the country.[360] Thus, any legal rule related to noncitizens is a means of regulating the border. Some means are simply more direct than others.

From this observation, Cox derives a normative claim: there is no reason "to ascribe constitutional or moral significance" to the distinction between immigration and alienage laws.[361] As Cox sees it, efforts to carve out a set of immigration rules and to distinguish those "real" instances of migration control from other types of state action are misguided because there is no legally salient difference between the state's many strategies for regulating migrants' lives.

This functionalist understanding of immigration law makes sense. There is no deep empirical difference between policing entry and exit and treating migrants differently from citizens inside the United States. But it is not clear where the functionalist argument ends — whether, for

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353 *See* Toll v. Moreno, 458 U.S. 1, 17 (1982) (holding that the federal law providing for G-4 visas preempted a University of Maryland policy denying eligibility for in-state tuition to noncitizens with such visas); *In-State Tuition and Unauthorized Immigrant Students*, NAT'L CONF. ST. LEGISLATURES (Feb. 9, 2014), http://www.ncsl.org/research/immigration/in-state-tuition-and-unauthorized-immigrants.aspx [https://perma.cc/D9W4-VJ8H] (surveying tuition policies across the country).

354 *See* Cristina M. Rodríguez, *Language Diversity in the Workplace*, 100 NW. U. L. REV. 1689, 1697–702 (2006) (summarizing the history of English-only workplace rules in the United States).

355 *See* Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341 (2008).

356 *See generally id.* (collecting case law and scholarship on the distinction between immigration and alienage law).

357 *Id.* at 357–76; *see also id.* at 351–53.

358 *Id.* at 363.

359 *Id.*

360 *Id.* at 364–65.

361 *Id.* at 342.

instance, it extends to alienage-neutral laws with a disparate impact on migrants or laws enforced more against immigrants than others. If those laws count, almost any law could be a mode of migration control. And in any event, the absence of a *functional* difference between two types of state action does not mean there ought to be no *constitutional* difference between the two. In fact, there are good reasons to classify only core immigration activities — setting rules on entry, exit, and naturalization — as migration control and to insist that, as a matter of constitutional law, other activities are not.

The first is that courts need a more defensible way to make sense of equality in a political community organized around the nation-state. As Part III pointed out, any law concerning immigrants implicates two competing principles: the equal protection guarantee and the government's authority to establish national borders and determine the terms of political membership.[362] When faced with any statute, regulation, or policy on noncitizens, courts have to balance the prohibition on denying noncitizens equal protection against the proposition that the federal government may divide foreigners from citizens in order to constitute itself. The only way to accomplish this balancing act is to distinguish between action that counts as migration control and action that does not.

A formal theory of migration control is thus a pragmatic solution to a thorny legal problem. There is no sharp functional distinction between rules on admission, expulsion, and immigrants' treatment in the United States. Nor, for that matter, are there actual borders to the nation-state in the absence of law. These are all invented boundaries. But law is always a line-drawing exercise. The law governing noncitizens is filled with formalisms — to cite a few, immigration detention and deportation

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[362] It is worth addressing whether these are *constitutional* principles. A state's duty not to "deny to any person within its jurisdiction the equal protection of the laws," U.S. CONST. amend. XIV, § 1, derives from the Fourteenth Amendment's Equal Protection Clause, which courts have extended to the federal government by way of the Fifth Amendment's Due Process Clause, *see* Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954). The federal immigration power has less sure textual footing. The Constitution nowhere says that the federal government has authority to regulate immigration, not to mention sole authority over the issue. Courts typically describe the federal immigration power as the outgrowth of multiple enumerated powers bestowed on Congress, including the authority to regulate foreign commerce and set naturalization rules, and as an inherent feature of national sovereignty. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 394–95 (2012) ("Th[e] [federal government's] authority [over immigration] rests, in part, on the National Government's . . . inherent power as sovereign to control and conduct relations with foreign nations . . . ."); Harisiades v. Shaughnessy, 342 U.S. 580, 587–88 (1952) (describing the power to deport noncitizens as "inherent in every sovereign state"). In the latter formulation, the government's authority to exclude noncitizens is an extraconstitutional principle, embedded in the very idea of a nation-state. Although the idea of inherent authority to establish borders is deeply interesting (and more than a little problematic), one need not settle the constitutional status of the federal immigration power to appreciate that every law concerning noncitizens raises both equal protection and sovereignty concerns.

are not "punishment";[363] immigrants paroled into the United States have never "entered" the country;[364] and the "border" within which customs agents can stop and search vehicles extends 100 miles inland.[365] Like most legal fictions, these rules benefit the state: the definition of punishment narrows the constitutional protections that apply in deportation proceedings; the entry fiction governing parolees limits their due process rights; and the 100-mile rule expands border patrol well inside the country's geographic boundaries.

Formal rules ought to limit state power, too. Constitutional immigration law begins from a paradox: for citizenship to mean anything, discrimination against noncitizens must be permissible; but for the equal protection guarantee to have content, discrimination against noncitizens can go only so far. When the federal government makes law, courts more or less ignore this paradox, prioritizing sovereignty values above all else. This doctrine lacks a solid foundation, and as the all-foreign prison illustrates, has unsettling consequences. In a legal system where immigrants are at once unequal and entitled to equal protection, the law needs a theory of migration control.

The second reason to distinguish migration control from other species of government conduct is that, in the absence of a clear theory of migration control, courts have adopted a haphazard jurisprudence that elevates all federal actors to immigration policymakers entitled to rational basis review. Current equal protection doctrine imposes no horizontal limits on plenary power. This approach embarrasses the traditional justification for deference to agency officials, which is that administrators have expertise that courts lack.[366] It also means, for example, that the Bureau of Land Management could rely on the plenary power doctrine to explain a policy denying noncitizens access to federal

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[363] Mahler v. Eby, 264 U.S. 32, 39 (1924) ("It is well settled that deportation . . . is not a punishment."). Although the Court held in *Padilla v. Kentucky*, 559 U.S. 356 (2010), that the Sixth Amendment requires criminal lawyers to inform their clients of the immigration consequences of a conviction, *id.* at 369, courts continue to distinguish deportation from punishment when determining whether constitutional protections attach to immigration proceedings, *see, e.g.*, Hinds v. Lynch, 790 F.3d 259, 263 (1st Cir. 2015) ("[F]ederal courts have long described removal orders as nonpunitive and, therefore, not punishment. . . . [W]e reject [the] contention that *Padilla* heralded a dramatic change in this long-settled view.").

[364] Section 212(d)(5) of the Immigration and Nationality Act permits immigration authorities to "parole" into the United States noncitizens who would otherwise be ineligible for admission. 8 U.S.C. § 1182(d)(5) (2012). Courts treat parolees as if they have never entered. *See, e.g.*, Sheba v. Green, No. 16-230, 2016 WL 3648000, at *2 (D.N.J. July 7, 2016) ("[A]n alien who is paroled for later inspection is not deemed to have been admitted or to have legally entered the country.").

[365] 8 C.F.R. § 287.1 (2018) (construing 8 U.S.C. § 1357(a)(3)).

[366] *See, e.g.*, Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 66 n.7 (2011) (citing "greater expertise" as the rationale for deference to the Federal Communications Commission); Gonzales v. Oregon, 546 U.S. 243, 266 (2006) ("[H]istorical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than the reviewing court . . . ." (quoting Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 153 (1991))).

parks; that the Department of Veterans Affairs could cite immigration control to segregate VA hospitals; and that the National Railroad Passenger Corporation could defend a policy charging noncitizens more to ride on Amtrak as an instance of border control. To put a slightly finer point on it, governing immigration doctrine means that all-foreign federal prisons can be described as an exercise in immigration regulation even if they make it no easier for the government to find and deport noncitizens convicted of crimes.

One might object that these examples are far-fetched. It would be strange indeed for Amtrak to segregate its trains, and even if it did, a court could deem such a policy irrational. But the concern is not that all federal alienage classifications will necessarily survive rational basis review; it is that, when it comes to federal policy, noncitizens' equality depends in large measure on administrative discretion. Segregated Amtrak trains and national parks seem outlandish not because the law clearly prevents them, but because our legal system operates on latent assumptions about which agencies "do border control" and when discrimination against noncitizens is permissible. Noncitizens' equality, in other words, is often a matter of norms rather than enforceable constitutional rights.

This is a real problem when norms change. The central claim in Part I was that norms around the use of penal institutions have shifted over the last three decades, turning prisons into tools of immigration policy and encouraging prison officials to justify segregated prisons as border control despite little evidence that they facilitate deportation. It is not difficult to imagine similar transformations in different parts of the federal bureaucracy. When this sort of institutional change unfolds, equal protection doctrine offers little insurance against an increasingly stratified society. Instead, under the governing theory of migration control, the plenary power doctrine applies to federal action no matter how attenuated it is from the government's interest in making and policing national borders. This is a blunt way to distribute constitutional power. And it produces outcomes — such as deference to federal prison officials when state prison officials get none — that are just as formal as the line between immigration and alienage rules, and far more perverse.

B. Which Theory?

The question, then, is when state action ought to count as migration control. Is the long-term segregation of foreign national prisoners related to the state's sovereign authority to regulate national borders? Is this prison policy a form of immigration regulation to which the plenary power doctrine should apply? If not, why not? When, in short, are federal citizenship laws entitled to deference?

There are many possible answers to these questions. It could be that deference is never justified in constitutional immigration law — this is

the argument for unqualified equal protection rights for noncitizens. Although I am sensitive to the goals of this argument, which aims to correct a jurisprudence that tolerates widespread discrimination, I am skeptical that courts would abandon deference to immigration policymakers in all cases. At least as a theory of judicial review, the plenary power doctrine is tenacious; it has warped and faded over time, but as the recent holding in *Trump v. Hawaii*[367] and the ongoing legal debate over policies limiting unauthorized immigrants' access to abortion[368] illustrate, it remains a powerful framework for understanding the government's obligations to noncitizens.

More to the point, the legal rule cannot be that immigrants are always equal to citizens. That approach to equal protection would eviscerate citizenship. So long as there is a nation-state, equal protection cannot preclude any second-class treatment of immigrants, for citizenship is itself a caste system.

But nor should the rule be that *any* federal alienage discrimination receives the extraordinary treatment that comes with classifying state action as migration control. That approach obscures the constitutional commitment to noncitizens' equality and assumes without good reason that the right to equal protection matters less when the federal government infringes it. It oversimplifies the federal government, which in a world of administrative agencies is a vast and varied idea. And it runs roughshod over the intuition that some forms of state coercion are not really "border control" even if they have an indirect effect on immigrants' behavior and status.

Courts thus need a rule that recognizes noncitizens' legitimate claims to equality, the basic inequality inherent to the nation-state, and the complexity of the modern administrative state. Here I propose a distinction between laws concerning which immigrants enter, exit, and naturalize, and all other laws affecting immigrants in the United States.[369]

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[367] 138 S. Ct. 2392, 2409 (2018) (upholding the Trump Administration's ban on entry of noncitizens from seven predominantly Muslim nations on the ground that "searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in th[e] [immigration] sphere").

[368] The D.C. Circuit recently split over whether an undocumented minor was protected by *Roe v. Wade*, 410 U.S. 113 (1973). Garza v. Hargan, 874 F.3d 735, 743 (D.C. Cir. 2017) (en banc) (Henderson, J., dissenting) ("Does an alien minor who attempts to enter the United States eight weeks pregnant — and who is immediately apprehended and then in custody for 36 days between arriving and filing a federal suit — have a constitutional right to an elective abortion? . . . [A]t least to me the answer is plainly — and easily — no. To conclude otherwise rewards lawlessness and erases the fundamental difference between citizenship and illegal presence in our country."), *vacated sub nom.* Azar v. Garza, 138 S. Ct. 1790 (2018).

[369] Note that the Constitution expressly empowers Congress to "establish an uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4. The Naturalization Clause provides some textual support for a theory that places naturalization decisions within the core of the federal immigration power.

The former laws are threshold rules that set out who may (or in the case of deportation must) cross the territorial border of the nation-state and the legal border between foreignness and citizenship. All other rules concerning noncitizens affect where and how immigrants live, but do so only incidentally, as a consequence of regulating migrants' access to social goods like welfare benefits, jobs, public schools, and prison services. Because they implicate sovereignty less directly, the latter rules ought not be classified as forms of migration control to which deference applies. When in doubt, moreover, the presumption ought to be that a law, policy, or regulation is not an instance of migration control that can be explained by reference to the federal immigration power.

This theory of migration control revives and clarifies the familiar distinction between immigration and alienage law. Both constitutional doctrine and immigration scholarship have long acknowledged a difference between regulating immigrants' entry into the United States and determining how noncitizens can be treated once they arrive.[370] As Cox's functionalist argument demonstrates, scholars have serious debates about whether courts can draw a coherent line between these modes of regulation.[371] My assertion is that they can — and indeed must — in order to separate the kind of alienage discrimination that is necessary to the function of the American legal system from alienage discrimination that reflects a racialized and constitutionally impermissible distaste for foreigners. Although the boundary between these types of discrimination will never be entirely clear, a theory that distinguishes threshold from incidental regulation of immigrants (and presumes strict scrutiny in borderline cases) does a significantly better job of filtering out noxious forms of discrimination than the doctrine courts currently employ.

Put differently, this theory of migration control gives meaning to the equal protection guarantee at the federal level, where the balance between equality and sovereignty is severely off-kilter. Under this theory, many federal alienage classifications would be subject to strict scrutiny rather than deferential review, and government conduct that indirectly affects immigrants' mobility could not be rationalized as an exercise of the federal immigration power. This does not mean that alienage classifications could never be justified. But it does mean that, outside a

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[370] Professor Linda Bosniak describes this as the "fundamental doctrinal division between immigration law's 'inside' and its 'outside.'" Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1058 (1994); *see also* BOSNIAK, *supra* note 272, at 55–56; Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256 (distinguishing "immigration law" from "the more general law of aliens' rights and obligations"); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 202 (1994) (discussing the "elusive" line between alienage and immigration rules). My work builds from this line of scholarship.

[371] *See supra* pp. 1434–35.

limited set of contexts, the government would need a compelling justification to discriminate on the basis of citizenship — and "regulating the border" would be an impermissible rationale.

In some respects, this is an atypical way to think about equal protection. This is not the "highly individualistic view of rights" most often associated with the Fifth and Fourteenth Amendments.[372] This theory treats equal protection as a structural principle that creates boundaries between different domains of state action, such as punishment and border control, and restricts the rationales that federal actors can give to justify policies in each.

As section III.B noted, however, courts *already* take a structural approach to equal protection when citizenship is at issue.[373] And this mode of reasoning is not nearly as exotic as it first seems. Although they rarely make it explicit, courts frequently employ rights to limit the acceptable reasons for government policy in certain contexts. Consider, for instance, First Amendment doctrine on campaign finance. In that area of law, the Supreme Court has dramatically restricted the permissible justifications for regulation of the political process, setting off-limits rationales that the government could otherwise use to explain its actions.[374] Similarly, in prison law, courts require policy to be justified by a "penological" goal.[375] In both of these examples, rights distinguish different domains of state action. As Professor Richard Pildes puts it, rights are the "means of marking separate spheres of authority in order to realize [competing] values"; they are the "tools the American legal system has created" to police which reasons are excluded from particular legal spheres.[376] The claim in this Article is that, to realize the competing values at work in any policy on alienage, migration control can be a legitimate justification for federal action in only the subset of cases most closely tied to the government's sovereign interest in policing its borders.

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[372] *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1665 (2001).

[373] *See supra* pp. 1426–31.

[374] *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1450 (2014) ("This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption." (citing Davis v. FEC, 554 U.S. 724, 741 (2008); FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496–97 (1985))). The goal here is not to defend campaign finance doctrine but rather to demonstrate that the kind of reasoning I would apply to immigration law is routine in other areas of constitutional law.

[375] *See supra* pp. 1424–26. Of course, *Turner* does not restrict state action nearly as much as the Supreme Court's campaign finance jurisprudence. But the doctrine does imagine that only a certain set of rationales — namely, the "legitimate penological objectives of the corrections system" — may justify prison policy. *See* Turner v. Safley, 482 U.S. 78, 95 (1987) (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)).

[376] Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 724 (1994).

So what does this theory of migration control look like in practice? For one, it means that all-foreign prisons could not be justified as an exercise of the federal immigration power, which is how the government has described them.[377] Instead, the Bureau of Prisons would have to explain why segregating noncitizens in separate, unequal penal institutions is a good *prison* policy. To be sure, courts are often deferential to prison officials; Part III described a jurisprudence in which courts have upheld extremely restrictive penal policies. But if taken seriously, a narrow legal definition of migration control would mean that prison officials could not borrow the plenary power doctrine to justify the creation of a second-class prison system for foreigners. These prisons would not receive rational basis review simply because they hold noncitizens. The case of the all-foreign prison would look much more like *Johnson v. California*: these institutions would get strict scrutiny and the question would be what penological goal authorizes segregation by citizenship.[378]

All-foreign prisons are difficult to defend from this perspective. As this Article has shown, segregated prisons are not the only (nor even a particularly good) way to identify foreign national prisoners or to share information with ICE. And although they may be a means to reduce prison costs, surely cost control cannot justify worse treatment and long-term isolation of a protected class of prisoners — if it could, prison officials could channel African-American prisoners into separate prisons with fewer services to save money. *Johnson* prevents that outcome and provides a blueprint for the analysis here.[379] In that case and lower court cases interpreting it, courts have suggested that only prison violence justifies segregating prisoners.[380] There is no evidence that all-foreign prisons, all of which are low-security institutions, were created in response to security concerns.

Of course, readers may disagree about how strict scrutiny should play out. Some might think the state has a compelling interest in restricting prison services to those who will be released into the United States. Once you accept that proposition, organizing the penal estate to distribute prison services efficiently seems less objectionable. There is also the blunter argument for these prisons: the state owes noncitizens less than citizens and can therefore hold them in second-class institu-

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[377] *See supra* pp. 1406–07. Although this Article focuses on prisons, a cabined theory of border control would mean that a wider range of "noncore" federal alienage regulations — from limits on access to welfare benefits to the provision of federal licenses — would be subject to strict scrutiny as well.

[378] *Cf.* 543 U.S. 499, 510–12 (2005).

[379] *See id.*

[380] *See id.* at 512–13; *see also* cases cited *supra* note 282 and accompanying text.

tions that reflect their status as outsiders. So long as these prisons comport with the Eighth Amendment, the argument goes, there is no constitutional problem with this particular form of discrimination.[381]

My own view is that *Wong Wing* had it right: the imposition of punishment brings a person into the political community such that one's status as an outsider cannot justify differential treatment.[382] When the state claims the power to punish — when it decides to imprison a person in the United States rather than repatriating or deporting him[383] — it incurs a duty not to distinguish prisoners by alienage. The state, in other words, cannot have it both ways; a person cannot be American enough to owe the state his liberty but insufficiently American to deserve equal treatment while that liberty is deprived. This is both because the right to punish is a mutual obligation[384] and because citizenship segregation is simply too tied up with racial and ethnic discrimination to comport with equal protection principles.

Whether this argument is convincing depends, ultimately, on the extent of one's commitment to the four equality arguments laid out in Part III.[385] Even if one rejects all those arguments, though, the core point remains: courts ought to evaluate all-foreign prisons as penal institutions rather than routine sites of border control. The Supreme Court's categorical conception of the federal immigration power prevents any meaningful assessment of which rights noncitizens have in the criminal justice system and which duties arise from the state's authority to punish. A better theory of migration control would bring these questions to the fore, and as a result, would generate a more candid and coherent equal protection jurisprudence.

More broadly, this theory of migration control would mean that courts play a bigger role in regulating the interagency dynamics of immigration enforcement. The all-foreign prison is a cautionary tale about what happens when two agencies "pool" the federal immigration power.[386] Slowly but surely, an effort to use prisons to identify foreign nationals for deportation has developed into a system of formal inequality of prisoners, which has little discernible effect on immigration officials' ability to deport noncitizens and which raises serious equal protection concerns. Under a narrow legal theory of migration control, courts would police this sort of mission creep by requiring prison (and

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381 It is not clear that current conditions in all-foreign prisons satisfy the Eighth Amendment, but that concern (while real and urgent) is orthogonal to the point here.

382 *See supra* section III.A, pp. 1419–24.

383 *See* Kaufman, *supra* note 177 (discussing the nonuse of existing repatriation treaties).

384 *See* NEUMAN, *supra* note 317, at 8 (describing a constitutional theory under which "rights are prerequisites for justifying legal obligation").

385 *See supra* pp. 1427–28 (describing moral, legal, historical, and practical arguments for noncitizens' equality).

386 *See* Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 285 (2015) (discussing the risks of interagency power sharing).

other federal) officials who coordinate with immigration agents to justify their alienage policies without reference to the federal immigration power.

This approach to plenary power requires the judiciary to oversee executive branch decisions about the treatment of immigrants. In this respect, it departs from traditional, expertise-based arguments for deference to agencies like the Bureau of Prisons. But expertise is beside the point here. Prison officials may have become very good at doing migration control over the last thirty years, but that does not make segregation by citizenship a permissible exercise of the federal immigration power. Instead, the real and inevitable question raised by all-foreign prisons is how to balance conflicting constitutional commitments to equality and sovereignty. That inquiry falls squarely within the judiciary's ken.

CONCLUSION

The rise of the all-foreign prison has transformed the federal prison system. Today, half of the noncitizens in federal prison live in segregated institutions, and prison officials have embraced a model of punishment in which equality is a privilege of citizenship. This new penology demands a critical reassessment of the relationship between punishment and migration control. Federal prisons are deeply involved in American immigration policy. In some cases, however, they must be judged as sites of punishment, lest sovereignty swallow the equal protection guarantee.