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## Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security

Liam Braber

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2002]

## Comments

### KOREMATSU'S GHOST: A POST-SEPTEMBER 11TH ANALYSIS OF RACE AND NATIONAL SECURITY

#### I. INTRODUCTION

Clashing for the first time since World War II are two constants of constitutional interpretation: unwavering invalidation of racial discrimination and vitally needed deference to the government in times of national emergency and war.<sup>1</sup> In *Korematsu v. United States*,<sup>2</sup> racial equality lost the first battle between these interests.<sup>3</sup> This Comment argues that adopting racial profiling in the war against terrorism is a practice dangerously unimpeded by both past and present constitutional doctrine.<sup>4</sup> This Comment also argues that current constitutional standards and policy should be interpreted as preventing racially-based measures, even as the nation faces arguably its greatest threat.<sup>5</sup>

On September 11, 2001, nineteen Middle Eastern terrorists carried out an obscene scheme that rivaled the most evil of human acts.<sup>6</sup> Rammed twice by hijacked airplanes, New York's World Trade Center towers fell with thousands caught inside.<sup>7</sup> Meanwhile, terrorists piled a third passenger jet into the Pentagon in Washington, D.C. and crashed a fourth in rural Pennsylvania.<sup>8</sup> Evidence soon suggested that Arab Islamic militants backed by Osama bin Laden, a known anti-American terrorist, had committed the massacre.<sup>9</sup> The aftermath has been marked by heated de-

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1. For a discussion of the applicable constitutional doctrine to the current terrorist threats, see *infra* notes 147-75 and accompanying text.

2. 323 U.S. 214 (1944).

3. See *Korematsu*, 323 U.S. at 218-23 (reasoning that wartime military and national security interests supported exclusion of Japanese residents in West Coast).

4. For a discussion of past and present use of racial profiling against Arabs despite Fourth and Fourteenth Amendments' protections, see *infra* notes 112-227 and accompanying text.

5. For a discussion of current equal protection standards and reasoning behind them, see *infra* notes 147-227 and accompanying text.

6. See CNN, *Bush: 'This is good vs. evil'* (Sept. 25, 2001), at <http://www.cnn.com/2001/us/09/25/gen.america.under.attack> (reporting President George Bush's characterization, "This is good vs. evil. There is no justification for these actions.").

7. See Michael Grunwald, *Terrorists Hijack 4 Airliners; 2 Destroy World Trade Center, 1 Hits Pentagon, 4th Crashes; Thousands Feared Dead; Bush Vows Retribution*, WASH. POST, Sept. 12, 2001, at A1 (reporting events of September 11, 2001).

8. See *id.* at A13 (recounting eventual fate of hijacked airplanes).

9. See *id.* (reporting early information about Muslim-extremist involvement). Osama bin Laden has been linked to prior terrorists acts against the United States. See *Frontline: Hunting Bin Laden* (PBS television broadcast, Mar. 21, 2000), available

bate on how to protect the United States from further attacks.<sup>10</sup> United States Senator John McCain said of bin Laden, "I want the guy dead, OK."<sup>11</sup> Naturally, the debate has focused on how to find terrorists in order to stop them.

Desperate to avert more catastrophic terrorism, officials and legislators are reconsidering the usefulness of racial profiling.<sup>12</sup> Based on the theory that Arabs and people of Middle Eastern ethnicity are disproportionately involved in the current terrorist threat, investigations using racial classifications subject these groups to more intense scrutiny than other ethnicities when they travel.<sup>13</sup> Fueling support for this investigative method are claims from other countries that such profiling decreases terrorist attacks.<sup>14</sup> While some commentators argue that race alone should determine who is stopped, race will likely be used either explicitly as one suspicion-arousing criterion or implicitly as a starting point for vastly expanded law enforcement discretion to detain.<sup>15</sup>

Evidence suggests this power expansion has, at least unofficially, already occurred.<sup>16</sup> In the two weeks following the attacks, over 500 people

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at <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/etc/script.html> (explaining extent of Osama bin Laden's influence and control over terrorist organizations). Allegedly protected in Afghanistan, bin Laden and his organization of largely independent Muslim terrorists, Al Qaeda, had previously been tied to the 1993 World Trade Center Bombing, the 1997 destruction of two U.S. embassies in Africa and the 2000 attack on destroyer *USS Cole* at port in Yemen. *See id.* (detailing U.S. intelligence about bin Laden before September 11, 2001 attack on World Trade Center and Pentagon).

10. *See, e.g., Hardball with Chris Matthews*, (CNBC television broadcast, Sept. 12, 2001), available at 2001 WL 22711105 [hereinafter *Hardball*] (presenting views by Senators John McCain, John Kerry and Max Cleland).

11. *Id.* Soon after the attack, it was suggested that the United States might lift its national policy forbidding assassination of foreign leaders. *See id.* (discussing legitimate response to attack from individual terrorist leaders). Senator McCain did not support sending a "specific assassin" to kill Osama bin Laden because trading assassination attempts would disfavor an open, free society. McCain made clear, though, that the killing itself was desirable. *See id.* (quoting Senator McCain).

12. For a full discussion of the theories and support for targeting Arabs, see *infra* notes 55-66 and accompanying text.

13. *See generally* Ronald J. Sievert, *Meeting the Twenty-First Century Terrorist Threat Within the Scope of Twentieth Century Constitutional Law*, 37 Hous. L. Rev. 1421 (2000) (raising concerns about Arab racial profiling); Jamie L. Rhee, Comment, *Rational and Constitutional Approaches to Airline Safety in the Face of Terrorist Threats*, 49 DePaul L. Rev. 847 (2000) (discussing practical aspects and solutions to terrorist screening).

14. *See* Adrian Weale, *Security Alert—Will Increased Security Measures Following Tuesday's Terrorist Attack Make Flying Safer?*, SUNDAY TELEGRAPH, Sept. 16, 2001, at P3 (reporting that Israeli airline, El Al, uses racial profiling and has remained hijack free for thirty years).

15. For a discussion of the types of racial profiling that could occur, see *infra* notes 33-54 and accompanying text.

16. *See Nightline: Profile* (ABC television broadcast, Oct. 1, 2001), available at 2001 WL 21773011 (reporting racial profiling that may have already occurred).

were either arrested or detained, and thousands of resident aliens were asked to submit to “random questioning,” almost all of them Arabic or Middle Eastern.<sup>17</sup> In several cases, Arab-Americans spent weeks in jail, suspected, as some see it, merely for being Arabs.<sup>18</sup>

Although these detentions involve searches and seizures that necessarily implicate the Fourth Amendment, the searches and seizures are more successfully challenged under equal protection jurisprudence.<sup>19</sup> In *Whren v. United States*,<sup>20</sup> the Supreme Court severely limited Fourth Amendment challenges to racial profiling in favor of equal protection claims.<sup>21</sup> Moreover, classifications based on race are traditionally actionable through the Equal Protection Clause.<sup>22</sup>

Wartime and national security interests, however, have often overridden constitutional protection, even though equal protection doctrine imposes strong prejudice against racial discrimination.<sup>23</sup> With the United States facing real threats from Arab terrorists, the ongoing war in the Middle East and the scrambling desperation for working security measures, the pressure to use race as a criteria of suspicion is at its apex.<sup>24</sup>

This Comment explores the theoretical constitutionality of racial measures adopted in the face of a national war or emergency.<sup>25</sup> Part II describes the theories and willingness of the current political structure to adopt racially-biased methods, outlines the current Fourth Amendment and equal protection standards as applied to racial profiling and explains constitutional deference in light of national security crises.<sup>26</sup> Part III dis-

17. *See id.* (reporting detentions following Sept. 11th attacks).

18. *See id.* (discussing such detentions with Georgetown Law Professor David Cole and U.S. Attorney Beth Wilkinson).

19. *See* U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

20. 517 U.S. 806 (1996).

21. For a discussion of the doctrinal application and impact of *Whren* on racial profiling claims, see *infra* notes 67-85, 135-46 and accompanying text.

22. *See* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213-15 (1995) (detailing history of racial classifications under equal protection standards).

23. *See, e.g., Korematsu v. United States*, 323 U.S. 214, 223 (1944) (holding that World War II and national security were compelling governmental interests to justify interning Japanese Americans).

24. For a discussion of the pressures behind the current search for terrorists, see *infra* notes 33-66, 119-34 and accompanying text.

25. This Comment does not address the practical aspects of litigating an Arab racial profiling claim in federal or state court. For a discussion of some of the practical concerns, such as proving intent to discriminate, discovery, evidence and other similar issues, see Honorable Phyllis W. Beck & Patricia A. Daly, *State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns*, 72 TEMP. L. REV. 597, 612-18 (1999) (expressing concerns about proving equal protection violation and difficulties of securing evidence); Elizabeth A. Knight & William Kurnik, *Racial Profiling in Law Enforcement*, 30 BRIEF 16, 18-23 (2001) (describing several practical difficulties of litigating racial profiling cases).

26. For a further discussion of the background behind the current political mindset in favor of adopting racial profiling, see *infra* notes 29-111 and accompanying text.

cusses the legal standards surrounding racial profiling in light of traditional deference to government during war and national emergency and argues that race-conscious methods in the hunt for terrorists cannot be justified under current constitutional standards and policies.<sup>27</sup> Part IV weighs the totality of political and constitutional protection against civil rights violations during war time and predicts social ramifications that could emerge from lax protection.<sup>28</sup>

## II. THE POLITICAL PUSH AND THE CURRENT LEGAL STANDARDS REGARDING RACIAL PROFILING

The potential use of racial profiling to combat terrorism is both a legal and policy based issue.<sup>29</sup> Preliminarily, although many Arabs affected by such measures may be non-citizen aliens, it is important to clarify that aliens legally inside the United States are afforded full Fourth, Fifth and Fourteenth Amendment protections.<sup>30</sup> In addition, even illegal aliens are protected by the Equal Protection Clause.<sup>31</sup> Only aliens outside U.S. territory, such as “enemy aliens” or those who have not developed societal or residential connections with the United States, do not receive Fourth, Fifth and Fourteenth Amendment benefits.<sup>32</sup> Assuming, then, that these

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27. For a further discussion of the legal standards regarding the debate about racial profiling, see *infra* notes 112-227 and accompanying text.

28. For a further discussion of the potential constitutional protections that could be used against racial profiling and the ramifications of not securing these protections, see *infra* notes 228-36 and accompanying text.

29. For a discussion of both the policies and legal standards involved, see *infra* notes 112-227 and accompanying text.

30. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-72 (1990) (summarizing Fourth, Fifth and Fourteenth Amendment protection as afforded once alien lawfully enters and resides in United States or has “significant voluntary connection” with United States as would “place him among ‘the people’ of the United States”); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (finding resident alien “person” for purposes of Fifth Amendment protection); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 492 (1931) (finding Fifth Amendment protection of resident aliens); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (entitling aliens to Fifth and Sixth Amendment protection); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that Fourteenth Amendment protects resident aliens).

31. See *Plyler v. Doe*, 457 U.S. 202, 211-12 (1982) (holding that illegal aliens are afforded equal protection rights in order to prevent creation of underclass residents that may be treated differently under law).

32. See *Johnson v. Eisentrager*, 339 U.S. 763, 784-85 (1950) (holding that German “alien enemy” arrested in China and held in Germany cannot receive Fifth Amendment protection); *Verdugo-Urquidez*, 494 U.S. at 269-71 (interpreting *Johnson* and holding that Fourth Amendment does not apply to search of Mexican citizen’s Mexican residence when suspect does not have any “voluntary connection” with United States). Interestingly, one interpretation of *Johnson* may have significant bearing on Middle Eastern terrorists and the application of the Constitution. In *Verdugo-Urquidez*, Justice Brennan argued that *Johnson*’s denial of constitutional protection was based on war and “alien enemy” status rather than extraterritoriality and lack of connection. See 494 U.S. at 290-91 (Brennan, J., dissenting) (“*Johnson* rejected the German nationals’ efforts to obtain writs of habeas corpus not

core constitutional protections apply to Arabs who live and travel inside the United States, the issue focuses on four fronts: (1) the imminence of and support for using racial methods in the United States, (2) the use and impact of racial profiling outside the United States, (3) the legal standard applied to racial profiling in the United States and (4) the extent that the legal standard protects rights during national crisis.

A. *Pulse of the Nation: The Theories and Support Behind Racial Profiling After September Eleventh*

Following times of crisis, national security and safety are often hailed as sacrosanct, not without reason, but civil rights and liberties become expendable.<sup>33</sup> After the destruction of the World Trade Center, many predict such a trend will likely continue.<sup>34</sup> The perception that Arabs are disproportionately responsible for terrorism and most likely to strike again has caused the attitudes of American leaders, the public, and legal and political scholars to range from outright validation of racial profiling to necessary, or at least inevitable, trade-off.<sup>35</sup>

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because they were foreign nationals, but because they were enemy soldiers.”). Although Justice Brennan’s argument seems limited to proven fighters for enemy governments, it is unclear how “enemy soldier” status might be applied to deny constitutional protection, even when the “enemy soldier” is a legal entrant to the United States or has connections that would otherwise afford him constitutional rights.

33. See generally JAMES X. DEMPSEY & DAVID COLE, *TERRORISM & THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* (1999) (analyzing loss of civil liberties connected with terrorist attacks and legislation enacted after bombing of Oklahoma City Federal Building); Richard Lacayo et al., *Privacy vs. Safety*, TIME (Special Issue), Sept. 24, 2001, at 92 (recalling that national security worries in World War II created Japanese-American internment camps and that after Oklahoma City Federal Building bombing, Immigration and Naturalization Service (INS) was given power to establish special court that could arrest, hold and deport aliens without revealing evidence against accused); Eric Pianin & Thomas B. Edsall, *Civil Liberties Debate Revived Amid Efforts to Fight Terrorism: Senate Clears Bill to Help FBI Tap Computer Communications*, WASH. POST, Sept. 14, 2001, at A11 (noting Espionage and Sedition Acts passed after World War I, which allowed easy arrest and deportation, and 1996 legislation that gave INS trial and deportation power expansion). The power given to the INS in 1996, known as trial by “secret evidence,” is widely criticized in legal circles because it allows holding and charging the innocent indefinitely without credible evidence. See Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists”*, 8 ASIAN L. J. 1, 19-21 (2001) (detailing specific instances where people tried before INS court were held for several years without knowing what evidence kept them there).

34. See Lacayo, *supra* note 33, at 92 (“If ever there was a time when [Americans] might be receptive to trimming their accustomed freedoms, that time is now.”); Pamela Sebastian Ridge & Milo Geyelin, *Aftermath: Investigation and Mobilization: Civil Liberties of Ordinary Americans May Erode*, WALL ST. J., Sept. 17, 2001, at A5 (predicting that racial profiling is most likely area of law enforcement reaction).

35. See generally Lacayo, *supra* note 33 (reporting atmosphere that is willing to sacrifice liberties).

Given the severity of the September 11th attacks, many legislators and policymakers seem willing to trade equality for increased national security.<sup>36</sup> Notably, Congressman Richard Gephardt announced, "We're in a new world where we have to rebalance freedom and security."<sup>37</sup> Congressman Trent Lott followed with similar language: "When you're in this type of conflict, when you're at war, civil liberties are treated differently."<sup>38</sup> These feelings, along with wide publicity that all the hijackers were Arabic, has resulted in a willingness among lawmakers to deem Arab ethnicity as relevant in terrorist screening.<sup>39</sup> The theory behind this willingness is that the responsibility for the recent attacks and the current war are linked to one identifiable ethnic group and that targeting this ethnic group will prove to be the quickest and most effective way to narrow the suspect pool and stop future attacks.<sup>40</sup> This argument is further supported by the ur-

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36. See Pianin & Edsall, *supra* note 33, at A11 (reporting legislative leaders willing to compromise on liberties).

37. *Id.* (quoting congressional leaders as they debate how to "clamp down" on suspected terrorists).

38. *Id.* Senator Lott went on to add, "We've been having an academic discussion and holding our breath in this area for several years. We can't do that anymore." See *id.* (adding to reality that Congress was moving forward with some legislation that would curtail freedom in name of war).

39. See *Attack on America*, PROVIDENCE J., Sept. 14, 2001, at A20 (reporting that U.S. Representative Bob Barr summarized his attitude toward hunting for terrorists by stating, "We're not interested in reading them their Miranda rights."); *Special Report: America United* (FOX television broadcast, Sept. 16, 2001), available at 2001 WL 7790874 [hereinafter *America United*] (interviewing Attorney General John Ashcroft, who denied sole use of race to detain but did not deny use of race among other factors). Former Ohio Congressman and appropriations advisor John Kasich responded to questions about racial profiling with, "Political correctness is out the window, Sean. I mean I think the country has had it, flat out had it with political correctness." *Special Report: America United* (Hannity & Colmes anchoring) (FOX television broadcast, Sept. 16, 2001), available at 2001 WL 5076459 [hereinafter *Hannity & Colmes*] (interviewing several government officials about domestic relations after September 11th attacks). New Jersey Attorney General John Farmer Jr., whose office has led an investigation to end racial profiling by police in New Jersey, agreed that because of public safety and pressure on police he could "see no reason" law enforcement would not be able to profile in terrorist investigations. See Ridge & Geyelin, *supra* note 34, at A5 (examining attitudes about racial profiling). Several other high government officials share similar views. William H. Webster, former director of the Federal Bureau of Investigations (FBI) currently on a commission examining FBI security, warned that to win a war on terrorism "there is going to have to be a relaxation on the ability to look for certain kinds of conduct and perhaps even appearance. If people are coming from a country that we think harbors terrorists, then they are going to have to be subjected to substantial scrutiny." Edmund Sanders, *Attacks Prompt Calls for More Passenger Profiling*, L.A. TIMES, Sept. 15, 2001, at A21. Peter Tarlow, government security advisor and FBI agent trainer stated that racial profiling "can be a very valuable law enforcement tool." *Id.* Tarlow acknowledged that "[i]t can also be a terrible prejudice tool. It's a fine line." *Id.*

40. See Sievert, *supra* note 13, at 1453-56 (discussing idea that if United States were at war with or under threat of terrorism from "England, Iran, or Latvia," threat perceived would be sufficiently high to validly consider English, Iranian or Latvian ancestry to entertain suspicion of terrorism). Professor Sievert asserts that

gent climate and the preexisting profiling theory that where a racial group is disproportionately involved in criminal activity, race becomes a legitimate factor for suspicion.<sup>41</sup>

Concern and hesitation do exist, but as the government clamps down on terrorism, the resignations are muffled amidst calls to expand law enforcement's stop-and-detain power.<sup>42</sup> Indeed, the rising desire to allow law enforcement a freer hand to detect and track terrorists illustrates popular outlets for racial profiling, with race either used as an added prong that creates reason to detain or an implicit starting point for unchecked enforcement discretion.<sup>43</sup> If race were an added criterion for suspicion,

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law enforcement could be "acting irresponsibly if they did not note a suspect's ancestry while attempting to protect the nation in the midst of such a violent conflict between the different societies." *Id.* at 1454; *see also* Richard W. Bloom, *Commentary on the Motivational Psychology of Terrorism Against Transportation Systems: Implications for Airline Safety and Transportation Law*, 25 *TRANSP. L.J.* 175, 179 (1998) (describing profiling philosophy as "depicting those most likely to engage in terrorism" to ensure "the closer terrorists get to transportation targets, the closer they will get to being greeted by antiterrorist and counterterrorist personnel"); Serge F. Kovalski, *A Wide, Aggressive Probe Collides With Civil Rights: Innocent People May Face Questioning, Experts Say*, *WASH. POST*, Sept. 15, 2001, at A14 ("[W]hen law enforcement agencies are under pressure they tend to cut corners and . . . there may be ethnic or racial profiling going on to narrow the pool of suspects.") (quoting Harvard School of Government Professor Juliette Kayyem); Sanders, *supra* note 39, at A21 (reporting security experts' proposals that war against terrorism would have to center on profiling groups that come from certain countries because those nationalities are more likely to harbor terrorists).

41. *See, e.g.*, Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 *N.Y.U. L. REV.* 956, 1005-08 (1999) (extolling use of race in seeking out certain groups known to be disproportionately involved in criminal activity). Professor Thompson does not advocate use of race alone to predict criminality, but instead as a "rough but workable proxy for suspicion" that could help single out members of criminal organizations and, notably, "exclude a large portion of the population from investigation." *Id.* at 1005-06. Such theories have been accepted into modern jurisprudence with the Supreme Court recognizing that in certain instances, racial appearance proves relevant to suspicion. *See* *United States v. Martinez-Fuerte*, 428 U.S. 543, 563-65 (1976) (holding risk of illegal border crossing sufficiently high to justify Mexican appearance as factor in border-stop); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975) (same).

42. *See Hardball*, *supra* note 10 (broadcasting interview with John McCain in which he stated very cautiously that racial profiling "would be a last resort"); *Attack on America*, *supra* note 39 (quoting President George W. Bush's caution, "We will not allow this enemy to win the war by changing our way of life or restricting our freedoms."). Congress and the Executive Branch, however, responded oppositely. Attorney General John Ashcroft deployed hundreds of U.S. marshals, customs and border officials to the nation's airports to implement a new security regime. *See id.* (reporting new security deployment). The Bush administration ordered the creation of special military tribunals that can try suspected terrorists quickly without normal judicial constraints. *See Lacayo*, *supra* note 33 (detailing measures that may constrain civil freedoms). In addition, on September 12, 2001, the U.S. Senate quickly passed a broadly phrased expansion of law-enforcement power to force Internet providers to disclose subscriber lists and e-mails, a sentiment that easily carried over into other security arenas. *See id.* (discussing Senate proposal).

43. *See Beck & Daly*, *supra* note 25, at 608-09 (noting that few advocates for racial profiling desire to use race alone to provide probable cause, but rather wish



for example, a young American checking no luggage, shabbily dressed, that had traveled to Afghanistan in the last two years *plus* having Middle Eastern complexion would be more likely to be detained than a Caucasian American.<sup>44</sup>

Congress has already expanded law enforcement power.<sup>45</sup> Attorney General John Ashcroft pushed through Congress legislation that allows indefinite detention of those deemed “a threat” to national security and gives broad-scale search powers without notice to the subject.<sup>46</sup> Although

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to include race “as part of the probable cause mix”) (citing Joseph Wambaugh, *Trust Cops’ Intuition*, WALL ST. J., May 19, 1998, at A22); Thompson, *supra* note 41, at 1005-08 (advocating outright use of race as “one factor in the quantum of suspicion” and extolling racial profiling in seeking out certain groups known to be involved in criminal activity); *America United*, *supra* note 39 (interviewing Attorney General Ashcroft, who when asked about racial profiling vaguely responded, “[W]hen there are factors that elevate . . . any suspicion that there’s a problem, we take action”). Some supporters would allow law enforcement to use race as a relevant factor, but would add limits. Suggesting that racial profiling could be made less offensive if racial detentions were limited to search of possessions and luggage, University of California Law Professor Gail Heriot stated that racial profiling could be used validly “with the lightest of touches.” See *Newshour with Jim Lehrer: Profile of a Terrorist* (PBS television broadcast, Sept. 26, 2001), available at [http://www.pbs.org/newshour/bb/terrorism/july-dec01/racial\\_profile.html](http://www.pbs.org/newshour/bb/terrorism/july-dec01/racial_profile.html) (broadcasting roundtable discussion of civil rights experts on racial profiling and racial tension following attacks). In the same discussion, *Newsweek* columnist Stuart Taylor suggested that special scrutiny of Arabs “for a limited time may be a justifiable exception to the general rule [applied] against racial profiling.” *Id.*

The Supreme Court has already held that certain enforcement officers must have wide discretion and that such “light touch” or multiple factor stops would be constitutional, even if based on race. See *Martinez-Fuerte*, 428 U.S. at 563-65 (holding that border patrol officers should have wide discretion and that ordering car to referral point where occupants would be questioned is sufficiently minimal intrusion to not be offensive even if “made largely on the basis of apparent Mexican ancestry”); Sievert, *supra* note 13, at 1453-54 (discussing availability of race as one “relevant factor” in searches and seizures).

44. See, e.g., *NBC Nightly News with Tom Brokaw* (NBC television broadcast, Sept. 6, 1996) (reporting that Israeli airlines, El Al, adopts multi-element screening procedures that include “young, dark-skinned males” and “Middle Eastern men with Western passports” among other neutral factors). It seems clear that if race is adopted into any sophisticated profiling system, it is usually part of a group of indicia. See Gregory T. Nojeim, *Aviation Security Profiling and Passengers’ Civil Liberties*, 13 AIR & SPACE LAW. 3, 4-8 (1998) (contrasting and comparing computerized multi-factor profiling adopted in United States and Israeli type profiling that actively screens based on national origin, complexion and religion among many other criteria).

45. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001) (enacting measures directly as response to recent, heightened calls for security).

46. See *Ashcroft, Leahy Anti-Terrorism Bills Center Stage This Week*, CONG. Q. WASH. ALERT, Sept. 24, 2001 (summarizing current proposed terrorism legislation); Neil A. Lewis & Robert Pear, *Negotiators Back Scaled-Down Bill to Battle Terror*, N.Y. TIMES, Oct. 2, 2001, available at <http://www.nytimes.com/2001/10/02/national/02RIGH.html> (predicting action by Congress to pass compromise on Ashcroft’s proposal). Ashcroft was adamant that federal agents need new tools “to identify,

such measures seem neutral, as past expansion of terrorist screening powers suggests, even facially non-discriminatory policies can covertly target certain racial groups or clear a path for intentional discrimination.<sup>47</sup>

Further, the public supports racial profiling by staggering margins.<sup>48</sup> Nationwide polls show that almost seven in ten people, even among non-white groups, agree that law enforcement should be able to randomly stop people fitting the profile of a terrorist.<sup>49</sup> A harbinger of the type of profiling that might be allowed, the numbers hardly move when Americans are asked specifically if people of Arab descent should undergo "special, more intensive security checks" when flying; a solid six in ten favor it.<sup>50</sup> Even though some polls also report that Americans disfavored generally target-

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dismantle, disrupt and punish terrorist organizations before they strike again." *House Judiciary Panel Delays Vote on Terrorism Legislation*, CONG. Q. WASH. ALERT, Sept. 25, 2001 (quoting Attorney General Ashcroft's remarks to U.S. House of Representatives Judiciary Committee). A slightly altered version of Ashcroft's bill was signed into law on October 26, 2001, allowing (1) indefinite detention yet requiring review every six months; (2) searches without notice; and (3) expansion of surveillance, intelligence gathering and criminal prosecutions of suspected terrorists. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codifying most of what Ashcroft asked for).

47. See DEMPSEY & COLE, *supra* note 33, at 11, 44-47 (examining several indirect ways, such as suppressing First Amendment rights of certain groups or allowing FBI monitoring of certain groups, that past legislation has targeted those of Middle Eastern decent); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318-27 (1987) (discussing, more generally, ability of "facially neutral" methods to be discriminatory); Nojeim, *supra* note 44, at 4-5 (discussing United States' airline adoption of Computer-Assisted Passenger Screening (CAPS) and its potential to computerize stereotypes); Saito, *supra* note 33, at 15-21 (discussing government association of Arab-Americans with terrorists in enacting legislation that allows indefinite detention and use of secret evidence); Donna Smith, Comment, *Passenger Profiling: A Greater Terror Than Terrorism Itself?*, 32 J. MARSHALL L. REV. 167, 167-68 (1998) (describing vividly example of free reign given to Israeli security officials, who may subject individual passenger to probing questions about her ethnicity and origins of her family name).

48. See Mark Z. Barabak, *America Attacked—Times Poll*, L.A. TIMES, Sept. 16, 2001, at A1 (reporting results of its nationwide poll examining steps U.S. citizens would be willing to take to stop terrorism).

49. See *id.* (reporting specific numerical results). The Los Angeles Times poll also revealed that Americans would be willing to pay higher taxes, sustain substantial casualties in a war and allow government monitoring of every private e-mail. See *id.* (revealing further public feelings after September 11, 2001).

50. See GALLUP ORGANIZATION, *Americans Felt Uneasy Toward Arabs Even Before September 11*, Sept. 28, 2001, available at <http://www.gallup.com/poll/releases/pr010928.asp> (reporting that when asked specifically about those of Arabic decent, American public favored specific racial restrictions). Even harsher restrictions were also favored. See Melissa Sepos, *Anti-Terrorism Laws Could Limit Rights*, LEGAL INTELLIGENCER, Sept. 18, 2001, at 1, 39 (reporting poll figures that 50% of Americans supported Arab identification card and 32% favored even more extreme measures, such as special surveillance akin to type that Japanese-Americans experienced after Pearl Harbor).

ing entire nationalities, focusing on Arabs and Arab-Americans was highly favored.<sup>51</sup>

Finally, scholars and observers predict the onslaught of using ethnicity in investigations and searches for terrorism as a result of proposed legislation that widens parameters for law enforcement.<sup>52</sup> Professor Lawrence Tribe stated, “[C]ourts are likely to be much more in tune with the national mood of fear and animosity toward whole groups of people who may be quite innocent but who are related ethnically or religiously to the source of the harm.”<sup>53</sup> Put to the public’s yearning question, “What can I do?”, Professor David Kairys glibly answered, “You can give blood, money and your civil liberties.”<sup>54</sup>

### B. *Pulse of Other Nations: The Influence of Other Nation’s Racial Profiling Policies*

Policies adopted in other countries that have faced similar threats prove influential on American politics.<sup>55</sup> Israeli airlines, El Al, is seen as the prototype success story.<sup>56</sup> Israeli terrorist screening includes profiling that regularly singles out women traveling alone, shabbily dressed people and Arabs.<sup>57</sup> The Israelis apply the idea that focusing on a group sus-

51. See Sepos, *supra* note 50, at 39 (reporting various polls from *CNN/USA Today/Gallup*, *Newsweek*, *CBS/N.Y. Times* and *ABC/Wash. Post* and contrasting 62% of population that said government would be mistaken to generally target nationalities with 60% in favor of special airline security for Arabs, 50% favoring Arab identification cards and 32% favoring special intense surveillance on Arabs).

52. See Ridge & Geyelin, *supra* note 34 (reporting reactions from threats to civil liberties).

53. *Id.* (quoting Harvard Law Professor Lawrence Tribe’s prediction of likely balance of national security with individual rights that prevent unconstitutional search and seizure). Harvard colleague Alan M. Dershowitz predicted similar limits. See Paul Raeburn et al., *The Costs of Fighting Terrorism: There’s Only so Much That Can Be Done—and Much That Shouldn’t*, BUSINESSWEEK ONLINE, Sept. 13, 2001, at [http://www.businessweek.com/bwdaily/dnflash /sep2001/nf20010913\\_009.htm](http://www.businessweek.com/bwdaily/dnflash /sep2001/nf20010913_009.htm) (quoting Dershowitz predicting “paradigm shift” in balancing of individual rights and anti-terrorism, “Government will have greater freedom to conduct searches at airports and elsewhere. There will be less access to public places.”).

54. See Sepos, *supra* note 50, at 1 (quoting Kairys and examining American willingness to give up freedoms in face of national security). Kairys pointedly warned against racial profiling, stating, “Civil liberties don’t mean a whole lot unless we extend them to everyone.” *Id.* at 39.

55. For a discussion of foreign, primarily Israeli, methods, see *infra* notes 56-66 and accompanying text.

56. See Uri Dan, *Our Security Might Follow Israel’s Hard Line*, N.Y. POST, Sept. 17, 2001, at 22 (explaining El Al’s rigorous security measures to prevent terrorism). In a recent case, Israeli police identified a would-be bomber based on a profile of race and appearance and thwarted the terrorist attack by tackling him as he boarded. See *id.* (describing event and mentioning that such tactics will “clash with the current American preoccupation with racial profiling”).

57. See Nojeim, *supra* note 44, at 6 (reporting that some elements of El Al profiling singles out “young, dark-skinned male[s]” and “Middle-Eastern looking men with Western passports”); Weale, *supra* note 14, at P3 (unveiling some realities of Israeli profiling systems). El Al’s method of profiling uses race as one factor in

pected to be disproportionately involved in terrorism narrows the focus enough to prevent it.<sup>58</sup> Defenders of the practice are quick to point out that, despite near war between Israel and the neighboring Middle Eastern community, El Al has not had a hijacking in thirty years.<sup>59</sup> This expanded power was deemed justified after the Israeli government officially declared terrorist groups at war with Israel, a foreboding similarity to the current declaration of war by Osama bin Laden against the United States and the now common referral by the American government to a “war on terrorism.”<sup>60</sup>

Other nations have mixed responses to racial measures.<sup>61</sup> Focusing on airlines, other countries have security more lax than El Al, but worlds more secure than the United States.<sup>62</sup> European nations, as well as Israel, use a tight screening system in hiring airport security as well as observing passengers.<sup>63</sup>

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screening travelers, and many commentators differ on whether such a method should be adopted in the United States. *See id.* (arguing further that El Al’s system should not be adopted in United States). *Compare* Rhee, *supra* note 13, at 875-76 (advocating personal aspect of El Al’s system), *with* Smith, *supra* note 47, at 167-71 (1998) (expressing doubts about fairness of El Al’s system).

58. *See* Dan, *supra* note 56, at 22 (describing nature of Israel’s fear of terrorist attacks stemming from specific groups that are deemed likely to attack Israel). Importantly, El Al’s expanded security scope looks specifically for members of terrorist groups Hamas and Islamic Jihad, which necessarily skews its profiling system toward Arabs and people with a Muslim background. *See id.* (reporting rationale behind El Al and racial profiling).

59. *See* Weale, *supra* note 14, at P3 (noting that racial profiling in Israel “does seem to work”).

60. *See id.* (noting specificity that Israeli government uses to target race in terrorist screening); Evan Thomas & Mark Hosenball, *Bush: “We’re at War”*, *NewsWEEK*, Sept. 24, 2001, at 26 (reporting President Bush’s unequivocal declaration, “We’re at war.”).

61. *See Weekend Edition—Sunday* (NPR radio broadcast, Sept. 16, 2001), *available* at 2001 WL 7877395 (discussing successes and failures of Spanish and British forays into racial methods to screen for terrorists). Harvard Professor Michael Ingatiff described British methods of screening as fighting terror without losing liberty but admitted that there was some “blow-back” for instituting measures that targeted Irish men and women for no reason. *See id.* (warning of battle between civil libertarians and police).

62. *See* Weale, *supra* note 14, at P3 (reporting that most Europeans will be surprised to learn that measures such as “sky marshals” are not already in place in United States). In the sky marshal plan, an armed federal agent flies on every plane to thwart hijackers. *See id.* (reporting that sky marshals are about to be reintroduced by Federal Aviation Authority (FAA)); *Hardball*, *supra* note 10 (discussing sky marshal plan with three U.S. Senators).

63. *See* Weale, *supra* note 14, at P3 (noting that all British airport security personnel are screened and trained by one government organization rather than each airport and airline hiring its own employees). As a testament to at least complacency regarding its profiling systems, Britain’s Commission for Racial Equality reports that it has not received any complaints about racial profiling. *See id.* (reporting lack of problems with British profiling systems).

Many predict that the United States will have to adopt an Israeli-type security model.<sup>64</sup> One federal expert on terrorism asserts that “[p]rofilng is the key; and the liberals will scream about it being racist.”<sup>65</sup> Despite any such screaming, legislators are looking to foreign technique for guidance on security standards.<sup>66</sup>

C. *Racial Profiling: Unreasonable Search and Seizure or Racial Discrimination?*

Even before the September 11th attacks, racial profiling spawned much debate.<sup>67</sup> Racial profiling, as it is commonly understood, applies to a broad range of racial discrimination by law enforcement that causes people to be “singled out” based on race.<sup>68</sup> A great deal of the debate centers on whether the Fourth Amendment’s protection against unreasonable in-

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64. See, e.g., *id.* (implying that adoption of such measures was desirable but noting that cost of such systems clashes both with American ideals and airline bank-accounts); Dan, *supra* note 56, at 22 (“For years, U.S. airlines have resisted the cost of such measures—but it’s likely they will now have to revolutionize their security systems along the Israeli model.”); Pianin & Edsall, *supra* note 33, at A11 (“We ought to be aware of what the Israelis are doing and whether that’s the sort of thing we would do.” (quoting William A. Niskanen of Cato Institute)); *Hardball*, *supra* note 10 (interviewing Senators Max Cleland, John Kerry and John McCain, who each spoke favorably about El Al and its security ideas).

65. See Weale, *supra* note 14, at P3 (quoting Gordon Rottman, United States Special Operations Command expert on terrorism who supports more Israeli-type security at airports).

66. See *Hardball*, *supra* note 10 (interviewing three senators about security ideas); *Hannity & Colmes*, *supra* note 39 (interviewing Congressman John Kasich, who, when asked if racial profiling was “in play,” responded, “Everything’s in place that’s going to guarantee the security of our country.”).

67. See generally KENNETH MEEKS, *DRIVING WHILE BLACK: HIGHWAYS, SHOPPING MALLS, TAXICABS, SIDEWALKS: HOW TO FIGHT BACK IF YOU ARE A VICTIM OF RACIAL PROFILING* (2000) (discussing historical and current racial profiling from actor Danny Glover’s inability to get taxicabs to governmental profiling, such as New Jersey State Police profiling on highways); Knight & Kurnik, *supra* note 25, at 18-22 (analyzing difficulties behind litigating racial profiling cases); David A. Harris, *Driving While Black—Racial Profiling On Our Nation’s Highways*, AMERICAN CIVIL LIBERTIES UNION FREEDOM NETWORK, June 1999, at <http://www.aclu.org/profiling/report/index.html> (giving vivid depictions of individual occurrences of racial profiling on U.S. highways and examining jurisprudence on racial profiling).

68. See Beck & Daly, *supra* note 25, at 597-98 (introducing basic concept of racial profiling). Racial profiling, however, should not be confused with mere “profilng,” which is a practice that allows law enforcement to draw reasonable inferences from the facts in light of experience and circumstances. See Knight & Kurnik, *supra* note 25, at 17-18 (analogizing profilng in general to permissible inferences allowed under *Terry v. Ohio*, 392 U.S. 1 (1968)). *Terry* allows police to detain and lightly search individuals based on “reasonable suspicion,” a standard significantly less than probable cause but more than a mere “hunch.” See *Terry*, 392 U.S. at 6-9, 27 (allowing limited searches when police have less than full probable cause). Similarly, profilng alone has been defined as “a set of circumstances, events, or behavior that . . . may cause heightened suspicion that affects an officer’s exercise of discretion.” Knight & Kurnik, *supra* note 25, at 17.

trusion<sup>69</sup> or the Fourteenth Amendment's Equal Protection Clause offers primary protection against stops, searches or detention based on race.<sup>70</sup>

In *Whren*, the United States Supreme Court significantly limited this debate.<sup>71</sup> Police in an unmarked vehicle became suspicious of Michael Whren when they saw him and another "youthful occupant" in a new truck with temporary license plates in a "high drug area."<sup>72</sup> Police followed the truck, stopped it for minor traffic violations, and found Whren with drugs.<sup>73</sup> Whren challenged his resulting conviction under the Fourth Amendment, claiming that the police suspected him because of his race and were merely using the minor traffic violation as a pretext to stop and search him for drugs.<sup>74</sup> The Supreme Court held that although a temporary stop did constitute a seizure under the Fourth Amendment, presence of neutral reasons to believe a traffic violation had occurred renders a stop reasonable *ad hoc*.<sup>75</sup> The Court rejected the argument that a stop might be proven unreasonable under the Fourth Amendment by showing that the police had a subjective racial motivation.<sup>76</sup>

69. See U.S. CONST., amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .").

70. See Beck & Daly, *supra* note 25, at 608 (addressing concerns that pretextual stops facilitate racial profiling and examining public policy behind that practice); Knight & Kurnick, *supra* note 25, at 19 (stating that it is not yet clear to litigants whether exclusionary rule would apply to Equal Protection Clause violations to suppress evidence that was obtained as result of violation).

71. See generally *Whren v. United States*, 517 U.S. 806 (1996) (finding that Fourth Amendment could not invalidate search based on subjective racial intent).

72. See *Whren*, 517 U.S. at 808-09 (reciting facts behind Whren's traffic stop).

73. See *id.* at 808 (noting that traffic violations cited were failing to signal for turn and proceeding at "unreasonable" speed through intersection).

74. See *id.* at 809-11 (reporting that Whren claimed officers could not have had probable cause to believe anyone in truck was engaged in illegal drug activity). The district court rejected Whren's challenge and the court of appeals affirmed, stating that a police officer's subjective intentions do not matter as long as a reasonable officer in the same circumstances could have stopped the car for suspected traffic violations. See *id.* (summarizing lower court holdings).

75. See *id.* at 809-10 (beginning analysis with general summary of law surrounding temporary stops).

76. See *id.* at 813-18 (holding that test for reasonable Fourth Amendment stop was not based on subjective or actual motivations of officers involved but whether probable cause existed for any violation). Whren argued that a police officer acting reasonably (i.e., not using race) would not have made the stop for the given reason. See *id.* at 810. Whren claimed that because traffic laws are so minutely regulated, absolute compliance for a considerable period of time was nearly impossible, allowing the police to "invariably be able to catch any given motorist in a technical violation." See *id.* Thus, according to the defendant, if an officer's actual intention based on racial discrimination could be masked with the pretext of a minor traffic violation, a defendant proving this could prove the stop unreasonable. See *id.* at 810-13 (citing *Florida v. Wells*, 495 U.S. 1, 4 (1990) (holding that inventory search must not be "ruse" for "general rummaging" to find incriminating evidence), *Colorado v. Bertine*, 479 U.S. 367, 372 (1987) (allowing plaintiff to show police officer "bad faith"), *New York v. Burger*, 482 U.S. 691, 716-17, n.27 (1987) (finding that warrantless search did not appear to be "pretext" for ob-

Broadly read, *Whren* represents an unwillingness to adjudge Fourth Amendment reasonableness based on the motives of law enforcement in searches and seizures and may leave all racially-motivated stops unassailable under the Fourth Amendment.<sup>77</sup> In the narrower reading, however, *Whren* still leaves open a Fourth Amendment reasonableness challenge when an officer uses race alone to tip the scales toward a stop.<sup>78</sup> Most debaters agree that detention for no other reason than race would be a rare occurrence.<sup>79</sup>

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taining evidence), and *Colorado v. Bannister*, 449 U.S. 1 (1980) (per curiam) (validating stop because “no evidence” that traffic citation was “pretext to confirm any other previous suspicion about the occupants”). The Supreme Court dismissed these cases as either deciding appropriateness of stops in the absence of probable cause or refusing to deal with the question rather than answering it. See *Whren*, 517 U.S. at 811-12 (distinguishing precedent).

77. See *Whren*, 517 U.S. at 812 (“Not only have we never held . . . that an officer’s motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary.”). More generally, the Court found outright “foreclos[ure of] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.” *Id.* at 813. It added, “Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” *Id.*; see also Knight & Kurnik, *supra* note 25, at 18 (reasoning that because *Whren* Court is unwilling to look to subjective intentions, no racial profiling claim seems feasible under Fourth Amendment, but noting that some courts allow showing subjective use of race to prove *absence* of probable cause or reasonable suspicion).

The Court also disregarded the argument that police must adhere to a standard of practices that can determine objective Fourth Amendment reasonableness and “root [ ] out pretext.” See *Whren*, 517 U.S. at 815-16 (stating that argument lacked support from case law but was mentioned in dicta). The basis of this argument was a police regulation that officers in unmarked vehicles should enforce the traffic laws “only in the case of a violation that is so grave as to pose an immediate threat to the safety of others.” See *id.* at 815 (quoting Metropolitan Police Department, Washington, D.C., General Order 303.1, pt. 1, Objectives and Policies (A) (2) (4) (Apr. 30, 1992)). The Court determined that police standard practice varies from place to place with such degree that, if found to test objective reasonableness, it would give too much variance to Fourth Amendment protection. See *id.* (“We cannot accept that the search and seizure protections of the Fourth Amendment are so variable.”).

78. See *Whren*, 517 U.S. at 817-18 (stating that detailed balancing of all relevant factors to determine Fourth Amendment reasonableness is necessary where probable cause does not exist); Beck & Daly, *supra* note 25, at 605 (reasoning that there must be at least appearance of minor infraction to validate racially motivated detention). Presumably then, if the police used race as the predominant factor without further reasons to make the stop, a balancing test could find the stop unreasonable. See *Price v. Kramer*, 200 F.3d 1237, 1256 (9th Cir. 2000) (affirming finding of Fourth Amendment violation where evidence showed that racial bias alone precipitated stop without other reasons for detention).

79. See Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1414-16 (2000) (arguing that probable cause and reasonable suspicion barrier does not limit officers’ use of racial animus because of low threshold for those standards and high number of small violations that will give officers needed neutral reasons to detain); Sievert, *supra* note 13, at 1454-56 (reporting reality that police officers are taught to consider any mention of race “taboo,” making it more likely that other reasons will be given to add to any proof of racial profiling).

In some instances, relying on race has been found to be objectively reasonable under the Fourth Amendment. In both *United States v. Brignoni-Ponce*<sup>80</sup> and *United States v. Martinez-Fuerte*,<sup>81</sup> the Supreme Court allowed officers to overtly use race as a “relevant factor” in screening who to detain and interrogate at the Mexican border.<sup>82</sup> These decisions shrink Fourth Amendment protection against racial profiling significantly amid a perception of one racial group constituting a large amount of the danger.<sup>83</sup>

As a solution, the *Whren* Court made clear that the Equal Protection Clause is the preferred cause of action for intentional racial discrimination in a search or seizure.<sup>84</sup> The Court’s decision was more reiteration than revelation, however, because racial classification by government actors is traditionally actionable as an equal protection claim.<sup>85</sup>

80. 422 U.S. 873 (1975).

81. 428 U.S. 543 (1976).

82. See *Martinez-Fuerte*, 428 U.S. at 563-64 (finding no constitutional violation in detailed secondary inspection at Mexican San Clemente border checkpoint “even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry”); *Brignoni-Ponce*, 422 U.S. at 886-87 (stating that “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor,” but could not stand alone in Border Patrol’s decisions to stop vehicles).

83. See Sievert, *supra* note 13, at 1453-55 (discussing Mexican border cases and potential parallels with terrorist screening because of perception that people of Arab ancestry are majority of those committing terrorist acts); Thompson, *supra* note 41, at 974-78 (discussing willingness of *Martinez-Fuerte* and *Brignoni-Ponce* Courts to allow use of race as overt factor).

84. See *Whren v. United States*, 517 U.S. 806, 813 (1998) (summarizing how claims of racial profiling can be brought). The Court stated:

We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

*Id.*

85. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227-28 (1995) (summarizing equal protection jurisprudence dealing with racial discrimination). Under the Equal Protection Clause, intentional classification based on race is inherently suspect, thus requiring “strict scrutiny” when challenged. See *id.* (“[W]e hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny.”). Strict scrutiny requires the government to show a “compelling” interest furthered by “narrowly tailored” means to pass constitutional muster. See *id.* (explaining parameters of strict scrutiny).



D. *Wartime and National Security Crises and Their Effect on Equal Protection Standards*

The Equal Protection Clause has become the bane of purposeful racial discrimination.<sup>86</sup> Under current equal protection jurisprudence, racial classification is only constitutional if the government (federal, state or local) can prove that it is a narrowly tailored way to meet a compelling interest, a standard known as "strict scrutiny."<sup>87</sup> Assuming the racial classification is facially or intentionally used, race need only be one factor in a governmental decision to fall under strict scrutiny.<sup>88</sup> Cynically viewed as

86. See generally *Fullilove v. Klutznick*, 448 U.S. 448, 534 (1980) (Stevens, J., dissenting) (describing racial discrimination as destructive of "the entire body politic").

87. See *Adarand*, 515 U.S. at 227 (stating standards of racial discrimination by state actors unequivocally). With the likelihood of increased federal security, possibly even federalizing airport personnel, it is important to note that federal, state and local officials and legislators are all held to the same standards under the Equal Protection Clause. Although the Fourteenth Amendment limitation on the states is the Constitution's only provision that explicitly provides "equal protection of the law," the Supreme Court, in *Bolling v. Sharpe*, held that the Fifth Amendment shares an unwritten equal protection counterpart that limits the federal government in exactly the same way as the Fourteenth limits states. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) ("In view of [the] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."). The holding in *Bolling* was not limited to educational racial discrimination and Fourteenth Amendment jurisprudence has been universally applied to Fifth Amendment equal protection reasoning. See *Adarand*, 515 U.S. at 216-18 (summarizing *Bolling* and reiterating equivalence of federal and state obligations to refrain from racial discrimination); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964) (treating Fourteenth and Fifth Amendment equal protection jurisprudence as indistinguishable).

88. See *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (acknowledging rarity to have policy or decision based on one declarative purpose of racial discrimination). Because this Comment is generally focusing on situations where race is *not the sole factor* on which to detain those of Arab descent, it is important to acknowledge that *Arlington Heights* allowed equal protection claims to proceed under strict scrutiny as long as claimants show that "discriminatory purpose is a *motivating factor*" found among other neutral factors. See *id.* (establishing possibility of invalidating method that is based on race in addition to neutral factors); see also *Shaw v. Hunt*, 517 U.S. 899, 906-08 (1996) (applying "motivating factor" standard to voter redistricting based in part on race). The *Shaw* Court found that, although race-neutral factors (creating rural/urban districts and preserving partisan politicking) were equally motivating, strict scrutiny applied because "the legislature subordinate[d] traditional race-neutral districting principles" to add racial considerations. See *id.* at 907 (quoting *Miller v. Johnston*, 515 U.S. 900, 916 (1995)). These cases illustrate that when race is behind part of a decision, it need not be the "sole," "dominant" or "primary" factor to require strict scrutiny. See *Arlington Heights*, 429 U.S. at 265-66 (establishing that in addition to sole reliance on race, it would be rare to find any particular purpose to be "dominant" or "primary").

On the other hand, discriminatory impact alone is not sufficient to support an equal protection claim. See *Arlington Heights*, 429 U.S. at 270 (holding that plaintiff has burden of proving that discriminatory purpose was motivating factor in decision). This caveat of equal protection doctrine makes proof of intent the key start-

an impossible standard to meet, the Supreme Court recently assured lawmakers and litigators that strict scrutiny is not “fatal in fact,” requiring a highly sensitive, case-by-case, factual determination of compelling interest and narrowly tailored means in each instance.<sup>89</sup>

First, although most interests are assured to fall to equal protection rigidity, war and national security have always been compelling interests.<sup>90</sup> In fact, the interests involved in protecting the nation during time of war or great national threat have been used to directly override some of our most protected freedoms.<sup>91</sup> Most congruent to the current political situation, in *Korematsu*, the Supreme Court held that the threat from Japanese Americans after the attack on Pearl Harbor justified ordering them from their homes and indefinitely interning them.<sup>92</sup> The Court gave almost

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ing point. For equal protection purposes, however, this Comment assumes that race is either a clearly set out factor or that challengers can show intent to use race. The intent requirement has been criticized as prohibiting many racial profiling cases because reliance on race by an officer or a department is difficult to conclusively discover. *See, e.g.*, Beck & Daly, *supra* note 25, at 612-18 (noting difficulty in proving equal protection violations). Significantly for equal protection litigants, however, the *Arlington Heights* Court did note that discriminatory impact could be used as circumstantial evidence of intent to discriminate. *See Arlington Heights*, 429 U.S. at 270 (reiterating disallowance of disparate impact claims under equal protection claims but not excluding evidence of disparate impact altogether).

89. *See Adarand*, 515 U.S. at 237 (dispelling “the notion that strict scrutiny is ‘strict in theory, but fatal in fact’” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980))). *Adarand* held that even though a racial classification may be intended to benefit a disadvantaged race, this “benign” status does not lessen the scrutiny it receives. *See id.* at 227 (holding that ensuring personal right of equal protection does not square with benign group classifications). Instead, *Adarand* held that affirmative action or racial distinction intended to remedy past discrimination could indeed be a compelling interest met with narrow means. *See id.* (stating all racial classifications to be treated same under equal protection analysis). Thus the Court justified its application of strict scrutiny to even remedial racial classifications by assuring litigants that strict scrutiny simply applied to “differentiate between permissible and impermissible governmental use of race.” *See id.* at 228-29 (distinguishing Justice Steven’s arguments in concurrence).

90. *See Haig v. Agee*, 453 U.S. 280, 307-08 (1981) (validating restriction on interstate travel and free speech on ground that person restricted is likely to cause threat to national security by compromising intelligence operations). The Court reiterated that national security could allow quite large ranges of regulation:

It is obvious and unarguable that *no governmental interest is more compelling than the security of the Nation*. Protection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot neatly be compartmentalized.

*Id.* at 307 (citing *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964); *Cole v. Young*, 351 U.S. 536, 546 (1956); *Zemel v. Rusk*, 381 U.S. 1 (1965)).

91. *See generally* WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE—CIVIL LIBERTIES IN WARTIME* (1998) (outlining war-time interest subjugation of rights from Abraham Lincoln’s suspension of habeas corpus to internment of World War II).

92. *See Korematsu v. United States*, 323 U.S. 214, 218-23 (1944) (affirming *Korematsu*’s conviction for failing to submit to evacuation order that excluded Japanese Americans from “the West Coast war area” even though many of them lived and worked there). The evacuation order also required *Korematsu* and hun-

*carte blanche* discretion to the government in protecting the country in time of national emergency or war, stating that even though racial discrimination required strict scrutiny, the government had met its burden in proving a compelling interest.<sup>93</sup> Despite all its criticism, including a rabid dissent and a subsequent congressional resolution passed to denounce the internment and provide reparations to descendants of those imprisoned, the *Korematsu* reasoning has never been overturned.<sup>94</sup> *Korematsu* stands as the only evidence of what might happen when prevention of racial discrimination directly conflicts with national security and war-time inter-

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dreds of other Japanese Americans to report to “assembly centers” that served as processing areas for movement to “relocation centers” for an indefinite period. See *id.* at 221-22 (summarizing order and its three parts); see also Saito, *supra* note 33, at 3-11 (recounting facts and flaws in historical internment narrative). The *Korematsu* Court did separate the failure to evacuate from the failure to report to an assembly center and the failure to submit to relocation in “concentration camps,” only expressly ruling on the order for Japanese Americans to leave their homes. See *Korematsu*, 323 U.S. at 222-23 (discussing order). The Court, however, defended each of the practices as within the power of the government in time of war, stating:

Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. *Korematsu* was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire, because properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that . . . all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.

*Id.* at 223.

93. See *Korematsu*, 323 U.S. at 216 (“[C]ourts must subject [racial classifications] to the most rigid scrutiny.”). *Korematsu* was among the first cases to expressly refer to racial discrimination as requiring modern strict scrutiny, but its application is notoriously deferential to military interests. The Court stated:

Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify [exclusion based on race]. . . . The military authorities, charged with the primary responsibility of defending our shores, concluded that [lesser measures] provided inadequate protection and ordered exclusion.

*Id.* at 218. The Court continued that the war with the Japanese Empire required placing confidence in government officials to have the power to make decisions that will best protect the country. See *id.* at 223 (citing public need to defer to government/military determinations in times of grave threat).

94. See *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting) (“Such exclusion goes over the very brink of constitutional power and falls into the ugly abyss of racism.”); see also Civil Liberties Act of 1988, Pub. L. No. 100-383, § 2(a), 102 Stat. 903 (1988) (“The Congress recognizes that . . . a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II.”).

ests.<sup>95</sup> Moreover, as recently as 1995, the Supreme Court continued to cite *Korematsu* at least partially as valid law.<sup>96</sup> It is not lost on legal scholars that the ghost of *Korematsu* might be resurrected at any time, possibly in less outrageous increment, given a sufficient threat by a specific racial group.<sup>97</sup>

95. See *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) (issuing writ of coram nobis vacating *Korematsu*'s conviction based on new factual evidence, but reminding litigants that Supreme Court's 1944 ruling was still controlling precedent by stating, "The Supreme Court's [*Korematsu*] decision stands as the law of this case"); Saito, *supra* note 33, at 9-12 (reporting validity of *Korematsu* decision and failure of any measure to "right the wrong" of Japanese internment or eliminate the risk of similar occurrence in future); Alfred C. Yen, *Introduction: Praising with Faint Damnation—The Troubling Rehabilitation of Korematsu*, 40 B.C. L. REV. 1, 2 (1998) ("[P]roclamations of *Korematsu*'s permanent discrediting are premature. The Supreme Court has never overruled the case. It stands as valid precedent, an authoritative interpretation of our Constitution and the 'supreme Law of the Land.'" (quoting U.S. CONST. art. VI, cl. 1)). Gossamer wisps of this deference to government and military decisions regarding national security string throughout current case law. For example, holding that U.S. soldiers had no constitutional claims for damages for involuntary drug experimentation, the Court reasoned that "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." See *United States v. Stanley*, 483 U.S. 669, 681-83 (1987) (disallowing constitutional tort actions for damages when violations arose "incident to service").

96. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 214-16 (1995) (referring to *Korematsu*'s scrutiny standard); see also *Reno v. Flores*, 507 U.S. 292, 344-45 n.30 (1993) (Stevens, J., dissenting) (explaining *Korematsu* as supporting blanket exclusions without individual determinations, but distinguishing *Korematsu* as product of "exigencies of war"). Justice Stevens noted that the Court should proceed with "extreme caution" when asked to permit such measures in light of the congressional condemnation of the Japanese internment. See *Flores*, 507 U.S. at 344-45 n.30 (implying that racially-based internment would fail under today's equal protection scrutiny).

97. See REHNQUIST, *supra* note 91, at 202-11, 218-25 (discussing Japanese internment, defending deference to military decisions in wartime and describing *Korematsu*'s legal reasoning as upholding maxim "*Inter arma silent leges*: In time of war the laws are silent"); see also Dean Masaru Hashimoto, *The Legacy of Korematsu v. United States: A Dangerous Narrative Retold*, 4 ASIAN PAC. AM. L.J. 72, 74 (1996) ("[W]hile public narratives about the Japanese internment have changed markedly, the *Korematsu* case remains consistent with modern legal doctrines and may lead to repetition of similar governmental actions."); Saito, *supra* note 33, at 11-25 (describing "racing" of Arabs as terrorists as akin to Japanese internment and equating logic and dangers of threat in World War II to threat from terrorist emergency). It is difficult to imagine ordering Arab-Americans into concentration camps, but less invasive measures might be justified by national emergency arising from an identifiable racial group, notwithstanding general distaste for *Korematsu* style internments. See REHNQUIST, *supra* note 91, at 211 (stating that military fear of attack and sabotage by Japanese loyalists seems "legally adequate" to justify treating two classes of "enemy aliens" differently). Already, Supreme Court decisions that allow screening based on race seem, at least in part, to be based on a showing that a disproportionate number of the racial group are involved in a crime. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 551-53 (1976) (citing disproportionately large number of illegal immigrants from Mexico in upholding ability of Border Patrol agents to selectively question car occupants based on "apparent Mexican ancestry"). Further, the *Martinez-Fuerte* Court outrightly extolled a utilita-

Other highly protected rights also have fallen to compelling national security and war-time interests.<sup>98</sup> With many parallels to the war on terrorism, the war on drugs has been held a compelling enough interest to abrogate Fourth Amendment rights.<sup>99</sup> Especially concerning “state sponsored terrorism,” First Amendment protection has also been qualifiedly limited by a compelling interest in national security.<sup>100</sup>

On the other hand, the level of specificity applied to find a compelling national security interest is unclear.<sup>101</sup> In *Wygant v. Jackson Board of Education*,<sup>102</sup> the Supreme Court required “particularized” investigation into a remedial protection of minority teacher jobs, stating that an “amor-

rian justification for racial profiling by holding that because 20% of vehicles subjected to extended questioning contained illegal immigrants then, “to the extent that the Border Patrol relies on apparent Mexican ancestry . . . that reliance clearly is relevant to the law enforcement need to be served.” *See id.* at 564 n.17 (drawing conclusions from arrest statistics provided by border patrol).

98. *See* REHNQUIST, *supra* note 91, at 11-25 (detailing suspension of habeas corpus by President Lincoln during Civil War and Lincoln’s view that one law should be violated before all U.S. laws went unexecuted because government fell).

99. *See* Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66, 670 (1989) (holding that because of importance in seizing illegal drugs and Customs Service’s critical role in war on drugs, government’s compelling interest allowed drug testing that was outside protection of Fourth Amendment). Ominously, the Supreme Court cited the danger of airline hijacking to provide compelling interest to search outside the Fourth Amendment and stated that “[w]here . . . the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government’s goal.” *Id.* at 674-75; *see also* Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 618-21 (1989) (finding that governmental “special needs” can out-balance privacy interests of individuals and allowing railroad employee searches without individualized suspicion); Nat’l Treasury Employees Union v. Unites States Customs Serv., 27 F.3d 623, 630 (D.C. Cir. 1994) (finding that “extraordinary and costly” drug war was compelling governmental interest that outweighed privacy interests in being free from intrusive drug testing for employees); AFGE v. Dole, 670 F. Supp. 445, 448-49 (D.D.C. 1987) (allowing suspicionless searches of federal employees whose positions relate to national security), *aff’d*, 885 F.2d 884 (D.C. Cir. 1989).

100. *See* Farrakhan v. Reagan, 669 F. Supp. 506, 510-12 (D.D.C. 1987) (holding that ending state-sponsored terrorism was compelling interest to justify economic isolation of Libya that interfered with both free speech and free exercise of religious organizations that traveled and sent money to Libya), *aff’d without opinion*, 851 F.2d 1500 (D.C. Cir. 1988); Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1205, 1212-13 (C.D. Cal. 1998) (denying preliminary injunction of Antiterrorism and Effective Death Penalty Act because it served compelling interest in “national security and foreign policy” that outweighed plaintiff’s right to political association and expression), *aff’d* 205 F.3d 1130 (9th Cir. 2000); *see also* Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176, 1193 (C.D. Cal. 1998) (“Without question, the government’s interest in national security is a compelling one, permitting the government to impose restrictions on citizens’ ability to maintain associations with foreign entities.”).

101. For a full discussion of the level of particularity courts require to find a compelling interest, *see supra* notes 98-100 and accompanying text and *infra* notes 102-06, 147-75 and accompanying text.

102. 476 U.S. 267 (1986).

phous" interest in remedying "societal discrimination" could not be compelling.<sup>103</sup> In *Adarand Constructors, Inc. v. Peña*,<sup>104</sup> the Court supported "the most searching judicial inquiry" and a "clearly articulat[ed] need and basis" to determine a compelling interest behind allowing a minority favoring contracting program.<sup>105</sup> These cases seem to extol the idea that a compelling interest cannot be a broad overarching concept, but only in rare circumstances does a court define the national security interest in such specific terms.<sup>106</sup>

Second, for race-based governmental action to be narrowly tailored, the Court has invoked differing, sometimes unpredictable, levels of scrutiny.<sup>107</sup> Generally, the means employed must "substantially address" or be "necessary" to accomplish the compelling interest, often without alternative race-neutral means of accomplishment.<sup>108</sup> Earlier reasoning, especially analysis of the exigencies of war and national security, found the Court deferring to a governmental decision that the measure adopted is necessary.<sup>109</sup> More recent jurisprudence, however, applies excruciating

103. See *Wygant*, 476 U.S. at 274-76 (holding that such broad standard could not support legal remedies that "work against innocent people").

104. 515 U.S. 200 (1995).

105. See *Adarand*, 515 U.S. at 229, 236 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting)).

106. See, e.g., *United States v. Rezaq*, 899 F. Supp. 697, 708 (D.D.C. 1995) (narrowing compelling national security interest as "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service" (quoting *CIA v. Sims*, 471 U.S. 159, 175 (1985))).

107. See *Shaw v. Hunt*, 517 U.S. 899, 915 (1996) (acknowledging that Supreme Court's decisions "have not always provided precise guidance on how closely the means (the racial classification) must serve the end (the justification or compelling interest)").

108. See *id.* (stating of Court's narrowly tailored reasoning, "[W]e have always expected that [the means] would substantially address, if not achieve, the avowed purpose"); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (holding that although protecting children in custody battle is compelling interest, deciding which parent gets custody based on race is not "necessary to the accomplishment" of that purpose (quoting *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964))); *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding that racially discriminatory marriage laws are not "necessary" to any legitimate state interest).

109. See *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944) (giving full credit to claims by military that such measures were needed because of timeliness of threat of "real military dangers"); see also *Hirabayashi v. United States*, 320 U.S. 81, 100-04 (1943) (upholding Japanese curfew imposed because military claimed it feared sabotage and espionage). The *Hirabayashi* Court stated:

We may assume that [the racial classifications here would be a violation of equal protection] were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas.

*Id.* at 100. The Court further stated that it need not investigate the action taken further than needed to find a "reasonable basis." See *id.* at 101-02.

factual investigations into the level of racial-classification that might be appropriate, including efficacy of alternatives, strong bases in evidence and balancing interests of those affected.<sup>110</sup> Most importantly, when race is the center of the problem, a racial classification can be found to be narrowly tailored.<sup>111</sup>

### III. COMBINING THE STANDARDS: NATIONAL SECURITY NEEDS AND CONSTITUTIONAL PROTECTION FOR RACIALLY PROFILED ARABS

The current political environment lends itself to an onslaught of racial profiling that will subject those of Middle Eastern descent and appearance to added searches, detentions and scrutiny.<sup>112</sup> Faced with this environment and low political standing, those alleging racial profiling must turn to existing legal standards for protection.<sup>113</sup> Little utility in watered-down Fourth Amendment doctrine will force racial profiling into other constitutional arenas—primarily equal protection.<sup>114</sup> Although racial classification is almost per se invalid under the Equal Protection Clause, constitutional standards are traditionally deferential to national security interests, and will be especially so in light of the recent terrorist attacks, existing threat and ongoing war.<sup>115</sup> Thus, equal protection reaches a rare impasse between two cherished constants, denouncement of racial discrimination and deference to the government during times of

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110. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506-08 (1989) (finding that City of Richmond's plan to award 30% of dollar amount of each contract to minority contractors was *not* narrowly tailored to compelling interest of remedying past discrimination because Richmond did not show that it had considered race-neutral means to increase minority business participation); see also *United States v. Paradise*, 480 U.S. 149, 171-85 (1987) (holding that district court order to promote corporals based on race was narrowly tailored). The *Paradise* Court further stated that a race-based remedy of past discrimination was limited by the interests of affected parties (there white troopers seeking promotion) that the issuing court must balance in adopting its race-based solution. See *id.* at 184-85. (upholding district court's balancing of interests in deciding what remedy to impose). Although *Paradise* evaluated a court ordered race-based policy, the *Paradise* factors apply to officially adopted racial plans as well. See *Croson*, 488 U.S. at 507-09 (applying *Paradise* factors as general test for any race-conscious action).

111. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (holding that when race-based action is necessary to further compelling interest, race-based plan can satisfy "narrow tailoring" test). This "necessary" race-based argument is today most often seen in remedial plans to correct past racial discrimination. See *Paradise*, 480 U.S. at 167 (finding that pervasive past discriminatory conduct justified narrowly tailored racially-based employment policy).

112. For a discussion on the likelihood of and the theories behind any racially sensitive methods adopted to fight terrorism, see *infra* notes 119-34 and accompanying text.

113. For a discussion on the political safeguards afforded Arabs and Arab-Americans, see *infra* notes 123-30 and accompanying text.

114. For a discussion of the failure of the Fourth Amendment to offer protection against racial profiling, see *infra* notes 135-46 and accompanying text.

115. For a discussion of war and national security and their effect on equal protection standards, see *infra* notes 147-227 and accompanying text.

crisis.<sup>116</sup> The standards and policies behind current equal protection doctrine, however, should be interpreted so that scrutiny of racial measures cannot be applied with variant force depending on the interests involved, but rather must remain consistently tight to avoid unnecessary affronts to racial equality through amorphous goals and overbroad means.<sup>117</sup> Thus, though wartime and national security interests do command an importance rarely matched, these interests should not simply grant the government a free pass to target Arabs merely because it sees fit.<sup>118</sup>

A. *Security At All Costs: The Current Political Atmosphere Paves the Way for Racial Profiling*

The United States' political community now seems eager to sacrifice its squeamishness to racial profiling to the patriotic mantra of heightened security.<sup>119</sup> Despite significant vocal opposition, very little stands to stop the political system from expanding law enforcement power to validly use race in terrorist screening.<sup>120</sup>

The extent that Arabs already have been targeted for terrorist activity creates a background of prejudice that may be amplified in the current crisis.<sup>121</sup> Indeed, some anti-terrorism legislation adopted before September 11, 2001 was already feared unfairly skewed to target Middle Eastern airline passengers.<sup>122</sup> The current threat will serve only to fuel such feeling.

116. For a discussion of the deference given to government and military by courts, see *infra* notes 147-227 and accompanying text.

117. For a discussion of the arguments behind levels of particularity and differing standards of scrutiny, see *infra* notes 147-228 and accompanying text.

118. For a discussion of the full policies that require constitutional protection, even in times of war, see *infra* notes 177-237 and accompanying text.

119. For a discussion of the facts and theories behind the current political feelings, see *supra* notes 33-85 and accompanying text.

120. For a discussion of the facts behind the political movement toward screening those of Arab descent, see *supra* notes 33-54, 67-85 and accompanying text.

121. See Michael Higgins, *Looking the Part*, A.B.A. J., Nov., 1997, at 48 (discussing rise of bias parallel to rise of criminal profiling in terrorist searches); Saito, *supra* note 33, at 11-15 (documenting "racing" of Arab-Americans as terrorists as similar to Japanese internment); Sievert, *supra* note 13, at 1454-56 (discussing likelihood of race being used surreptitiously by officers because of "litany of Islamic terrorist acts" as of Winter 2000). Sievert himself admitted the realities behind this feeling, stating that Arab terrorism "has arguably constituted a continuous global conflict." *Id.*

122. See DEMPSEY & COLE, *supra* note 33, at 11 (finding that targeting of racial groups pursuant to anti-terrorism measures has "corroding effect" on community's attempts to homogenize socially or politically); see also Nojeim, *supra* note 44, at 7 (analyzing recently adopted computerized profiling system and its disparate impact on Arabs). Gregory T. Nojeim, legislative counsel to the ACLU in Washington D.C., reports that the Department of Justice had defended such disparate impact as "not unjustified" but stated that it would closely monitor the impact level. See *id.* at 8 (reviewing Department of Justice report and noting that Department did not establish what level of disparate impact would be unacceptable).



Further, while previous terrorist attacks were often performed by non-Arabs, the September 11th attacks by nineteen Middle Eastern men, the almost daily threats of more violence from Arab extremists, and the ongoing war in Afghanistan thrusts an identifiable racial group into the spotlight.<sup>123</sup> According to most advocates of racial profiling, the likelihood that someone of Arabic descent will attempt further terrorism is the most compelling argument for security expanded to take race into account.<sup>124</sup> In response, lawmakers' and officials' obvious desperation to create a tighter, safer security regime points to inadequate protection against racial profiling.<sup>125</sup>

Traditional opposition to racial measures and fairly universal distaste of decisions based solely on race, however, should serve to curb any ex-

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The use of indefinite detention and "secret evidence" against those deemed a threat to national security is also highly criticized as facilitating the targeting of Arabs as terrorists. See Saito, *supra* note 33, at 15-21 (illustrating freedom to use racial bias and its evil effects when there are no requirements that reasons be given for detention or charges be brought). See generally Michael J. Whidden, Note, *Unequal Justice: Arabs in America and United States Terrorism Legislation*, 69 *FORDHAM L. REV.* 2825 (2001) (exploring history, application and ramifications of Anti-terrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), which codified use of secret evidence and indefinite detention).

123. See *Nightline: Profile*, *supra* note 16 (discussing likelihood of greater scrutiny of three million Arabs in United States because of racial identity of September 11th hijackers).

124. See, e.g., *NewsHour*, *supra* note 43 (interviewing several civil rights experts on whether "at any time" racial profiling can be acceptable). One commentator asserted, "[T]he only mass movement in the world that we know of that includes [numerous] people who are interested in mass murdering Americans by hijacking airplanes . . . are adherents to this perversion of Islam that centers in the Middle-East." *Id.* (quoting *Newsweek* and *National Journal* writer, Stuart Taylor).

One of the greatest fears surrounds an attack by biological agent, possibly the most insidious of all possible future terrorist events. See generally Barry Kellman, *Biological Terrorism: Legal Measures for Preventing Catastrophe*, 24 *HARV. J.L. & PUB. POL'Y* 417 (2001) (analyzing bio-terrorism in depth, who may attack and why, what pathogens might be used, how an attack might be devised and what law enforcement measures might be viable to prevent such terrorism). Such fears are intensified given the relatively minor, but nevertheless widespread release of the anthrax bacteria in U.S. cities in the weeks following the September 11th attacks. See *CNN: Investigators Report "No Clues" in Latest Anthrax Death*, Nov. 1, 2001, at <http://www.cnn.com/2001/HEALTH/conditions/11/01/anthrax/index.html> (reporting results of investigation and reviewing previous anthrax incidents).

125. See *America United*, *supra* note 39 (questioning Attorney General John Ashcroft about racial profiling, who would not deny use of race as one of group of factors in new security regime); see also Pianin & Edsall, *supra* note 33, at A11 (reporting that congressional leaders outright favor "re-balancing" of civil rights and national security). Compare *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001) (providing broad sweeping police search and detain powers), with *Nightline: Profile*, *supra* note 16 (reporting that racial profiling may be already occurring by detention of hundreds of Middle Easterners described as "ethnic profiling on a massive scale" caused by new push for tighter security).

trème uses of race.<sup>126</sup> Most likely, the forms that racial profiling will take are the types most often adopted in security regimes, using race expressly as an added criterion in a multi-factor system and implicitly as a starting point under broad enforcement discretion.<sup>127</sup> Profiling of this type raises much less opposition, especially with legislators and officials already sensitive to greater security needs.<sup>128</sup> Therefore, the danger of racially-based detentions is immediate and may not be obvious to non-victims.

Finally, given that the overwhelming majority of people in the United States support at least some heightened scrutiny of those of apparent Arab descent,<sup>129</sup> the democratic oversight of the government will likely not prevent use of race in terrorist screening.<sup>130</sup> The racial minorities who find themselves detained, searched or seized based on race have no avenue for protection, save the Court.<sup>131</sup> Indeed, the risk of such tyranny of the majority is intensified, because even though alien residents in the United

126. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (expressing one of earliest opinions that government is limited to race-neutral methods, "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."). Justice Harlan later added, "[T]he common government of all shall not permit the seeds of race hate to be planted under the sanction of law." *Id.* at 560; see also Beck & Daly, *supra* note 25, at 608 (noting that few advocates suggest using race alone for suspicion); Sievert, *supra* note 13, at 1453 ("The law is clear as to the general prohibition against objective reliance *solely* upon race and ethnicity in law enforcement decisions.") (emphasis added).

127. See Dan, *supra* note 56, at 22 (discussing Israeli airline El Al's practices and predicting that United States' similarity of dangers requires adoption of Israeli model); see also Nojeim, *supra* note 44, at 6 (reporting multi-factor elements of El Al profiling include "young, dark-skinned male[s]" and "Middle-Eastern looking men with Western passports"). For a further discussion of this issue, see *supra* notes 34-51 and accompanying text.

128. See Sievert, *supra* note 13, at 1453-56 (arguing that race and ethnicity can be overtly considered as one "relevant factor" and that public must understand that when law enforcement officers "occasionally consider ethnic background" it is sometimes defensible); Thompson, *supra* note 41, at 1005-06 (asserting that when race constitutes "an essential element" in determining criminal activity, such as organization/gang membership or border searches, it could be considered among other factors); *America United*, *supra* note 39 (broadcasting Attorney General Ashcroft's feeling that any factors "that elevate any suspicion" will be used). For a further discussion on the feelings of legislators and policy makers, see *supra* notes 33-42 and accompanying text.

129. See Sepos, *supra* note 50, at 39 (reporting public poll results that overwhelmingly favor special scrutiny of Arabs).

130. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (reasoning that racial prejudice may "tend seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities"); see also Gregory P. Magarian, *Toward Political Safeguards of Self-Determination*, 46 VILL. L. REV. 1219, 1219-21 (2001) (discussing state and federal structures for allowing political protection of individual personal freedoms and proposing that some political safeguards are insufficient to provide complete self-determination).

131. See *Carolene Prods.*, 304 U.S. at 153 n.4 (finding that Court must protect "discrete and insular minorities" when their political process power has been eliminated).

States are afforded constitutional protections, their political representation is practically nil.<sup>132</sup>

This political environment opens the door to racial discrimination.<sup>133</sup> It is a situation that in many ways mirrors the struggle that initiated the events behind *Korematsu* and points to inevitable use of race in the ongoing war against terrorism.<sup>134</sup>

B. *The Fourth Amendment's Failure: Insufficient Protection Against Racial Profiling Claims in Terrorist Screening*

As the racially profiled turn to the courts for some remedy, they must meet the legal standards for protection.<sup>135</sup> For a variety of reasons, the Fourth Amendment will offer little protection against use of race as a factor in the search for terrorists.<sup>136</sup>

The scenario that posits race as one among several reasons that together justify the stop can be reasonable under the Fourth Amendment in three ways. First, such a policy will no doubt be a direct application of the theory that one race poses a disproportionate threat and, as such, will be backed by the existence of Middle Eastern terrorist cells.<sup>137</sup> It is the Fourth Amendment that is most susceptible to such a theory, since the Supreme Court in *Brignoni-Ponce* and *Martinez-Fuerte* indicated that the likelihood of an individual of certain ancestry being involved in a certain crime was enough to make that ancestry an "objective criterion" to reasonable detention.<sup>138</sup> Second, multi-criteria racial policies can also be justi-

132. See *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (providing that those who have lawfully entered United States have same Fourth and Fourteenth Amendment rights as citizens). *But see* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264-71 (1990) (holding that not all aliens are "the people" under the Fourth Amendment); *Mathews v. Diaz*, 426 U.S. 67, 79-81 (1976) (discussing "plenary power doctrine" allowance of treatment of citizens and aliens differently). For a further discussion on the legal rights of aliens in the United States, see *supra* notes 30-32 and accompanying text.

133. See generally *Saito*, *supra* note 33 (predicting possibility that Arabs "raced" as terrorists could become victims of racial discrimination).

134. See *id.* at 3-7, 11-15 (discussing similarities in "internment narrative" and current plight of Arabs in America).

135. For a discussion of the legal standards behind racial profiling and racial classifications, see *supra* notes 67-111 and accompanying text.

136. For a discussion of the Fourth Amendment's protection against Arab terrorist profiling, see *infra* notes 137-49 and accompanying text.

137. See *Sievert*, *supra* note 13, at 1453-56 (discussing scenario where information actually received by government depicted terrorist cell made up of Arab extremists and exploring legitimacy of racially-based response to such threat).

138. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 563-64 (1976) (allowing limited inspection at Mexican border even if largely based on Mexican ancestry); see also *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) (stating race might be one "relevant factor" to make search reasonable under Fourth Amendment). Although dealing with Mexicans on the Texas/Mexico border, the border cases share significant parallels with the current war on terrorism. According to legal scholars, the Court's allowance of race as a factor for a reasonable search, even though it recognized that a vast majority of Mexicans were not

fied as searching for specific descriptions of Islamic terrorists, which has also been held a reasonable use of race.<sup>139</sup> Especially because the FBI list of Islamic-terrorists possesses the commonality of Middle Eastern descent, an objectively reasonable policy could conceivably be promulgated to search for specific people with general criteria—such as race—that would be untouchable through the Fourth Amendment.<sup>140</sup> Third, because *Whren* eliminates consideration of racial motivations when neutral reasons otherwise justify the stop, officers using race as one criterion have the opportunity to show that other factors provided sufficient suspicion.<sup>141</sup>

Additionally, racial profiling as a result of the expansion of police power to search and detain, implicitly allowing law enforcement to use race to initiate suspicion, is similarly unprotected by the Fourth Amendment. Under a broad reading of *Whren*, the Fourth Amendment can *never* be used to challenge subjective intent and even intentional reliance solely on race would lie outside Fourth Amendment protection.<sup>142</sup> Even *Whren's*

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illegal immigrants, opens up the use of race to other arenas of law enforcement. See Sievert, *supra* note 13, at 1451-56 (discussing border cases and their application in post-September 11th attack United States, where it would be understood that not all of one nationality were terrorists, but likelihood was sufficiently high to consider ancestry); Thompson, *supra* note 41, at 975-78, 1005-08 (discussing border cases and using them to support valid use of race as “[one] factor in the quantum of suspicion”).

139. See *United States v. Kim*, 25 F.3d 1426, 1431 n.3 (9th Cir. 1994) (holding that race may constitute “parallelism between a detained and a previously described suspect”) (citing *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982), *cert. denied*, 459 U.S. 1211 (1983)).

140. See *id.* (explaining that race could be considered along with height, age and location).

141. See *Whren v. United States*, 517 U.S. 806, 811-14 (1996) (finding that where probable cause existed to believe traffic law has been violated, fact that officers also considered race was insufficient to render stop unreasonable). Although *Brignoni-Ponce* and *Martinez-Fuerte* were based on statistics that tend to predominate studied and adopted policies, *Whren* would protect an individual officer's subjective use of race among other criteria. If race is simply one of an officer's reasons, a court will not be able to practically decide that the detention would have been unreasonable without the single use of race. See Oliver, *supra* note 79, at 1414 (arguing that because standards of probable cause and reasonable suspicion are based largely on observance and experience, use of race can easily be hidden among other reasons to detain). For example, a stop made based on race, traveling habits and nervous behavior would not be objectively unreasonable because it could be made only based on traveling habits and nervous behavior. See Beck & Daly, *supra* note 25, at 608 (explaining how *Whren* causes minorities to be detained disproportionately).

142. See *Whren*, 517 U.S. at 813 (“We think [case law] foreclose[s] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.”); Knight & Kurnik, *supra* note 25, at 18 (arguing that “[t]he Fourth Amendment does not provide an open avenue for challenging racially motivated stops and arrests because of the objective standard set forth in *Whren*, which does not require an analysis of the officer's intent or motive”). Indeed, courts have read *Whren* to only allow proof of racial discrimination if it is part of showing *lack* of probable cause or reasonable suspicion. See, e.g., *Price v. Kramer*, 200 F.3d 1237, 1249-51 (9th Cir. 2000) (allowing evidence of racial bias to prove absence of probable cause). Such showings, however, might not

narrowest reading, however, offers little more protection.<sup>143</sup> If subjective intent may not be analyzed in the presence of neutral factors that show a properly made detention, the variant, unpredictable behavior patterns and signals that can tip agents off to a terrorist make stops based on race easy to cover.<sup>144</sup> Thus, more dangerously, as police power to detain and search is expanded, *Whren's* refusal to look at racial intentions becomes an absolute cover for racial profiling because law enforcement will have an extremely low threshold for reasonable detention.<sup>145</sup> Although *Whren's* Fourth Amendment window already provides very limited protection, with an expansion of power to detain, that minuscule protection becomes non-existent.<sup>146</sup>

### C. *Korematsu Reborn: A Compelling Interest Too Easily Met*

Because it is intentional racial classification, racial discrimination in terrorist screening or security procedures must be analyzed pursuant to equal protection standards, which are historically deferential to justifications based on national security, wartime threats and military needs.<sup>147</sup> Seeing limits to Fourth Amendment protection against racial profiling, the *Whren* Court magnanimously reminded litigants that the Equal Protection Clause was the more viable method for challenging official action based on race.<sup>148</sup> Although correct in sentiment, *Whren's* condolence that "the Constitution prohibits selective enforcement of the law based on considerations such as race" is oversimplified.<sup>149</sup> Though unwavering in its application of strict scrutiny against racial classification, the Supreme

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invoke the Fourth Amendment exclusionary rule. See Sievert, *supra* note 13, at 1453 (positing that, given *Whren's* language invalidating all use of subjective intent, Fourth Amendment's exclusionary rule might not apply even when it is clear that race was sole factor precipitating stop).

143. See *Whren*, 517 U.S. at 817-18 (implying that without probable cause or reasonable suspicion, balancing reasonableness of stop might take race into account); Oliver, *supra* note 79, at 1410-16 (arguing from narrow reading of *Whren* that probable cause alone shields officer who has used race for suspicion).

144. See Saito, *supra* note 33, at 15-21 (discussing various ambiguous terms that have been used to detain those "suspected of terrorism," some of criteria unavailable because of practice of using "secret evidence"); see also Nojeim, *supra* note 44, at 4-5 (discussing computerized terrorist profiling system that takes account of forty secret pieces of data that might tip off officials to terrorist); Rhee, *supra* note 13, at 865 (detailing government's unwillingness to disclose what criteria are considered in screening of terrorists).

145. See Beck & Daly, *supra* note 25, at 597-601 (warning of danger "pretext" stops even through fairly identifiable standards of traffic violations).

146. For a discussion of the minimal protection, see *supra* notes 140-44 and accompanying text.

147. See Knight & Kurnik, *supra* note 25, at 19 (outlining equal protection claims as "most direct constitutional avenue" for racial profiling).

148. See *Whren*, 517 U.S. at 813 ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.").

149. See *id.* (summarizing Constitution's treatment of racial classification).

Court's holding in *Adarand* unequivocally establishes that strict scrutiny can be met.<sup>150</sup> *Adarand*'s insistence on applying strict scrutiny to a benign contract plan aimed at remedying discrimination garnered its support primarily by assuring strict scrutiny was not the death knell to every racially-based plan.<sup>151</sup>

Given the assurance from *Adarand* that all racial classification is analyzed under the same passable standard, a compelling government interest must stand behind intentional racial terrorist screening—regardless of the rationale behind it.<sup>152</sup> No doubt the argument will sound that the current threat looms so large and that national security is in such dire crisis that absolute racial equality can be sacrificed to provide this needed compelling interest.<sup>153</sup>

With war and surrounding national security concerns long heralded without question as the ultimate government interests, courts do not usually require any great degree of particularity in determining the “compelling” prong.<sup>154</sup> Thus, the standard often exists in a vacuum and could be

150. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (assuring that strict scrutiny is not “fatal in fact”).

151. See *id.* (noting that in past, every Justice on Court has agreed that remedying prior discrimination could be compelling interest met with narrowly tailored program) (citing *United States v. Paradise*, 480 U.S. 149, 167 (1987)). Thus, the previously used less-intensive scrutiny for benign racial classifications was abandoned in favor of passable strict scrutiny for all racial classifications. See *id.* at 227 (overruling *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990)).

152. See *id.* at 237-39 (remanding case to lower court to find “compelling” rather than “significant” governmental purpose). The varying degrees of “compelling” found in several earlier decisions show that scrutiny of interests has not always been semantically consistent. See *Palmore v. Sidoti*, 466 U.S. 429, 430-34 (1984) (describing interest needed to justify racial considerations in custody battles as “compelling” but later holding “interests of the child” were “substantial” interests that pass strict scrutiny); see also *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (holding that “permissible” ends justify racial classification). *Palmore* invalidated the lower court’s custody ruling based primarily on scrutiny of the means, holding that consideration of race was not necessary to further the goal of protecting the child’s interest. See *Palmore*, 466 U.S. at 433 (assuming that protecting children in custody cases was compelling interest).

153. See, e.g., REHNQUIST, *supra* note 91, at vii, 11, 218-25 (defending Abraham Lincoln’s philosophy: “Are all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?”). Indeed, many of those who find racial profiling distasteful in less threatening times now support its use because of the overarching importance of stopping further catastrophes and protecting the country during wartime. See, e.g., *Newshour*, *supra* note 43 (interviewing University of California Law Professor Gail Heriot, who under “normal” circumstances disagreed with racial profiling, but now supported it “with the lightest of possible touches”).

154. See *Haig v. Agee*, 453 U.S. 280, 307 (1981) (holding simply that it is “‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation” without requiring any more specificity or factual inquiry (quoting *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964))); accord *Cole v. Young*, 351 U.S. 536, 546 (1956); *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1205, 1212-13 (C.D. Cal. 1998) (finding vague compelling interest in “national security” and “foreign policy”), *aff’d* 205 F.3d 1130 (9th Cir. 2000); *Stehney v.*

served just as well before the court hears any facts if the defending party argues it acted to protect “national security.”<sup>155</sup> Here, using this method, the compelling interest test is easily met.<sup>156</sup> Indeed, in this case, the Nation’s search for protection may never have been more compelling, considering the worst attack in history, the war in the Middle East and the almost daily threats of more terrorism from Arab extremists.<sup>157</sup>

The government’s ease in meeting the first prong by claiming “national security” gives rise to a genuine policy concern. Especially because the current war effort is so broad and amorphous, the “national security” umbrella can be too quickly opened to shield an expansive set of restrictions from any downpour of constitutional concern.<sup>158</sup> As Justice Jackson warned in *Korematsu*, if courts will not reassess what the military or government has deemed to be in its national security interest, a broad range of measures become permissible as long as they are narrowly tailored to any security interest.<sup>159</sup> Because equal protection is the principle invalidation of racial discrimination, strict scrutiny’s first prong should not be met by such “over-expansive” standards.<sup>160</sup> Indeed, the *Adarand* Court itself im-

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Perry, 907 F. Supp. 806, 823 (D.N.J. 1995) (upholding polygraph testing to work with National Security Agency as valid based on compelling interest in “protecting national security”); *Farrakhan v. Reagan*, 669 F. Supp. 506, 510-12 (D.D.C. 1987) (finding general compelling interest in national security but also finding more specific interest in ending state sponsored terrorism), *aff’d without opinion*, 851 F.2d 1500 (D.C. Cir. 1988).

155. *See, e.g.*, *Zemel v. Rusk*, 381 U.S. 1, 16-18 (1965) (restricting right to international travel by merely citing “the weightiest considerations of national security”).

156. *See Humanitarian Law Project*, 9 F. Supp. 2d at 1212-13 (giving deference to government’s claim of “national security” in upholding constitutionality of anti-terrorist legislation); *Farrakhan*, 669 F. Supp. at 512 (similarly finding “legitimate and compelling interests in national security” in upholding anti-terrorism measures).

157. *See* Grunwald, *supra* note 7 (headlining immediate threat).

158. *Cf.* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (holding that general, overbroad interests do not sufficiently justify racial classification and specifically stating that “[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy”).

159. *See* *Korematsu v. United States*, 323 U.S. 214, 244-48 (1944) (Jackson, J., dissenting) (criticizing majority for constitutionalizing military deference because its reasoning would expand to cover “new purposes”). Justice Jackson feared “the tendency of a principle to expand itself to the limit of its logic,” a sentiment born to fruition when courts simply adopt vague military/governmental claims of national security. *See id.* at 246 (Jackson, J., dissenting) (quoting BENJAMIN N. CARDOZO, *NATURE OF THE JUDICIAL PROCESS* 51 (1921)).

160. *See* *Wygant*, 476 U.S. at 276 (holding that vague interest of “societal discrimination” insufficient and over-expansive to support racially based remedies because of strict scrutiny’s tough requirements); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (holding that “core purpose of the Fourteenth Amendment” is to “do away with all governmentally imposed discriminations based on race”); *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting) (arguing that “[u]nless Congress clearly articulates the need and basis for a racial classification” interest could not be found compelling).

pliedly favored greater detailed inquiry by noting that even “the most rigid scrutiny” sometimes fails to detect invidious racial discrimination.<sup>161</sup> It is an uneasy protection against the government when the trumpets of “national security” can so readily drown out a constitutional right often referred to as inalienable.<sup>162</sup>

To assure strictness in strict scrutiny and prevent overbroad measures, a more precise solution would be either to balance the particular national security interest against the racially-based measure sought or, more practically, to require a definition of the governmental interest in light of the particularized circumstances.<sup>163</sup> Although employed usually in other constitutional arenas, a balancing test is not outside the realm of determining whether an interest is compelling and, more importantly, serves to narrow each governmental interest distinctly to eliminate over-broad application.<sup>164</sup> As the Court explained in *Vernonia School District 47J v. Acton*,<sup>165</sup> a “compelling state interest” should not describe a “minimum quantum of governmental concern,” but rather should be tested for degree in light of the particular invasion of rights.<sup>166</sup> Without subsuming narrow tailoring analysis, such a philosophy could be applied to equal protection doctrine to protect against heavy-handed *Korematsu*-like methods by allowing a court to determine that general governmental interests are never “compel-

161. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (criticizing *Korematsu*'s failure to detect unconstitutional racism).

162. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (describing racial classification as “odious to a free people whose institutions are founded upon the doctrine of equality”) (citation omitted).

163. For a discussion of more precise solutions, see *infra* notes 162-66 and accompanying text.

164. See, e.g., *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 670-73 (1989) (determining that compelling national self-protection interest in ensuring that front-line drug officers have integrity and judgment unimpaired by drugs outweighs Fourth Amendment protection against searches without individualized suspicion). In cases such as these, analysis of compelling interests in light of the specific facts facilitates determining, without speculation, whether the measure adopted serves that interest. See *id.* at 686 (Scalia, J., dissenting) (arguing that because interest is limited to front-line drug officials, violating Fourth Amendment rights of all officials that carry guns is overbroad).

165. 515 U.S. 646 (1995).

166. See *Acton*, 515 U.S. at 661 (applying, in Fourth Amendment context, more balanced version of compelling interest). Upholding a school's random urinalysis for athletes, Justice Scalia's majority opinion warned:

It is a mistake, however, to think that the phrase “compelling state interest,” in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest that appears *important enough* to justify the particular search at hand . . . .

*Id.*



ling enough” to justify such broad and extreme constitutional aberrance.<sup>167</sup>

An even more protective solution, the Supreme Court in *Adarand* and *Wygant* urged “particularized” investigation to find a specific compelling interest.<sup>168</sup> Indeed, adopting a more case-by-case evaluation of the national security ends, the *Korematsu* Court itself found (rightly or wrongly) a sense of supreme urgency in exact circumstances where “properly constituted military authorities feared an invasion of our West Coast,” but then failed to inquire into the particularity (narrow tailoring) of means.<sup>169</sup> Perhaps then, it is a low level of specificity that is truly the risk, with a needed clarification that compelling interests do not exist in broad form to be picked from when the government needs to justify equal protection restraint.<sup>170</sup> Illustrating the risks inherent in vague national security interests, in *United States v. Rezaq*,<sup>171</sup> the United States District Court for the District of Columbia defined a compelling interest specifically as “secrecy of information important to our national security . . . .”<sup>172</sup> The court then determined that *Rezaq*’s due process rights did not have to be sacrificed

167. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (giving weight to argument that compelling interest prong should be more strictly construed by noting that *Korematsu* correctly applied strict scrutiny but failed to detect illegitimate discrimination).

168. See *id.* at 229 (applying Justice Stevens’ argument that compelling interest must be shown by “clearly articulated need and basis”); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-76 (1986) (requiring showing of “particularized” past discrimination from specific governmental institution before remedial interest could be deemed compelling because danger of overbroad race-based remedies). The *Wygant* Court noted, “No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over-expansive.” *Id.* at 276.

169. See *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (finding compelling interest in immediate threat from attack through West, but completely deferring to military/government judgment that such extreme methods were necessary). It is this lack of searching scrutiny that, in many views, makes *Korematsu* a dangerous legal philosophy. See *Reno v. Flores*, 507 U.S. 292, 344 n.30 (1993) (Stevens, J., dissenting) (criticizing *Korematsu* as failing to require case-by-case investigation as to whether internment was necessary to fulfill national security interest); REHNQUIST, *supra* note 91, at 205-06 (analyzing argument that *Korematsu* was too deferential to government’s assertion that measures were necessary).

170. For a discussion of an example of the risks inherent in low specificity in compelling interests and protection afforded by the more exact definition, see *supra* note 169 and accompanying text and *infra* notes 171-72 and accompanying text.

171. 899 F. Supp. 697 (D.D.C. 1995).

172. See *Rezaq*, 899 F. Supp. at 708 (finding compelling interest not merely in national security, but in “protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence” (quoting *CIA v. Sims*, 471 U.S. 159, 175 (1985))). In *Rezaq*, a hijacking case, the government sought a protective order prohibiting at trial use of classified material the defense had requested. See *id.* at 707 (summarizing facts).

because other safeguards met the secret information concerns.<sup>173</sup> Had the court allowed broad “national security” to suffice as the compelling interest, it could not have found the interest alternatively met and Rezaq’s rights would have been unnecessarily compromised.<sup>174</sup> Consistent with strict scrutiny, a higher level of specificity in defining the interest will then help determine whether anti-terrorist measures are narrowly tailored to meet the exact interest, thereby fully protecting against unnecessary racial classification.<sup>175</sup>

D. *Korematsu the Undead: The Haunting of Current Narrowly Tailored Scrutiny by Old War-Time Deference*

By early standards, such as applied in *Korematsu*, courts determining “narrowly tailored means” afforded great deference to the government’s decisions and findings on what was necessary to fulfill its security interests.<sup>176</sup> Partially because of claims of immediacy, *Korematsu* failed to require any consideration of less racially intrusive alternatives or evidence that group exclusion and internment would be necessary to quell imminent threat.<sup>177</sup> Under recent “narrowly tailored” analysis, however, racial classification must undergo an exacting scrutiny that the method is the

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173. *See id.* at 711 (analyzing more specific interest concerning secret information). *Rezaq* held that the due process right to fair and expeditious trial prevailed because other safeguards provided adequate confidentiality. *See id.* (holding that government could not prosecute defendant and restrict his ability to use information in his defense).

174. *See generally id.*, at 697 (illustrating importance of defining national security interests in light of specific circumstances and implying risk of generalized “national security” is compelling interest).

175. *See* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (“In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.”); *Kleindienst v. Mandel*, 408 U.S. 753, 783-84 (1972) (Marshall, J., dissenting) (responding to Court’s ad hoc application of “plenary power” to exclude aliens based on general foreign relations and national defense interests). According to Justice Marshall in *Kleindienst*, the First Amendment rights of a group that sought entrance of a foreign scholar could not be subordinated by a general interest in foreign relations. *See id.* at 782 n.5 (citing *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965)). Justice Marshall limited his national security interest to “actual threats.” *Id.* at 783.

176. *See* *Korematsu v. United States*, 323 U.S. 214, 218 (1944) (“[W]e cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained.”); *Reno v. Flores*, 507 U.S. 292, 344 n.30 (1993) (Stevens, J., dissenting) (criticizing *Korematsu* for failing to apply stricter scrutiny).

177. *See* *Korematsu*, 323 U.S. at 218-24 (deferring to what governmental authorities deemed necessary to further compelling interest). In fact, *Korematsu* used post-exclusion investigations that showed “loyalties to Japan” as a kind of justification for giving military authorities free reign to decide what methods to use. *See id.* at 219 (summarizing findings provided by military).

necessary and only solution.<sup>178</sup> Which standard is applied will determine the fate of racially-based terrorist screening.

The *Korematsu* standard has two strengths in the current political climate.<sup>179</sup> First, it directly considered the rare collision of racial classification with immediate, war-time national security interests.<sup>180</sup> The attacks on Pearl Harbor and the World Trade Center share stunning parallels.<sup>181</sup> The comparable immediate and identifiable threat could urge similar deference to government decisions made to deal with that threat.<sup>182</sup> The spotlight on the Japanese now shifts to Arabs as the source of the identifiable threat.<sup>183</sup> Further, similar to the perceived urgency of the Japanese threat, the present terrorist threat seems even more urgent.<sup>184</sup> Second, the nature of many national security measures requires deference to government choices.<sup>185</sup> Because knowledge of what tips off officials would allow terrorists to avoid certain behavior, terrorist screening shares this undercurrent of deference that precludes the government from explaining its methods and leaves courts with no alternative but agreement.<sup>186</sup>

178. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506-08 (1989) (requiring Richmond to show that it had considered race-neutral means to increase minority business participation and use of numbers that were not based on assumptions about minorities); *United States v. Paradise*, 480 U.S. 149, 171-85 (1987) (examining several factors: efficacy of alternatives, flexibility and duration, relationship of numerical goals to relevant labor market and impact of relief on rights of third parties).

179. See Saito, *supra* note 33, at 10, 11 (warning of *Korematsu's* validity).

180. See *Korematsu*, 323 U.S. at 216 (expressing at outset that case would be determined under racial classification standards).

181. See William Rees-Mogg, *Attacks Are Worst on US Since Pearl Harbor*, *TIMES* (London), Sept. 12, 2001, at 19 (comparing similarities between attacks).

182. See REHNQUIST, *supra* note 91, 208-11 (contending that although discriminatory action against second-generation Japanese-Americans was overbroad, specific threat perceived, based on intercepted messages, could justify keeping them from work in aircraft factories). Rehnquist stated that the threat also allowed disproportionate treatment of first-generation (Issei) Japanese immigrants, describing them as "enemy aliens in time of war." See *id.* (discussing governmental powers during war-time).

183. See Saito, *supra* note 33, at 10-11, 24-26 (enumerating folly that, in time of war or emergency, military can decide ad hoc which racial group is "infected" with threatening ideologies).

184. Compare REHNQUIST, *supra* note 91, at 184, 206-11 (detailing intelligence and facts behind threat from Japanese loyalists), with Kellman, *supra* note 124, at 419 (explaining seriousness of biological attack), and CNN, *supra* note 124 (updating current Anthrax attack suspected to come from Islamic terrorists).

185. See, e.g., *CIA v. Sims*, 471 U.S. 159, 175 (1985) (explaining sensitive nature of classified information relating to national security); *United States v. Rezaq*, 899 F. Supp. 697, 708 (D.D.C. 1995) (similarly giving credit to national security interest in protecting classified information because very nature of that information could compromise foreign intelligence operations).

186. See Higgins, *supra* note 121, at 50 (explaining that details of FAA computerized profiling system are kept secret because if they were known, terrorists could evade profiles); Nojeim, *supra* note 44, at 6-8 (same).

The current national security emergency breathes new life into these arguments.<sup>187</sup>

Conversely, modern narrow tailoring analysis utterly refutes that differential standard. In *City of Richmond v. J.A. Croson Co.*,<sup>188</sup> the Supreme Court invalidated a race-based construction contract plan and expressly refused to allow the government to pronounce necessity as it had in *Korematsu*.<sup>189</sup> The Court in *Adarand* commended *Korematsu's* application of "the most searching scrutiny" but chided *Korematsu's* reasoning as failing to detect illegitimate discrimination.<sup>190</sup> Thus, to eliminate this risk, *Adarand* combined previous jurisprudence to require an ultimate "detailed examination, both as to ends and as to means."<sup>191</sup> Many prongs attach to this detailed investigation.<sup>192</sup> Two, however, immediately stand out to invalidate racially based terrorist screening.

First, racial profiling has not been conclusively shown to "substantially address, if not achieve" the goal of preventing terrorist attacks.<sup>193</sup> Profiling adopted earlier in U.S. history failed to stop over two dozen hijackings in one year.<sup>194</sup> Profiling is easy to thwart and regularly fails to catch both terrorists and drug traffickers.<sup>195</sup> Further, a terrorist's race is not precise.<sup>196</sup> A vast majority of Arabs have nothing to do with terrorism and as many non-Arab Americans have committed terrorist attacks as have Arabs.<sup>197</sup> Although September 11, 2001 is strong in our minds, we must

187. See REHNQUIST, *supra* note 91, at 184-211 (leaving open possibility that racially-based remedies could be adopted in war-time if imposed very narrowly or against non-citizen aliens).

188. 488 U.S. 469 (1989).

189. See *Croson*, 488 U.S. at 501 (rejecting *Korematsu* approach by holding that "blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis") (emphasis added).

190. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (supporting its position that only highest scrutiny is appropriate).

191. *Id.*

192. See *United States v. Paradise*, 480 U.S. 149, 171 (1987) (listing several factors courts must consider in determining narrow tailored means).

193. See *Shaw v. Hunt*, 517 U.S. 899, 915 (1996) (finding that voting redistricting plan was not narrowly tailored because it did not actually ensure achievement of government's compelling interest).

194. See *Nojeim*, *supra* note 44, at 5-6 (reporting that in 1972, the last year United States used profiling, there were twenty-eight hijackings of United States airplanes). Notably, the hijackings decreased significantly when the FAA adopted a policy of x-raying everyone and abandoned profiling. See *id.* (reporting policy of searching everyone).

195. See *id.* (noting that it is easy for terrorist who knows profile to use someone else or change behavior); Rhee, *supra* note 13, at 869-70 (documenting thwarting of profiling system employed to target Finnish people before Pan Am Flight 103 bombing and "deplorable" record of drug war profiling that has obviously not stopped serious drug problem).

196. See generally Saito, *supra* note 33 (explaining folly in "racing" Arabs as terrorists).

197. See *Nojeim*, *supra* note 44, at 6 (reporting incongruence of identities of terrorists pre-World Trade Center attacks).

not forget that the Unibomber mailings, the Oklahoma City bombing,<sup>198</sup> attempts to blow up CIA recruiting offices during the Vietnam War,<sup>199</sup> a 1996 attempt by a Florida student to board an airplane with grenades,<sup>200</sup> and numerous other terrorist acts were committed by non-Arab Americans.<sup>201</sup> Stereotyping is hardly narrowly tailored, and “generalized assertions” or “assumptions” that minorities will behave in a certain way do not meet the modern means requirements.<sup>202</sup>

Second, a number of “racially neutral alternatives” exist that could prove at least as effective as racial profiling.<sup>203</sup> Airport security is currently under private control that is blamed for numerous security shortcomings.<sup>204</sup> Federal replacement or oversight of airline security is expected to provide much relief.<sup>205</sup> Armed officers on flights, or “sky marshals,” could achieve a similar effect.<sup>206</sup> Intensifying random searches is also a viable alternative.<sup>207</sup> Professor David Cole proposed perhaps the most Ghandian alternative to racial profiling: try to develop good relations with the Islamic community to help identify the true threats.<sup>208</sup> Unlike correcting specifically race-based past discrimination, national security or even prevention of Middle Eastern terrorism does not compel a race-based solution.<sup>209</sup> Essentially, with a vague interest such as “preventing terrorism” there are literally hundreds of alternatives that must be considered before racial methods can be installed.<sup>210</sup>

198. See Saito, *supra* note 33, at 11-13 (discussing Oklahoma City bombing, which was committed by two white Americans, and its perception as work of Arab terrorists).

199. See Sievert, *supra* note 13, at 1436 (recounting American protesters' attempts at terror).

200. See Nojeim, *supra* note 44, at 5-7 (recounting Florida incident).

201. See *id.* at 6 (“Profiling does not fill security gaps, it creates them.”).

202. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500-01, 506 (1989) (finding thirty percent minority contract plan not narrowly tailored because it was based on “generalized assertion” that racial classification was relevant to goal and “completely unrealistic” assumptions that minorities would choose particular trade in proportion to population); *Nightline: Profile*, *supra* note 16 (broadcasting Professor David Cole’s reiteration of idea that racial stereotypes are irrelevant).

203. See *Croson*, 488 U.S. at 507-08 (analyzing whether race-neutral alternatives were considered before adopting race-based policy) (citing *United States v. Paradise*, 480 U.S. 149, 171 (1987)).

204. See Weale, *supra* note 14 (reporting that United States Congress had received update on airline security revealing “serious vulnerabilities”).

205. See Sharon Begley et al., *The Fallout—Will We Ever Be Safe Again?*, *NEWSWEEK*, Sept. 24, 2001, at 58 (reporting several new security measures).

206. See *id.* (stating that FAA will likely put more officers on board flights).

207. See Rhee, *supra* note 13, at 874 (advocating intensified random searching already in existence).

208. See *Nightline: Profile*, *supra* note 16 (broadcasting interview session on racial profiling of Arabs after September 11th).

209. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (reiterating that race-based action must be “necessary”).

210. See Higgins, *supra* note 121, at 52 (reporting other alternatives to profiling in general include more sophisticated scanners, better baggage/passenger

Therein lies the choice, and a court faced with it makes a critical determination of racial policy. Past standards are deferential to government decisions but are now highly criticized.<sup>211</sup> Current legal standards for narrow tailoring invalidate screening terrorists based on race, but were promulgated by the Court to examine affirmative action and remedial racial measures.<sup>212</sup> With the defense of the nation to balance, the temptation surely exists to distinguish current law from war-time jurisprudence.<sup>213</sup> Indeed, applying the current equal protection analysis risks handcuffing law enforcement when the need for protection is the greatest.<sup>214</sup> Such reasoning does rationalize race-based screening outside the United States.<sup>215</sup> Nazi Germany reportedly racially profiled those of Jewish descent boarding its Zeppelins in the 1930s.<sup>216</sup> The existence of constitutionally guaranteed rights, however, stands as the distinction that prevents a government to do whatever it deems necessary to protect itself.<sup>217</sup> Despite the need for secretive procedures, as Justice Brennan recognized in *United States v. Stanley*,<sup>218</sup> allowing government officials absolute freedom to determine necessary methods simply by invoking national security has resulted in unconstitutional practices, such as involuntary drug and chemical experiments on United States soldiers.<sup>219</sup> The

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matching and creation of FAA security oversight committee to prevent breakdowns).

211. See, e.g., Civil Liberties Act of 1988, Pub. L. No. 100-383, §1, §2(a), 102 Stat. 903-904 (1988) (condemning internment and reasons behind it and providing reparations to Japanese internment survivors); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500-01, 506 (1989) (rejecting idea that government can determine for itself what is necessary to its compelling interest when it employs suspect classifications). For a further discussion, see *supra* notes 165-74 and accompanying text.

212. See, e.g., *Adarand*, 515 U.S. at 201-08 (explaining minority contracting plan that was its focus); *United States v. Paradise*, 480 U.S. 149, 171 (1987) (examining court ordered race-based remedy of past discrimination). For a further discussion, see *supra* notes 165-73 for further discussion.

213. See Yen, *supra* note 95, at 2 (examining possible "rehabilitation" of *Korematsu's* reasoning).

214. See Lacayo, *supra* note 33, at 92 (weighing protection of privacy versus obvious current need for safety).

215. See, e.g., Weale, *supra* note 14 (reporting use of racial profiling in Israel has been willing trade off of security for civil rights); Dan, *supra* note 56 (describing Israel's and El Al's security measures).

216. See Rhee, *supra* note 13, at 849-51 (outlining German S.S. officer's use of racial profiling).

217. See, e.g., *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985) (noting "danger that high federal officials will disregard constitutional rights in their zeal to protect the national security" and finding that danger sufficient to deny such officials absolute immunity from constitutional violations); PETER IRONS, *A PEOPLE'S HISTORY OF THE SUPREME COURT*, 365 (1999) (explaining that many allies of United States lacked "inalienable rights" that Americans are guaranteed constitutionally).

218. 483 U.S. 669 (1987).

219. See *Stanley*, 483 U.S. at 690-91 (Brennan, J., concurring and dissenting in part) (criticizing majority's deference to military and governmental decisions and noting that prior cases show damage done when government is given free hand to

United States should be wary of adopting measures merely because the military or government has labeled them necessary to war-time or national security interests.<sup>220</sup>

Even if it were certain that these measures would end terrorist attacks, that end cannot be the only consideration. If it were, then even more draconian methods, such as the Japanese internment, would be fully justified.<sup>221</sup> Racial equality has played too profound a role in United States history since World War II to allow the government to now sanction inequality under any interest.<sup>222</sup> If America can endure assassinations, lynchings and bombings, stomach bloody riots and order federal troops into school houses and governors into custody to end racial disparity, it can address terrorism without compromising that ideal.<sup>223</sup> Most importantly, our judicial system has assimilated this regard for racial distinction as odious and irrelevant.<sup>224</sup> As the country weathered the bloodshed necessary to set a course toward racial equality, courts diverged irrevocably from racial precedent existing at the time of *Korematsu*.<sup>225</sup> In the name of ultimate equality, the Supreme Court has promulgated a standard that is rooted in the idea that it does not matter what type of racial method exists

violate constitutional rights of soldiers without fear of reprisal) (citing *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981); *Schnurman v. United States*, 490 F. Supp. 429 (E.D. Va. 1980); *Thornwell v. United States*, 471 F.Supp. 344 (D.D.C. 1979)).

220. *Contra* Begley, *supra* note 205 (noting several extreme security measures that United States is considering adopting).

221. *See* REHNQUIST, *supra* note 91, at 184-202 (providing details of internment that show that if any Japanese-American was going to threaten national security, extreme measures certainly stopped him); Saito, *supra* note 33 (discussing Japanese internment and subsequent reparations).

222. *See, e.g.*, IRONS, *supra* note 217, at 383-408 (detailing passions and political fervor that surrounded civil rights movement, especially concerning educational integration, that led to Supreme Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954)); *Remembering Kent State*, COLUMBUS DISPATCH, Apr. 30, 2000, at 1A (recalling racial tension and civil rights movement's effect on anti-Vietnam War protests and conglomerate protest on campus of Kent State University that left four dead in Ohio).

223. *See* IRONS, *supra* note 217, at 404-09 (detailing some bloodshed and measures taken after *Brown* decision).

224. *See* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (finding that racial classifications are "harmful to the entire body politic" (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 533-35, 537 (1980) (Stevens, J., dissenting))); *Brown*, 347 U.S. at 495 (finding that educational racial segregation itself causes detrimental effects); *Plessy v. Ferguson*, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting) (arguing that Constitution is "color-blind" and cannot tolerate racism of separate but equal accommodations).

225. *See* IRONS, *supra* note 217, at 398-400 (detailing breaking of Supreme Court from racial biases of *Plessy v. Ferguson* and quoting Justice Marshall's exultation "They've got to yield to the Constitution!" as turning point in racial jurisprudence).

or why it exists, merely whether it exists.<sup>226</sup> *Adarand* equates all racial classification as presumptively invidious and irrelevant, expressly eliminating the argument that a certain interest or claim can provide reason not to subject the classification to the most restrictive requirements. Thus, the current movement to tightly scrutinize benign racial plans cannot be undone back to deference for malignant ones, even in times of great national threat.<sup>227</sup>

#### IV. CONCLUSION

The realities of this theoretical analysis should not assure Arabs or civil rights activists that all will be fine. This Comment warns first of the willingness of America to engage in racial profiling in the name of anti-terrorism.<sup>228</sup> It then warns that the Fourth Amendment fails to protect against racially based anti-terrorism methods.<sup>229</sup> It further suggests that “national security” deference could still be abused to trod over racial equality by renewing old passes given to government/military decisions.<sup>230</sup> Finally, this Comment finds that equal protection jurisprudence will invalidate the racial methods through its narrow tailoring requirement, even during time of war.<sup>231</sup>

In totality, however, it is only after both political and constitutional safeguards fail that detention and searches against Arabs are doctrinally eliminated.<sup>232</sup> This should be enough to evidence that racial discrimination is alive in the United States and that crises such as war give such thinking a chance to remain unchecked.<sup>233</sup> Further, the difference between the two analyses, Fourth and Fourteenth Amendment, is not so dissimilar that one may not bleed into the other.<sup>234</sup> As surprised as the legal world

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226. See *Adarand*, 515 U.S. at 235-37 (expressly stating that there is never any difference between benign and malicious racial discrimination and that strict scrutiny ensures “consistent” and “detailed” analysis of ends and means).

227. See REHNQUIST, *supra* note 91, at 209 (admitting that justifying internment of Japanese American citizens “should have taken far more substantial findings . . . even in wartime”) (emphasis added).

228. For a discussion of the theories and movement toward profiling those of Arab descent, see *supra* notes 119-34 and accompanying text.

229. For a discussion of the Fourth Amendment, see *supra* notes 177-228 and accompanying text.

230. For a discussion of the application of national security deference to equal protection standards, see *supra* notes 147-227 and accompanying text.

231. For a discussion of the validity of current equal protection doctrine, see *supra* notes 167-227 and accompanying text.

232. Cf. Beck & Daly, *supra* note 25, at 612-18 (examining difficulties in practical protection under Equal Protection Clause); Knight & Kurnik, *supra* note 25, 18-21 (same).

233. See Yen, *supra* note 95, at 7 (urging that scholars study *Korematsu* and its legacy closely lest “climate become ripe for rewriting history that so rightly condemns the internment” and again allows curtailment of civil liberty during wartime).

234. Compare *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-60 (1976) (stating that Fourth Amendment does not prohibit limited vehicle stops without



was to learn that the Fourth Amendment protected officers who intentionally used race, it could be in for a similar shock if making a reasonable detention became a defense for an equal protection violation.<sup>235</sup> Could making a lawful stop be a narrowly tailored means of furthering an interest in national security?<sup>236</sup> This theory does seem incongruent, but it points out the insufficiency of protection in a constitutional interpretation that both allows racial discrimination and outlaws it.

*Liam Braber*

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reasonable suspicion if sufficiently high number of people with apparent ancestry are involved in crime), *with* *Korematsu v. United States*, 323 U.S. 214 (1944) (allowing, under equal protection, Japanese exclusion based on perceived threat from high number of Japanese race).

235. *See* Beck & Daly, *supra* note 25, at 597 (noting that “[s]cholars, journalists, and lawyers promptly and vociferously assailed . . . *Whren*”).

236. For a discussion in full of narrowly tailored means standards, *see supra* notes 176-227 and accompanying text.