Systemic Racism and Immigration Detention

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ABSTRACT

The *denouement* of the Trump presidency was a white supremacist coup attempt against a backdrop of public reawakening to the persistence of institutionalized racism. Though the United States has entered a new administration with a leader that expresses his commitment to ending institutionalized racism, the United States continues to imprison Central American and Mexican immigrants at the southern border. If the majority of the people in immigration jails at the border are Latinx, does immigration law disparately impact them, and do they have a right to equal protection? If they do, would equal protection protect them?

This Article explores whether the immigration statute that permits discretionary imprisonment of migrants seeking protection at the United States–Mexico border violates the Equal Protection Clause. In order to answer that question, the Article outlines equal protection intent jurisprudence, beginning with the intent doctrine—the framework used to determine if a facially race-neutral law is discriminatory. In addition, it considers the shortcomings of the intent doctrine and parses plenary power—the legal doctrine that the Court invokes to abstain from exercising jurisdiction or limiting review of immigration laws.

After examining the intent doctrine generally and specifically within immigration law, this Article undertakes a limited analysis of a hypothetical equal protection challenge to a facially neutral immigration statute, INA § 235(b)(1)(A), with potentially disparate impact on Latinx immigrants.[1] As a result of grappling with the shortcomings of the intent

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1. The analysis is limited because it would be beyond the scope of this Article for it to exhaust all arguments from the standpoint of each element, but more to the point, it focuses on specific

doctrine and the barrier of plenary power, this Article considers ways in which the Supreme Court of the United States could interpret the intent doctrine in a manner that might enhance equal protection efficacy.

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elements to demonstrate a particular problem within equal protection intent doctrine in immigration law.

INTRODUCTION

The constitutional right to equal protection[2] is the only constitutionally enshrined tool to address express or facially neutral—or implicit—discrimination by government actors.[3] However, courts and constitutional law scholars notoriously in disagree about both the framers' intent and what the doctrine can, and should, mean today.[4] This Article outlines ways in which equal protection could be more effective in the face of immigration laws with disparate impact, given the heightened awareness of systemic racial injustice and inequity.

What if the equal protection doctrine actually furthered equality?[5] What if the equal protection doctrine prohibited the United States from making and enforcing immigration laws that racialized and oppressed noncitizens, particularly since they are "people" and therefore entitled to Fifth Amendment protections?[6] What if the equal protection doctrine could address the most visible—and simultaneously invisible—symbol of

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2. The anti-discrimination principle that characterizes equal protection at the federal level comes from the Due Process Clause of the Fifth Amendment to the United States Constitution which provides that "no person" (hence not limited to citizens) shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Although the Fifth Amendment does not expressly contain an equal protection clause like the Fourteenth Amendment, which applies to the states, it is understood to forbid discrimination that is "so unjustifiable as to be violative of due process." Bolling v. Sharpe, 347 U.S. 497, 499 (1954). As noted by John Bingham, drafter of the Fifth Amendment, "It must be apparent that the absolute equality of all, and the equal protection of each, are principles of our Constitution . . . ." CONG. GLOBE, 34th Cong., 3d Sess. 140 (1857).

3. *See, e.g.*, Michael J. Perry, Brown*,* Bolling*, & Originalism: Why Ackerman and Posner (Among Others) Are Wrong*, 20 S. ILL. U. L.J. 53, 59 (1995) (explaining that "the Equal Protection Clause was meant to protect principally against racially discriminatory administration that victimized nonwhites"). Most narrowly defined, it "is a limitation on a state's administration of the laws." *Id.* at 58.

4. *See, e.g.*, Commonwealth v. Wasson, 842 S.W.2d 487, 497 (Ky. 1992) (proclaiming an erroneous "misdirected application of the theory of original intent"); *see also* Samuel Marcosson, *Colorizing the Constitution of Originalism: Clarence Thomas at the Rubicon*, 16 LAW & INEQ. 429, 463 n.144 (1998) ("The constitutional attack on affirmative action programs by Justices Scalia and Thomas, without any investigation of history on their part, is one of the most disturbing features of their purported originalism.") (quoting Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 92 n.465 (1996)); Perry, *supra* note 3, at 55 (explaining why Richard Posner is wrong that "on a consistent application of originalism," i.e., Brown v. Bd. of Educ., 347 U.S. 483 (1954), "was decided incorrectly").

5. The public is more skeptical about this possibility, especially after the Supreme Court's decision in *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987), which held that the state of Georgia's death penalty was not applied in a racially discriminatory manner, despite significant racial disparities. *See* Surell Brady, *A Failure of Judicial Review of Racial Discrimination Claims in Criminal Cases*, 52 SYRACUSE L. REV. 735, 740 (2002) (acknowledging the "growing public perception that the Supreme Court has closed off the debate insofar as equal protection of the laws is concerned").

6. *See* Sarah L. Hamilton-Jiang, *Children of a Lesser God: Reconceptualizing Race in Immigration Law*, 15 NW. J.L. & SOC. POL'Y 38, 70 (2019) (highlighting how Latinx immigrants have long been subjected to mythical narratives of criminality).

the racism of U.S. immigration laws: the immigration prison? This Article begins to answer these questions.

Currently, the equal protection doctrine is not designed to remedy racial harm from the standpoint of race as a social construct or as institutionalized racism.[7] "Race" is a social construct defined by institutions, cultural practices, and law.[8] "Racialization" is the construction of a racial identity through characterizing comparative merits based on superficial attributes, like physical appearance.[9] Because immigration law, criminal law, and the point at which they converge have contributed to the construction of race, these areas of law are simultaneously two of the biggest threats to equality, yet the most invisible and hardest to overcome.[10] Why does immigration law exert such a stronghold on the making of race yet so fiercely resist curtailment? It may be because the tools available were not really designed to dismantle it.[11]

Immigration equal protection challenges face an impenetrable wall comprised of both the intent doctrine and plenary power. When a law is facially neutral but allegedly has a disparate impact on a disfavored minority group, pursuant to the current doctrine, the Court attempts to

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7. *See* Maureen Johnson, *Separate but (Un)equal: Why Institutionalized Anti-Racism is the Answer to the Never-Ending Cycle of* Plessy v. Ferguson, 52 U. RICH. L. REV. 327, 335 (2018) (arguing that "the best way to combat institutionalized racism is institutionalized *anti*-racism") (emphasis added).

8. IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 45 (Richard Delgado & Jean Stefancic, eds., 10th ed. 2006) ("Race is often seen in fixed terms, either as a biological given or a static social category. However, as the debates about race at the turn of the century demonstrate, racial categorization is a fluid process that turns not only on prejudice, but also on factors ranging from dubious science to national honor.").

9. Hamilton-Jiang, *supra* note 6, at 62–63 (explaining that the term originated in sociology and "refers to the methods and process by which race imposes differential and prejudicial meaning upon different groups, constructing a racial identity") (citing *Racialize*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016)); *see also* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S (2nd ed. 1994); Carrie L. Rosenbaum, *The Natural Persistence of Racial Disparities in Crime-Based Removals*, 13 U. SAINT THOMAS L.J. 532, 536 (2017) (arguing that "[c]riminality has long been used as a determiner of desirability for noncitizens" and "has somewhat successfully masked racialization").

10. *See, e.g.*, Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 483 (2004) ("[C]an a single standard of review effectively screen all types of classifications without negating either the deference to government decisionmaking traditionally accorded under rational basis review or the bias-sensitive review effectuated by strict and intermediate scrutiny?"); Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307, 309 (2009) ("[T]he structure of immigration laws has institutionalized a set of values that dehumanize, demonize, and criminalize immigrants of color.").

11. It is also overlooked by scholars exploring the shortcomings of Equal Protection. *See, e.g.*, Derrick Darby & Richard E. Levy, *Postracial Remedies*, 50 U. MICH. J.L. REFORM 387, 387 (2017) ("This Article asks what can be done" where all but express discrimination is vulnerable to equal protection challenges in the era of intent and "argues that 'postracial remedies' are a necessary component of an effective strategy to combat racial disparities in areas such as wealth, incarceration, education, and housing").

discern whether the government actor harbored discriminatory intent when creating the challenged law or state action.[12] Similarly, the Court invokes the plenary power doctrine, in this context, when it either abstains from exercising jurisdiction over a constitutional claim or gives great deference to legislative or executive authority over immigration law.[13] The combination of these two doctrines in particular results in a dilution of constitutional protections for noncitizens.[14]

The Court has applied equal protection guarantees within civil alienage laws—those that pertain to noncitizens within the United States. Yet within immigration law, which dictates who can become and remain a member of the legal and political community within the United States, equal protection is less protective. Simultaneously, immigration regulation has contributed to the making of race.[15] The social construction of race in

12. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–68 (1977); Washington v. Davis, 426 U.S. 229, 239–42 (1976).

13. *See* Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 210 (2003) ("In the United States, plenary power to regulate immigration generally has meant the fervent rejection of *any* limits on the sovereign's power to impose immigration restrictions."); *see also* David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015) (examining the plenary power doctrine's persistence).

14. *See, e.g.*, Fong v. United States, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."); *see also* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 53–74 (1998) (advocating abolishing the plenary doctrine); Kevin R. Johnson, *Federalism and the Disappearing Equal Protection Rights of Immigrants*, 73 WASH. & LEE L. REV. ONLINE 269, 270 (2016) (criticizing "the continuing vitality of the plenary power doctrine" and how it "shields from judicial review invidious classifications under the U.S. immigration laws").

15. *See, e.g.*, NATALIA MOLINA, HOW RACE IS MADE IN AMERICA: IMMIGRATION, CITIZENSHIP, AND THE HISTORICAL POWER OF RACIAL SCRIPTS 11 (Earl Lewis, George Lipsitz, George Sánchez, Dana Takagi, Laura Briggs & Nikhil Pal Singh eds., 2014); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 27 (2014); *see also* Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1, 3 (2002) ("[T]he intellectual foundations of the immigration laws were eugenics and scientific racism."); Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection"*, 40 CONN. L. REV. 931, 943 n.36 (2008) (explaining that racism functions more as a verb than a noun because as speech "it refers to a socially constructed idea or meaning derived from a history of oppression" and refers to "conduct in that it is perpetuated and reinforced through an ongoing process of contemporaneous speech and acts") (citing Kendall Thomas, Nash Professor of L. & Co-Director of the Ctr. for the Study of L. & Culture at Columbia L. Sch., Comments at Panel on Critical Race Theory, Conference on Frontiers of Legal Thought, Duke Law School (Jan. 26, 1990)); David B. Oppenheimer, Swati Prakash & Rachel Burns, *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 BERKELEY LA RAZA L.J. 1, 4 (2016) ("Recognizing the complexity of the social construction of 'otherness'" to analyze "assimilation or integration by immigrant and migrant groups into American society."); Carrie L. Rosenbaum, *Crimmigration—Structural Tools of Settler Colonialism*, 16 OHIO ST. J. CRIM. L. 9, 27 (2018) ("[F]ederal immigration law and policy, criminal and immigration racial profiling jurisprudence, and criminalization of migration have converged to signify new and additional ways to contain and control.").

immigration law has occurred through national origin quotas; racial restrictions on naturalization;[16] exploitive policies influenced by labor needs and capitalism,[17] like the Bracero Program;[18] and mass-deportation programs targeting or disproportionately burdening particular ethnic groups or persons of particular national origins, like the repatriation of Mexican nationals in the 1930s[19] or Operation Wetback in 1954.[20] More recently, other race-neutral immigration policies hide discrimination in colorblind[21] or race-neutral terms, yet reflect a longstanding pattern of discrimination that racialized immigrants receive at the hands of the authorities. Policies that ban immigration from Muslim-majority countries,[22] utilize migrant detention centers on the border to imprison Latinx migrants,[23] terminate programs like Temporary Protected Status

16. *See* HANEY LÓPEZ, *supra* note 8, at 27–28; *see also* Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998) (exploring the United States' history of racial discrimination in immigration policy).

17. *See* Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime: Part I: A New Vision for Workplace Regulation*, 33 N.Y.U. REV. L. & SOC. CHANGE 479, 553 (2009) (observing, in the context of worker protections for immigrant workers, that the "exploitative Bracero Program, under which approximately one million Mexican workers were temporarily admitted into the United States to serve the needs of the agricultural sector, is indicative of the way in which law has tacitly (yet indelibly) framed immigrant labor, particularly Latino immigrant labor, as an expendable") (parenthetical in original).

18. *See generally* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. (Routledge 1992) (criticizing the guest worker Bracero Program); ERNESTO GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY (1964) (critically recounting the Mexican Bracero story).

19. *See generally* FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S (rev. ed. 2006) (discussing the history of "repatriation" during the Great Depression).

20. *See* JUAN RAMON GARCÍA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954, at 139 (1980); *see also* Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 632–33 (1981). World War II created a labor shortage that resulted in a shift in American attitudes toward immigration from Mexico. Thus, at least for a short while, the United States welcomed Mexican nationals with open arms. In fact, a temporary worker program called the Bracero Program was implemented to provide thousands of low-wage workers in the Southwest during this era. *See* Bill Ong Hing, *No Place for Angels: In Reaction to Kevin Johnson*, 2000 U. ILL. L. REV. 559, 601 (2000).

21. John Tehranian, *Playing Cowboys and Iranians: Selective Colorblindness and the Legal Construction of White Geographies*, 86 U. COLO. L. REV. 1, 72 (2015) ("[T]he very same courts that tell us that we have a colorblind Constitution have also held that one's Latino appearance is a relevant factor in determining reasonable suspicion for an immigration sweep, one's Middle-Eastern heritage is a perfectly suitable consideration when ascertaining whether transportation of a passenger is 'inimical to safety,' and one's African-American descent can serve as an acceptable indicia of criminality without running afoul of the Fourth Amendment.").

22. *See* Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017); Exec. Order No. 13,780, 3 C.F.R. § 301 (2018); Exec. Order No. 13,769, 3 C.F.R. § 272 (2018).

23. *See generally* César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 245–46 (2017) (arguing for abolition of immigration prisons, the majority of which are filled with Latinos); Sarah Sherman-Stokes, *Reparations for Central American Refugees*, 96 DENV. L. REV. 585 (2019) (arguing for reparations in the form of humanitarian asylum, an expansion

(TPS),[24] and rescind Deferred Action for Childhood Arrivals (DACA) are examples of recent immigration policies that contribute to racialization.[25]

Through the use of national origin as a race-neutral and colorblind proxy, the Trump Administration's "[c]olorblind [r]epatriation of Latinx [n]oncitizens," including border jails,[26] will impact Latinx families in the United States long after Trump's presidency.[27] Just as the "criminal process exacerbates the stereotype of black criminality that has suppressed African American civic authority for over a century,"[28] the caging of migrants seeking protection exacerbates the racialized stereotype of Latinx illegality.[29] The system perpetuates the civic disenfranchisement that

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of TPS, and litigation in response to historic oppression and mistreatment of Central American asylum seekers including in response to family separation policies and imprisonment in border jails); Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L.J. 118 (2018) [hereinafter Rosenbaum, *Immigration Law's Due Process Deficit*].

24. *See* Termination of the Designation of Honduras for Temporary Protected Status, 83 Fed. Reg. 26,074 (June 5, 2018); Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2,648 (Jan. 18, 2018); Termination of the Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg. 59,636 (Dec. 15, 2017). The administration also ended TPS for citizens of Sudan but extended it to natives of South Sudan. *See* Termination of the Designation of Sudan for Temporary Protected Status, 82 Fed Reg. 47,228 (Oct. 11, 2017); Extension of South Sudan for Temporary Protected Status, 82 Fed. Reg. 44,205 (Sept. 21, 2017).

25. *See* Kevin R. Johnson, *Trump's Latinx Repatriation*, 66 UCLA L. REV. 1442, 1497 (2019) (ominously warning that "the new Latinx" is different from the 1930s and 1954 era ones in that the new version "institutionalize[s] the racial impacts of immigration enforcement through race-neutral means" and "will affect many thousands more noncitizens than the repatriation and Operation Wetback").

26. *See id.*

27. SARAH PIERCE, JESSICA BOLTER & ANDREW SELEE, MIGRATION POL'Y INST., U.S. IMMIGRATION POLICY UNDER TRUMP: DEEP CHANGES AND LASTING IMPACTS 15 (2018) https://www.migrationpolicy.org/sites/default/files/publications/TCMTrumpSpring2018-FINAL.pdf [https://perma.cc/3SG9-CQXN]
("No administration in modern U.S. history has placed such a high priority on immigration policy or had an almost exclusive focus on restricting immigration flows, legal and unauthorized alike. This, in and of itself, marks a major departure in how immigration is discussed and managed . . . [, and] over time . . . could reshape U.S. immigration policy significantly[.]").

28. ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 167 (2018).

29. *See* Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding "Sanctuary Cities"*, 59 B.C. L. REV. 1703, 1721 n.76 (2018) ("Leo Chavez has argued that this immigrant 'threat narrative' was constructed and replenished over the course of a century.") (citing Leo R. Chavez, *"Illegality" Across Generations: Public Discourse and the Children of Undocumented Immigrants*, *in* CONSTRUCTING IMMIGRANT "ILLEGALITY": CRITIQUES, EXPERIENCES, AND RESPONSES 84, 86 (Cecilia Menjívar & Daniel Kanstroom eds., 2014)); *see also id.* (explaining that the threat narrative "posits that Latinos, led by Mexicans and Mexican Americans, are unwilling to integrate socially, unwilling to learn English and U.S. culture, and preparing for a take over [of] the Southwest of the United States"); Rosenbaum, *supra* note 16, at 41 ("The narratives of crimmigration and chain migration demonstrate a simple truth—there is no good immigrant, because there is always a narrative that deems a racialized immigrant of color as unassimilable, which necessitates or predestines exclusion or deportation."); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76

marks the alien citizen experience well after migrants gain formal membership.[30]

The Court's recent equal protection jurisprudence in immigration cases[31] represents the interplay of plenary power and the intent doctrine as overlapping and mutually reinforcing mechanisms enabling racial discrimination.[32] But even without plenary power, the intent doctrine necessitates reimagining immigration equal protection claims to receive serious consideration.[33] The current guidelines for identifying discriminatory intent, established by the Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, has facilitated a narrow reading of the evidentiary record—particularly, the disparate impact and historical background factors.[34] The problem was not so much the Court's framework, but rather, its application, or lack thereof, including in *Arlington*. Without meaningful review of these factors to prove discriminatory intent, in combination with plenary power, equal protection challenges to facially neutral laws—laws that do not

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OHIO ST. L.J. 599, 599 (2015) (discussing how "restructuring social categories, diminishing economic and political power" has perpetuated the marginalization of the Latino population).

30. NGAI, *supra* note 15, at 2.

31. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (striking down Equal Protection challenge to former President Trump's rescission of the Deferred Action for Childhood Arrivals (DACA) program); Trump v. Hawaii, 138 S. Ct. 2392 (2017) (upholding the travel ban which impacted primarily Muslim-majority countries).

32. As I explained in a previous essay,

> The Supreme Court's recent ruling in *Department of Homeland Security (DHS) v. Regents* exposes the equal protection doctrine's failure to reach one of the most entrenched systems of racial oppression in the United States—immigration law. The *Regents* Court considered the lawfulness of the Trump [A]dministration's criticized Deferred Action for Childhood Arrivals (DACA) rescission. Former Department of Homeland Security Secretary Janet Napolitano announced the DACA program on June 15, 2012, and it allowed DHS to exercise discretion to defer removal of young noncitizens who met specific, and rigorous, criteria to qualify for the program. By the time of the rescission, DHS had granted deferred action to over 800,000 individuals. The rescission was effectuated via a facially race-neutral government action but with a documented disparate impact on Latinos and surrounded by anti-Latino rhetoric. When a state action does not purport to discriminate overtly on the basis of race, the Court analyzes equal protection claims via the intent doctrine, or by looking at the intent of the lawmaker. In *Regents*, in spite of considerable evidence of discriminatory intent—disparate impact and discriminatory rhetoric—the Court dismissed the equal protection challenge, instead invalidating the policy on Administrative Procedure Act [] grounds. The Court sidestepped equal protection scrutiny through an unsatisfying combination of "plenary power," a doctrine that grants great legal deference to the political branch, and the intent doctrine, which also ultimately affords great deference to the government actor accused of discrimination.

Carrie L. Rosenbaum, *(Un)Equal Immigration Protection*, 50 SW. L. REV. 231, 232–33 (2021) (internal citations omitted).

33. *See generally* Carrie L. Rosenbaum, *The Role of Equality Principles in Preemption Analysis of Sub-Federal Immigration Laws: The California TRUST Act*, 18 CHAP. L. REV. 481 (2015) (describing the limitations of equal protection in crimmigration enforcement).

34. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977).

discriminate on their face but burden a disfavored minority or group in their impact—face a double barrier.

This Article contributes to immigration equal protection jurisprudential discussions by exploring how equal protection could better protect immigrants.[35] First, it briefly explains the origins of the equal protection intent doctrine and its existing state, which are relevant to challenges to facially neutral government action with discriminatory impact. Second, it highlights the intent doctrine's shortcomings as well as the role of the plenary power doctrine in immigration constitutional law cases. Third, after establishing these frameworks, this Article discusses a crimmigration statute[36]—8 U.S.C. § 1325, which criminalizes illegal entry—to consider how a court might approach a hypothetical immigration detention equal protection claim.[37] In doing so, this Article articulates ways in which the existing doctrine could be interpreted to better align with equality principles. Fourth, this Article explores a hypothetical challenge to immigration imprisonment at the United States–Mexico border to underscore the fundamental limitations of the doctrine. Fifth, and finally, this Article ends with preliminary considerations that would increase the likelihood that the hypothetical challenge would be validated. It also includes a short discussion of how critical race theorist Derrick Bell's concept of interest convergence applies to immigration equal protection challenges at least as well as it did in Bell's original one:

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35. *See* Jenny-Brooke Condon, *Equal Protection Exceptionalism*, 69 RUTGERS U. L. REV. 563 (2017); Chin, *supra* note 14; Johnson, *supra* note 14.

36. A "crimmigration statute" describes a federal law at the intersection of criminal and immigration law. Since Juliet Stumpf coined the term "crimmigration" in 2006, scholars have created a vast body of work on the subject interrogating the significance of the relationship between criminal and immigration law, particularly with respect to individual rights. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006). *See, e.g.*, Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. L. REV. 709, 710 (2015) (using a framework of "legal liminality" to encourage "crimmigration scholarship" to examine "its deeper theoretical grounding in membership theory" and engage in more "discussion of the role that race, class, and place play in structuring governance strategies"); *see also* César Cuauhtémoc García Hernández, *Crimmigration Realities & Possibilities*, 16 OHIO ST. J. CRIM. L. 1, 2 (2018) (symposium commemorating crimmigration law's origins and "crimmigration law's intellectual contribution"); Rosenbaum, *Immigration Law's Due Process Deficit*, *supra* note 24, at 120 (due process in crimmigration detention).

37. This exercise will demonstrate the failure of equal protection, particularly in immigration law. At the same time, it reinforces calls for deeper systemic change in line with recent advocacy. *See* Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/89BB-KJ9J]; Elaine Godfrey, *What 'Abolish ICE' Actually Means*, THE ATLANTIC (July 11, 2018), https://www.theatlantic.com/politics/archive/2018/07/what-abolish-ice-actually-means/564752/ [https://perma.cc/76YR-S4YN]. Even short of systemic change, by examining some of the complex history of equal protection challenges to facially neutral discriminatory laws, it will demonstrate the ways in which the law used to be more effective, and how it could be, once again.

the Cold War with Russia. This discussion shows how enhancing equal protection review in immigration asylum and detention cases is desirable—and feasible—doctrinally. Ending cruelty at our border will also help the United States demonstrate adherence to democratic values and exhibit the kind of moral authority that has historically played a role in domestic and international politics.[38]

I. EQUAL PROTECTION INTENT DOCTRINE

An equal protection challenge to a facially neutral law with discriminatory impact hinges on the intent doctrine. Even without the exceptionalism of immigration law, disparate impact challenges to criminal or civil laws are put through a rigorous and muddled test that has evolved over the past five decades.[39] Critics contend that, while there were moments where the pre-1970s intent doctrine held promise for racial justice, it has evolved to undermine protection of racial minorities from government harm.[40]

The analytic elements established by the *Arlington* Court that dominate the analysis of such claims have potential to both better unpack

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38. Derrick A. Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (arguing that the Supreme Court's decision on desegregation was motivated in part by international affairs, the United States' Cold War strategy, and the significance of the United States being perceived as having moral authority and a laudable democracy); Robert S. Chang, *Centering the Immigrant in the Inter/National Imagination (Part III): Aoki, Rawls, and Immigration*, 90 OR. L. REV. 1319, 1326–27 (2012) (describing the way in which foreign policy influenced immigration law in the context of World War II and the 1943 legislation finally allowing Chinese nationals to become U.S. citizens) (first citing Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN L. REV. 61 (1988); then citing RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 377 (1989); then citing Neil Gotanda, *Towards Repeal of Asian Exclusion*, *in* ASIAN AMERICANS AND CONGRESS: A DOCUMENTARY HISTORY 309 (Hyung-chan Kim ed., 1996); and then citing John Hayakawa Torok, *"Interest Convergence" and the Liberalization of Discriminatory Immigration and Naturalization Laws Affecting Asians, 1943–1965*, *in* CHINESE AMERICA: HISTORY & PERSPECTIVES 1 (Marlon K. Hom et al. eds., 1995).); *see also* Sudha Setty, *National Security Interest Convergence*, 4 HARV. NAT'L SEC. J. 185, 187 (2012) (bringing interest convergence theory into the post 9/11 context and proposing ways the nation's interest could be served in the international arena by addressing rights and cross-ideological coalitions domestically).

39. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Loving v. Virginia, 388 U.S. 1 (1967); Palmer v. Thompson, 403 U.S. 217 (1971); Washington v. Davis, 426 U.S. 229 (1976); Obergefell v. Hodges, 576 U.S. 644 (2015).

40. *See* Mario L. Barnes & Erwin Chemerinsky, *What Can* Brown *Do for You?: Addressing* McCleskey v. Kemp *as a Flawed Standard for Measuring the Constitutionally Significant Risk of Race Bias*, 112 NW. U. L. REV. 1293, 1306 (2018); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1277–80 (1997); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 967–72 (1989); *see also* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 703–04 (2006) (describing the liberal scholarly perspective on *Davis*); K.G. Jan Pillai, *Shrinking Domain of Invidious Intent*, 9 WM. & MARY BILL RTS. J. 525, 531 (2001) ("[T]he invidious intent doctrine is hopelessly adrift, having no certainty in meaning or consistency in application.").

the machinations of institutionalized discrimination and advance equality goals. One recent district court opinion demonstrated the potential of the *Arlington* framework.[41] However, each jurist's power to continually disregard this possibility suggests the importance of an analysis that can explore deeper questions of remedies to historically systematized inequality.[42]

The level of scrutiny triggered in an equal protection challenge—strict, intermediate, or rational basis—is largely determinative of the outcome.[43] When a law does not facially target a suspect classification, such as national origin or race, heightened scrutiny does not apply. Thus, a facially neutral law is only invalidated by establishing a discriminatory purpose, or intent, on the part of the government.[44]

As the equal protection doctrine evolved, state actors adapted to avoid strict scrutiny by discriminating by proxy.[45] Discrimination by proxy can occur when instead of naming a suspect classification, like "Mexican nationals" (national origin), "Latinos" (race), "Muslims" (religion), or immigration status (alienage), a law or state action uses the Spanish language or another neutral feature to target the group in question.[46] There was a time where the intent doctrine allowed the Court to uncover covert classifications so they might not evade more rigorous examination,[47] such as discrimination that is not effectuated via a designated protected class but instead by proxy.

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41. United States v. Rios-Montano, No. 19-CR-2123-GPC, 2020 WL 7226441, at *7–8 (S.D. Cal. Dec. 8, 2020); *see* discussion *infra* Section II.B.

42. *See infra* Section V. I intend to expand on this idea in a subsequent article.

43. When the Court applies strict scrutiny, the government faces a higher likelihood of losing because its action receives the least degree of deference. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273–74 (2007).

44. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).

45. *See* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1118 (1989) ("After the Court made clear that racial and some other sensitive classifications would receive heightened scrutiny, however, governments tried to circumvent equal protection by discriminating by proxy."); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 172 (2016) ("[S]trict scrutiny rarely benefits people of color because modern racial discrimination does not rely on overt racial classifications to do its dirty work.").

46. *See, e.g.*, Kevin R. Johnson & George A. Martinez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1230 (2000) (arguing that California Proposition 227 constituted unlawful racial anti-Latinx discrimination by proxy of language).

47. See Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1, 1 (2016), for a discussion on the intent doctrine's history and "the realignment of Equal Protection doctrine away from racial justice aims."

The intent doctrine is described as having progressive, anti-racist origins.[48] However, it evolved in a way that masks proxy discrimination because the party challenging the law must prove improper motivation or "malicious intent," yet Justices are not necessarily demonstrating commitment to uncovering discriminatory motivation or "mindsets."[49] The requirement of discriminatory intent evolved to foster hyper deference to government action, treating legislative decisions as void of discriminatory intent where a race-neutral proxy stands in for what would have been a suspect class. To prove improper motivation, the challenging party must show that race was a motivating factor, and that the state could not have reached the same result in another nondiscriminatory manner.[50]

Before the late 1970s, the Court considered intent as "a broadly informed inferential approach that focused on motives only in the loosest sense (and sometimes not at all)" and focused on discriminatory effects.[51] Prior to the mid-1970s, a facially neutral government action could violate equal protection, and a government actor's intent was potentially "irrelevant if the circumstances as a whole and discriminatory impact suggested an equal protection violation."[52]

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48. Professor Eyer explains,

> It would no doubt [be a] surprise . . . to hear [the] *intent doctrine* described as one of the major racial justice victories of the *Brown v. Board of Education* era . . . . Understanding this progressive history of intent doctrine has important implications. There are strong reasons to believe that these early progressive struggles to establish intent-based invalidation helped facilitate the 1970s-era conservative turn in intent doctrine that progressive scholars today decry. Thus, although the normative valence of intent doctrine shifted from progressive to conservative in the early to mid-1970s, progressive and moderate Justices on the Court were slow to realign their own doctrinal preferences. As a result, the Court's progressive wing rarely resisted—and at times aided—the conservative doctrinal developments of the mid- to late 1970s.

Id.

49. Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1858 (2012) (suggesting that "malicious intent disguised . . . the consolidation of a majority of Justices disposed to find no discrimination against non-Whites" and in fact the "exhortations to prove malice were never about calling for evidence of illicit motives," but instead were indicative of a preference for "excluding contextual proof of continued discrimination" and, this author suggests, facilitating proxy discrimination); Eyer, *supra* note 48, at 34, 47 (describing this transition as a "[d]rift [t]owards [i]ntent-[m]andatory [e]qual [p]rotection," with the Court's "race liberals" choosing the intent over effects methodology as indicated by their decision in *Keyes v. Denver School District No. 1*).

50. Ortiz, *supra* note 46 ("But by asking . . . whether the same result 'could' have, rather than 'would' have, been reached, the Court seriously subverts the overall process.").

51. Haney-López, *supra* note 50, at 1785; *see, e.g.*, Palmer v. Thompson, 403 U.S. 217, 225 (1971).

52. Rosenbaum, *supra* note 33, at 239; Haney-López, *supra* note50, at 1789 (characterizing intent in the Court's "racial jurisprudence" through about 1977 as a consideration of the circumstances as a whole—an example being pervasive Jim Crow practices negating the need to examine the intent of the specific government decisionmakers responsible for a challenged state action); *see also Palmer*, 403 U.S. at 225.

A. The Shift in Intent Jurisprudence

Equal protection challenges to facially neutral laws shifted away from protectiveness over the course of the 1970s and 1980s.[53] In the shift from situational scrutiny of racially discriminatory intent or "effects-based invalidation,"[54] the Court determined it could not and should not speculate the lawmaker's motivation (or intent).[55] The Court reasoned that such a consideration was futile because the purpose motivating a government actor's legislative action is highly subjective, making it hard to discern,[56] and legislators could usually find a way to reimplement the legislation without evidence of the alleged invidious intent.[57] Yet the Court moved towards rejecting the possibility that a government action and its impact could produce anticipated outcomes that were reasonably intended.[58]

By 1976, the Supreme Court foreclosed recognition of structural inequality by circumscribing intent in *Washington v. Davis*.[59] After *Washington*, implicit consideration of motives behind a government action was no longer a part of the equal protection analysis and racial impact alone was insufficient to show a discriminatory purpose.[60] A year later, the

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53. Before the intent doctrine, the Court only looked for express discrimination on the face of a law whereas the intent doctrine originally evolved to create a path to invalidate state action that was implicitly discriminatory, before then shifting away from being a check on implicit discrimination. *See* Eyer, *supra* note48, at 1 ("[T]he normative valence of intent doctrine shifted from progressive to conservative in the early to mid-1970s."); *see also id.* at 16 ("Faced with the reality of the laws' segregationist aims—and their apparently indefinite effectiveness in forestalling integration—a small number of judges began to look behind the text of facially neutral laws to invalidate them based on intent.").

54. *See id.* at 48–50.

55. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

56. *See* McGinnis v. Royster, 410 U.S. 263, 276–77 (1973) ("The search for legislative purpose is often elusive. . . . Legislation is frequently multipurposed."); *Arlington*, 429 U.S. at 265 ("Rarely can it be said that a legislature . . . operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations the courts refrain from reviewing the merits of their decisions[.]").

57. *See, e.g.*, *Palmer*, 403 U.S. at 225.

58. *E.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 210–11 (1973).

59. Washington v. Davis, 426 U.S. 229, 239–42 (1976).

60. *See* Haney-López, *supra* note 50, at 1785 (describing *Davis* as "the source of today's failed doctrine, insofar as it required direct proof regarding the minds of government actors"). Post-*Davis*, the intent doctrine was also stymied in part by the Court's bifurcation of the intent inquiry into a two-part test. First the Court considers whether a preponderance of the evidence indicates that race was a motivating factor, and the inquiry can end there. If a preponderance of the evidence does show that race was a motivating factor, the equal protection claim can still be defeated when the Court subsequently considers whether the state would be able to show that it would have reached the same result anyway. *See* Ortiz, *supra* note 46,. If a plaintiff cannot show discriminatory purpose, the government is not required to offer a "racially neutral explanation" for "unequal effects" and a challenged government action does not receive scrutiny beyond the rational basis test. Barnes &

Court affirmed this foreclosure in *Arlington*: an "official action" would not be "held unconstitutional solely because it results in a racially disproportionate impact."[61] The Court emphasized that only proof that discriminatory purpose was a motivating factor would eliminate judicial deference.[62] The *Arlington* ruling embodies the evolution of the modern intent doctrine and is the primary test today.

The *Arlington* Court did not explicitly spell out or mandate a particular test, but instead provided that discriminatory motivation could be proven by objective factors. These factors include "[t]he historical background of the [governmental actor's] decision . . . , particularly if it reveals a series of official actions taken for invidious purposes."[63] Other factors might include departures from normal procedures, legislative and administrative history, contemporary statements by members of the decision-making body, and a specific series of events leading up to the challenged action.[64]

The factors frequently result in narrow review of an evidentiary record and are blind to institutionalized racism, particularly of the sort of endemic to immigration law.[65] Additionally, subsequent decisions further narrowed consideration of discriminatory purpose. This includes the malicious–intent requirement from the *Personal Administrator of Massachusetts v. Feeney* decision, which made direct proof of injurious

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Chemerinksy, *supra* note 41, at 1301. Pursuant to this test, the Court will validate a discriminatory government action if it determines that it is rationally related to a legitimate government interest. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018). However, even in a discriminatory impact case, the Court can apply strict scrutiny to a facially neutral law. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222 (1985); *Davis*, 426 U.S. at 242. "Beyond . . . legitimating a simplistic conception of racism, *Davis* set back equal protection along two other dimensions: (1) in adopting a rigid on-off approach to heightened review and (2) in closing off the possibility of responding to structural inequality." Haney-López, *supra* note 50, at 1812 (italics added); *see also* Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 747 (1994) (explaining that critical race theorists critiqued not just the Court's faulty decision, but "the understanding of racism on which that test is based"); Lawrence*, supra* note16, at 944 (noting that if equality was the goal, *Davis*' flaw was its "motive-centered inquiry" because it required "that we identify a perpetrator, a bad guy wearing a white sheet and hood").

61. *Arlington*, 429 U.S. at 259, 264–65 (finding that it was not enough that the "ultimate effect" of a policy was racially discriminatory; proof of government or state actor "discriminatory intent" was required). The Supreme Court uniformly rejected the Seventh Circuit's approach, effectively using a recklessness standard and "faulting it for disregarding known racially segregationist effects." Eyer, *supra* note 48, at 57.

62. *Arlington*, 429 U.S. at 266.

63. *Id.* at 267.

64. *See, e.g.*, *id.* at 266–68.

65. Before *Arlington*, in response to *Plessy v. Ferguson*, there was a limited time where the Court embraced jurisprudence looking "behind the text of facially neutral laws to invalidate them based on intent" in a manner much more expansive than what would become the *Arlington* factors. Eyer, *supra* note 48, at 16.

motives a prerequisite and eliminated relevance of situational evidence.[66] And, any nondiscriminatory, legitimate government purpose insulates the government act from an equal protection challenge. Requiring proof that government actors harbored "malicious intent" became a technique for not finding discrimination.[67]

The Court's narrow review of the evidentiary record along with the newly adopted malicious intent standard is largely responsible for the outcome in *McCleskey v. Kemp*. Following *McCleskey*, showing discriminatory purpose requires "proof that the government desired to discriminate;" therefore, proof that the government acted with knowledge of its discriminatory consequences does not suffice.[68] Most notably, the *McCleskey* Court rejected the notion that historical evidence and statistical data of discriminatory impact, even combined, could evince malicious intent.[69]

McCleskey stemmed from an equal protection challenge in criminal law, where racial bias or disparity is particularly visible as it is in immigration law.[70] Nonetheless, contrary to the logic of the *Arlington* Court's implications, the *McCleskey* Court ignored the significance of the history of slavery, racial oppression, and their relationship with the criminal justice system, and declared that *historical evidence did not prove current intent*.[71]

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66. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 & n.25 (1979) ("[T]he inevitability or foreseeability of consequences of a neutral rule" might, but need not, have bearing upon the existence of a discriminatory intent). The *Feeney* Court required proof of the government action evincing an "illegitimate purpose," conscious antipathy, or malice to find intent. *Id.* at 264; *see also* Haney-López, *supra* note 50, at 1833 (elaborating on how the Court also rejected the notion that a person intends the natural and foreseeable consequences of voluntary actions) (citing Siegel, *supra* note 41, at 1135).

67. Mario L. Barnes and Erwin Chemerinsky contend that the Court's requirement of proving discriminatory purpose or intent for the past four decades misapprehends the reason for and purpose of the Constitution's guarantee of equal protection as far as preventing the government from "act[ing] in a manner that harms racial minorities, regardless of why it took the action." Barnes & Chemerinksy, *supra* note 41, at 1302.

68. Barnes & Chemerinksy, *supra* note 41; *see* Reva B. Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in* McCleskey v. Kemp*—and Some Pathways for Change*, 112 NW. U. L. REV. 1269, 1269 (2018) (critiquing *McCleskey*'s stance on statistical evidence, contending that "[t]hree decades of living with *McCleskey* teaches that it is important to design remedies for bias in the criminal justice system that do not depend solely on judges for their implementation").

69. McCleskey v. Kemp, 481 U.S. 279, 296–97 (1987).

70. It is visible particularly with respect to the ethnic or racial composition of criminal and immigration prisons.

71. *See id.* at 298 n.20. In Justice Brennan's dissent, he considered the significance of the history of slavery and racial oppression and their relationship to the criminal justice system. *See id.* at 329 (Brennan, J., dissenting) ("For many years, Georgia operated openly and formally precisely the type of dual system the evidence shows is still effectively in place. The criminal law expressly differentiated

This new standard from *Arlington* and its progeny became nearly impenetrable; it states a need for "real evidence" of discriminatory intent but declines to do the work to decode mental states or grapple with historical background evidence or contemporary statements of decision-making bodies.[72] By the time lawmakers learned to cleanse government acts of racial or other classifications based on protected status, the Court already adopted an interpretation of the intent doctrine that evaded intent detection when it was not explicit in the government action.[73] Even as social science research on implicit bias has flourished and legal scholars and advocates engaged with it,[74] the Court generally does not consider the "actual motives of today's government officials" or use the tools at its disposal to consider the role of implicit bias.[75] This line of cases exposes an "ideological drift" away from the brief period of effects-based invalidation.[76]

B. The Arlington *Factors in Recent Crimmigration Jurisprudence*

In immigration law, like in criminal law, much is at stake for individuals experiencing disparate impact of an implicitly discriminatory

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between crimes committed by and against blacks and whites, distinctions whose lineage traced back to the time of slavery.").

72. *See* Haney-López, *supra* note 50, at 1787–88.

73. As an example, Katie Eyer describes the shift after *Brown v. Board of Education* where Southern legislators found race-neutral ways to achieve the same results struck down as unequal. Eyer, *supra* note 48, at 12 n.44 ("Many states adopted both facially neutral and facially discriminatory measures in resistance to *Brown*, often within a single package of legislation.") The practice persists today, particularly in light of colorblind racism. *See* Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being "Out of Place" from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1119–20 (2017)
(explaining how "strategies, practices, and tactics for protecting whiteness and its attendant advantages and benefits have shifted from explicit actions in thwarting, punishing, and even violently resisting challenges to black racial subordination and white authority to ostensibly 'race-neutral' actions that . . . legal scholar Ian Haney López calls 'commonsense racism,' and that sustain a form of rationalizing racial inequities and injustices that sociologist Eduardo Bonilla-Silva refers to as 'colorblind racism') (internal citations omitted); EDUARDO BONILLA-SILVA, COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 2 (4th ed. 2014); *see also* Charles M. Blow, Opinion, *Poverty as a Proxy for Race in Voter Suppression*, N.Y. TIMES (Mar. 17, 2021), https://www.nytimes.com/2021/03/17/opinion/republican-voter-suppression.html [https://perma.cc/B72A-2E6D].

74. *See, e.g.*, JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO (2019).

75. Haney-López, *supra* note 50, at 1856, 1877 n.339; *see also* Gayle Binion, *"Intent" and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397, 441–42 ("Because it must be shown that the decisionmakers were motivated by that which they deny, the plaintiffs must prove them to be liars."); Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1231 (2018). ("[W]hile the idea of 'discriminatory intent' has served since 1976 as an organizing principle in Equal Protection jurisprudence, the Court has not hewed to a clear and specific understanding of such 'intent,' or a single understanding of how it is to be proved.").

76. *See generally* Eyer, *supra* note48.

law.[77] The pattern of racial profiling and racially disproportionate impacts persists, as does the limited viability of equal protection challenges to facially neutral practices. *Arlington* can be, and has been, applied to examine whether a facially neutral criminal immigration law violates equal protection.[78]

In the United States District Court for the Southern District of California decision, *United States v. Rios-Montano*, the court examined historical evidence of racially discriminatory intent using the *Arlington* framework to evaluate an equal protection challenge to a crimmigration statute, 8 U.S.C. § 1325, criminalizing illegal entry.[79] The *Rios-Montano* decision provides insight into how an equal protection claim could be adjudicated in a challenge to the immigration statute analyzed in Part IV.[80]

The *Rios-Montano* court rejected the government's plenary power argument, stating "the federal government's plenary power over immigration matters does not provide it license to enact racially discriminatory statutes in violation of the equal protection guarantee of the Fifth Amendment."[81] Specifically, the court declared the statute was "not insulated from scrutiny[,]" noting that the crimmigration statute was facially race-neutral.[82] The court determined that Rios-Montano had demonstrated disparate impact.[83]

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77. *See* Ian F. Haney-López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1036 (2010) ("[F]ighting crime became a seemingly 'obvious' framework for responding to social problems," including immigration without authorization.); *see also* Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. L. REV. 257, 298 (2017) (dissecting the problems with "earned citizenship" and "reinforce[ing] the immigrant-as-criminal narrative that restrictionists so regularly invoke."). *See generally* Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 207 (2012) (exploring "the polarized narratives told about 'good' and 'bad' immigrants" and proposing challenging "broader societal narratives" in advocacy efforts); Luna Martinez G. & Kiki Tapiero, Essay, *Prax-Is in Action: A Resistance Toolkit for Family Separations at the Border*, 29 BERKELEY LA RAZA L.J. 51, 55–56 (2019) (discussing immigrant as criminal in the context of advancing a praxis-based approach to address family separations at the border).

78. *See, e.g.*, United States v. Rios-Montano, No. 19-CR-2123-GPC, 2020 WL 7226441, at *1 (S.D. Cal. Dec. 8, 2020).

79. *See id.*

80. *Rios-Montano* and the hypothetical claim I lay out in Part IV both concern claims by Mexican and Latinx individuals with respect to prosecution at the border; the *Rios-Montano* statute criminalizes illegal entry, whereas the immigration statute that will be examined below addresses immigration detention at the border, presumably to deter migration. Similarly, prosecution for illegal entry is meant to deter migration.

81. *Id.* at *2.

82. *Id.*

83. *Id.* at *1–2, *8. Pursuant to *Washington v. Davis* disparate impact under *Arlington*, the court specifically noted that it did not require a showing that a law both had a discriminatory purpose and was *also* not neutrally applied. *Id.* at *7 (citing Washington v. Davis, 426 U.S. 229, 242 (1976)). The *Rios-Montano* court suggested that the disparate impact in *Arlington* was comparable to the disparate

However, after the court looked at the statute's historical background, it determined that it had to consider Congress' intent in passing the statute's current iteration (from 1990, not the 1929 original), which had been purged of its discriminatory intent.[84] Relying on an affidavit of an immigration historian, the court examined the historical context of the 1929 congressmembers' motivation to criminalize unlawful entry, which showed that they were motivated "at least in part, because of their endorsement of eugenics and opposition to the 'Mexican race.'[85] In disavowing a connection between the earlier statute and its reenactment, the court refused to grapple with the deeply entrenched roots of racist and racializing crimmigration harm.

Indicative of the challenges of parsing legislative history for discriminatory intent, the *Rios-Montano* court said that the 1990 law evinced a "180-degree turn away from the racist tropes that accompanied the enactment of the 1929 immigration law."[86] In finding the current version lacked discriminatory intent, the court outlined the diverse, bipartisan supporters of the bill; the lack of overt racism; and the endorsements of the 1990 law by civil rights groups.[87] However, the *Arlington* Court never mandated this analysis of assessing whether express racial bias surrounding an earlier iteration of a law or government act had been purged. Relying on the *Arlington* factors, the *Rios-Montano* court could have found that the related history of bias was enough.

Politics makes strange bedfellows (as the saying goes), which adds to the complicated nature of understanding and pinpointing evidence of discriminatory intent. In the case of *Rios-Montano*, an endorsement of a broad, sweeping statute by reputedly progressive organizations was considered evidence that the law lacked implicit bias.[88] The legislative process is so complex and obscure that attempting to interpret legislative intent is futile.[89] While it may be true that the competing policy

impact of 8 U.S.C. § 1325 on Mexicans and Latinx individuals apprehended at the border. *Id.* at *7–8.

84. *Id.* at *5–8.

85. *Id.* at *3.

86. *Id.* at *5.

87. *Id.* at *5–7.

88. The court may have attributed meaning to the endorsements that was not there or was inaccurate. It is possible that the endorsements were a result of political compromise to avoid a less desirable outcome, perhaps having nothing to do with race. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003) ("[L]egislative preferences do not pass unfiltered into legislation; they are distilled through a carefully designed process that requires legislation to clear several distinct institutions, numerous veto gates, the threat of a Senate filibuster, and countless other procedural devices that temper unchecked majoritarianism. . . . [P]recise lines drawn by any statute may reflect unrecorded compromises among interest groups, unknowable strategic behavior, or even an implicit legislative decision to forgo costly bargaining over greater textual precision.").

89. *Id.*

preferences of advocacy organizations and interest groups can result in compromises that "form rational, beneficial legislative outcomes," such outcomes may still reflect systemic bias.[90] While the *Rios-Montano* court engaged in a somewhat expansive view of the legislative history, it put too much, or the wrong kind of, emphasis on certain aspects of that history.

Outside of the equal protection context, the Court has more effectively grappled with the role of race. In *Ramos v. Louisiana*, a criminal jury trial case, Justice Sotomayor employed aspects of the *Arlington* equal protection intent analysis when considering a Sixth Amendment challenge to Louisiana's racially face-neutral statute requiring two juror votes to acquit and prevent a criminal conviction.[91] The Court considered the history of discriminatory intent in the creation of the statute,[92] and ultimately struck down the jury rules because of their racist origins.[93] However, Justice Sotomayor highlighted the importance of avoiding too narrow of an approach to historical evidence of bias and presenting too low of a bar for assessing whether a law lacks racially discriminatory motive. Justice Sotomayor proposed a potential additional hurdle: "[P]erhaps also where a legislature actually confronts a law's tawdry past in reenacting it —the new law may well be free of discriminatory taint."[94] Perhaps eliminating the stain of the racialized past should require consideration of how it manifests now via structural racism, and should require affirmative action not just symbolically, but to move towards equality.[95]

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90. John David Ohlendorf, *Textualism and Obstacle Preemption*, 47 GA. L. REV. 369, 380 (2013).

91. Ramos v. Louisiana, 140 S. Ct. 1390, 1408–10 (2020) (Sotomayor, J., concurring). ("Although Ramos does not bring an equal protection challenge, the history is worthy of this Court's attention.").

92. *Id.* at 1394 (majority opinion).

93. The Louisiana law's origins were an 1898 constitutional convention, where the state endorsed unanimous verdicts, and a committee chairman stated that the intention of the convention was to "establish the supremacy of the white race." *Id.* Convention delegates were savvy enough to hide their overt racism in documents produced by the convention and "sculpted a 'facially race-neutral'" rule. *Id.* Oregon's law had come about in a similar manner and was "traced to the rise of the Ku Klux Klan and efforts to dilute 'the influence of racial, ethnic, and religious minorities on Oregon juries.'" *Id.* (citation omitted). The Court expressed confusion as to why laws with origins in white supremacy and racism still existed. *Id.* In deeming the law unconstitutional, the majority disagreed with Justice Alito's dissenting argument that both states subsequent recodification without referencing race was sufficient to cure the laws original animus and the Court had to consider "the very functions those rules were adopted to serve." *Id.* at 1440 n.44.

94. *Id.* at 1410 (Sotomayor, J., concurring).

95. *Id.* (emphasizing the need to recognize racialized history where "the States' legislatures never truly grappled with the laws' sordid history in reenacting them" and explaining that policies "'traceable' to a State's *de jure* racial segregation . . . still 'have discriminatory effects' [that] offend the Equal Protection Clause" (citing United States v. Fordice, 505 U.S. 717, 729 (1992))).

There have been glimmers of movement towards more complex analyses of the historic role of race in invalidating statutes on equal protection grounds. In *Hunter v. Underwood*, the Court relied on *Arlington* and considered evidence of historical background to strike down a facially neutral provision in Alabama's state constitution restricting voting.[96] Relying on historian testimony and historical academic literature, the Court found that racial discriminatory purpose "was a 'but-for' motivation" for the law's original enactment.[97] While *Hunter* is largely an anomaly, it is a reminder of what the intent doctrine could do if the evidentiary record received relevant weight.[98]

Even without setting foot into the realm of immigration exceptionalism, the current equal protection intent doctrine has shortcomings, though there are signs of potential improvement.[99] Tracing equal protection challenges to facially neutral laws may be instructive in hypothesizing how a court might analyze an equal protection challenge to an immigration law that uses incarceration to deter migration from Mexico and Central America.

II. IMMIGRATION UNEQUAL PROTECTION

While it began overtly, "the racial history of immigration policy has become institutionalized so that seemingly neutral policies actually have

96. Hunter v. Underwood, 471 U.S. 222, 227 (1985) (highlighting that the result of the provision by 1903 had a disproportionate disenfranchisement of Black compared to White potential voters by ten times); *see also* Eyer, *supra* note48, at 66 (2016) (arguing that "in *Hunter*, intent doctrine would stand as the champion of racial justice, rather than an obstacle to its effectuation").

97. *Hunter*, 471 U.S. at 229–232. It is possible that the Court's willingness to examine the intent of the lawmakers was influenced by the fact that the lawmakers were long gone, and those responsible were "attendees at a 1901 Alabama constitutional convention" where, even reputedly conservative Justice Rehnquist remarked, the 'zeal for white supremacy ran rampant.'" Haney-López, *supra* note50, at 1855 ("[The law] was enacted with the intent of disenfranchising blacks.") (citing *Hunter*, 471 U.S. at 229).

98. In a recent voting rights case, the Ninth Circuit invalidated a law criminalizing third-party ballot collection because the legislative history and the events leading to its passage demonstrated discriminatory intent. *See* Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 1040–42 (9th Cir. 2020) (en banc) (finding equal protection violation where some lawmakers that voted for the law had a "sincere, though mistaken, non-race based belief" that voting misconduct was a problem because the belief was "fraudulently created" by a "racially tinged" campaign ad and supported by well-intended legislators may still be tainted by discriminatory intent as a result of "false and race-based" claims of other legislators).

99. *See* Jennifer M. Chacón, *The Inside-out Constitution:* Department of Commerce v. New York, 2019 SUP. CT. REV. 231, 247; *see also* Robinson, *supra* note46, 172–73 (2016); Siegel, *supra* note41, at 1139–46; Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1, 1 (1991) (explaining that intent in the "color-blind" equal protection doctrine serves as subterfuge for avoiding acknowledging continuing racism). The *Ramos* decision suggests a possibility of new methods to address racial harm within existing frameworks with, or without, equal protection. *See generally* Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

racial effects."[100] However, equal protection challenges to facially neutral immigration laws face a double barrier of the plenary power and intent doctrine. The Court has cordoned off immigration law as exceptional, distinguishing it from criminal law and other categories of civil or administrative law, deeming the Legislative and Executive Branches' power at their apex when making immigration law.[101] Even though the language of the Constitution does not confine the Equal Protection Clause to United States citizens, the Court has interpreted noncitizens to lack full entitlement to constitutional protection.[102] In the realm of equal protection in immigration law, the Court has shown greater deference to the Legislative and Executive Branches at the expense of protecting individual rights because of its plenary power.[103] This is particularly true in the context of due process claims for those seeking admission at the border and subject to expedited removal. Their constitutional rights are at their nadir particularly after the 2020 Supreme Court decision in *Department of Homeland Security v. Thuraissigiam*, where the Court held that immigrants who have recently arrived at the border have no procedural due process rights.[104]

The people whose individual rights are most often limited by plenary power are racialized noncitizens of color who have been historically,

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100. Hing, *supra* note 10, at 310.

101. *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)); Reno v. Flores, 507 U.S. 292, 305 (1993).

102. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018); Chae Chan Ping v. United States (*Chinese Exclusion Case*), 130 U.S. 581 (1889); Jean v. Nelson, 863 F.2d 759 (11th Cir. 1988).

103. David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81, 145 (2013) (explaining that "immigrant advocates" have long "excoriated" foreign affairs as justification for the plenary power doctrine).

104. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1961 (2020) (internal citation omitted) (limiting judicial review of individuals charged under the expedited removal statute at the border citing plenary power and concluding that "more than a century of precedent establishes that, for aliens seeking initial entry, 'the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law'"); *see* Vanessa M. Garza, *Unheard and Deported: The Unconstitutional Denial of Habeas Corpus in Expedited Removal*, 56 HOUS. L. REV. 881, 881 (2019) (explaining that "writ of habeas corpus, ensured by the Constitution, is the only avenue for immigrants contesting an unlawful detention under expedited removal"); Fatma E. Marouf, *Extraterritorial Rights in Border Enforcement*, 77 WASH. & LEE L. REV. 751, 759 (2020) (contending that "extending constitutional protections, preserving judicial review, and critically examining demands for deference are crucial in this context in order to avoid creating a law-free zone just beyond our southern border"); Leading Case, *Article I—Suspension Clause—Expedited Removal Challenges*—Department of Homeland Security v. Thuraissigiam, 134 HARV. L. REV. 410, 419 (2020) (analyzing *Thuraissigiam* and concluding "in upholding the limited judicial review accorded to asylum seekers subject to expedited removal, *Thuraissigiam* created methodological confusion that may lead to narrow interpretations of the Suspension Clause and further entrenched the increasingly expansive, 'shadowy regime' of expedited removal") (citation omitted).

politically, socially, and culturally marginalized and demonized.[105] Race-based discrimination in immigration law, what Professor Gabriel Chin twenty years ago called "segregation's last stronghold,"[106] originates with immigration law itself; but at the same time, equal protection has barely touched it. This phenomenon is partially explained by the way in which the intent doctrine fosters the ability of language and immigration status to serve as proxies for racial discrimination in immigration law.[107] Of the immigration-related equal protection claims the Court heard in 2020 concerning noncitizens or historically disadvantaged groups, none prevailed.[108]

A. The Court's Reliance on National Security at the Expense of Constitutional Rights

Because immigration law raises sovereignty and national security concerns,[109] the Court affords the government more leeway in engaging in practices that would otherwise be deemed intolerable. The perniciousness of plenary power began in 1889. In *Chae Chan Ping v. United States*,[110] the Court determined that Congress's decision to exclude Chinese

105. The Court has consistently upheld Congress' ability to exclude "aliens of a particular race." *See, e.g.*, Yamataya v. Fisher, 189 U.S. 86, 97 (1903); *see also* Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring) (reasoning that the Court must defer to Congress even when immigration policy relies on "discredited racial theories[,] anti-Semitism or anti-Catholicism"); *Stranahan*, 214 U.S. at 336; United States v. Ju Toy, 198 U.S. 253, 261 (1905); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 291 (1904); Wong Wing v. United States, 163 U.S. 228, 237 (1896); *cf. Flores*, 507 U.S. at 305–06 ("[I]n the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens." (internal quotation marks omitted) (citations omitted)); *Trump v. Hawaii*, 138 S. Ct. at 2392; Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

106. Chin, *supra* note 14, at 5.

107. *See* Johnson & Martinez, *supra* note 47, at 1230 (contending that California Proposition 227 constituted unlawful racial anti-Latino discrimination by proxy of language, though the author notes that Proposition 227 was a state alienage rather than immigration law); *see also* Alfredo Mirande, *"Now That I Speak English, No Me Dejan Hablar ['I'm Not Allowed to Speak']": The Implications of* Hernandez v. New York, 18 CHICANO-LATINO L. REV. 115, 132 (1996); Susan Kiyomi Serrano, Comment, *Rethinking Race for Strict Scrutiny Purposes*: Yniguez *and the Racialization of English Only*, 19 U. OF HAW. L. REV. 221, 224–26 (1997) (suggesting that it may be appropriate to treat the notion of "race" as including language for certain applications of equal protection strict scrutiny claims).

108. Chacón, *supra* note100, at 235–36 (arguing that the fate of the equal protection claim in the Census 2020 Case is a logical sequel to the fate of the First Amendment discrimination claim in the Muslim Exclusion Case, *Trump v. Hawaii*, where both cases "illustrate the near impossibility of vindicating claims of racial or religious animus against historically disadvantaged groups under existing constitutional antidiscrimination jurisprudence").

109. *See generally* Martin, *supra* note 13 (exploring why the plenary power doctrine endures); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 558 (1990) (exploring the partial erosion of the plenary power doctrine, somewhat indirectly, through statutory interpretation).

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

immigrants on the basis of race fell within its sovereign power and not that of judges.[111] This history overlapped with the Court's upholding of racial segregation in *Plessy v. Ferguson*.[112]

Not only does the plenary power doctrine signify great deference to Congress in making immigration law, but, like the intent doctrine, it signals the Court's unwillingness to probe a superficial rationalization of "national security" when Congress needs a nondiscriminatory justification for an otherwise discriminatory law.[113] From the first plenary power case to reference national security—*Chinese Exclusion Case*[114]—to one of the more recent—*Trump v. Hawaii*[115]—the Court has not demonstrated an actual threat to national security. In the infamous plenary power Japanese internment case, the racialized restraint on liberty was later revealed to have been justified by an internally falsified threat to national security. [116]

Even without plenary power, the intent doctrine already results in great deference to lawmakers because disproportionate impact is insufficient to invalidate a law on equal protection grounds, and discriminatory intent can be overcome by a showing of a nondiscriminatory purpose.[117] Accordingly, plenary power, which affords special deference to both the Executive and Legislative Branches in matters of immigration, is duplicative in a way that powerfully reinforces the barrier to equal protection.[118]

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111. *Id.*; Fong Yue Ting v. United States, 149 U.S. 698, 722 (1893).

112. Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896). But note that on the same day as it upheld segregation in *Plessy,* the Court in *Wong Wing v. United States* struck down part of the Chinese Exclusion Act in requiring imprisonment of unauthorized Chinese in the United States. Chin, *supra* note 15, at 43 (2002) (citing Wong Wing v. United States, 163 U.S. 228, 228 (1896)).

113. *See* Motomura*, supra* note110, at 549 (contending that plenary power was being eroded via statutory interpretation); Shawn E. Fields, *The Unreviewable Executive? National Security and the Limits of Plenary Power*, 84 TENN. L. REV. 731, 747 (2017) (while not every immigration case before the Court presents an explicit national security justification for the actions of the political branches, the ones that do reflect plenary power at its most robust).

114. *Chinese Exclusion Case*, 130 U.S. at 609.

115. Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018). It is quite possible that plenary power helps explain why the *Trump v. Hawaii* Court chose rational basis review instead of strict scrutiny in spite of evidence of discriminatory intent and impact.

116. Korematsu v. United States, 323 U.S. 214, 216 (1944), *abrogated by Trump v. Hawaii*, 138 S. Ct. at 2392.

117. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) (suggesting that neutral law that has a disproportionately adverse effect upon a racial minority is unconstitutional under the Equal Protection Clause *only* if that impact can be traced to a discriminatory purpose); *see also* Haney-López, *supra* note 50, at 1831 (discussing disproportionate impact and disproportionately adverse effect on a racial minority).

118. The combination of the two makes equal protection claims impossible to win in immigration related claims. At the same time, the two doctrines do the same thing. Plenary power results in the Court accepting any rationale the government offers in discriminating or limiting a substantive right usually with just an utterance of "national security." In the intent doctrine realm, a plausible alternative justification to racial animus or motive is all that is needed to upend an equal protection claim.

The combination of intent and the plenary power doctrine in *Department of Homeland Security v. Regents of the University of California* (the DACA case) is an example of the Court's narrow approach to evidence while employing an already limited test to assess potential discriminatory intent.[119] Despite the transparently discriminatory rhetoric and anti-immigration policies of the Trump administration,[120] DACA recipients are not a suspect class; even though they are almost exclusively Latinx, thus DACA status is broadly understood as a proxy for race. Even though the Court invalidated the rescission on other grounds, it rejected the argument that the rescission of DACA violated plaintiffs' rights under equal protection.

Justice Sotomayor was the lone voice challenging the plurality's narrow application of the *Arlington* test to the evidentiary record.[121] Justice Sotomayor emphasized that nothing in the Court's caselaw supported disregarding any of the campaign or other statements as "remote in time from later-enacted policies."[122] In addition, Justice Sotomayor criticized

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119. *See generally* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

120. *See generally* Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197 (2019) (writing two years into the Trump presidency that white nationalism may be driving the Administration's immigration policy); Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 575 (2019) (arguing that *"the Administration's initiatives together reveal the [E]xecutive [B]ranch's overall war on immigration diversity*" and *"when situated within the history of immigration laws and policies in the United States, the current war against immigration diversity furthers the Administration's broader goal of returning to pre-1965 immigration policies designed to maintain a 'white nation'");* Ernesto Sagás & Ediberto Román, *Build the Wall and Wreck the System: Immigration Policy in the Trump Administration*, 26 TEX. HISP. J.L. & POL'Y 21, 22 (2020) ("[W]hile hundreds of miles of actual walls are yet to be built, through executive order and policymaking, Trump has succeeded in building barriers to exclude people of color from coming to the United States.").

121. *Regents*, 140 S. Ct. at 1918 (Sotomayor, J., concurring in part). To elaborate further on this, the Court considered some but not all of the factors set forth by the *Arlington* Court for demonstrating discriminatory motivation or evidence of discriminatory intent.

> To "plead animus," the Court stated that the plaintiffs "must raise a plausible inference that an 'invidious discriminatory purpose was a motivating factor'" in the administration's rescission. The evidence the Court considered was (1) the disparate impact on Latinx individuals from Mexico who represent 78% of DACA recipients (ignoring the amicus statistic that 90% of DACA beneficiaries are Latinx)[;] (2) the unusual history behind the rescission[;] and (3) pre- and post-election statements by President Trump. However, the Court dismissed them as not attributable to the DHS Secretary directly responsible for technically rescinding DACA.

Rosenbaum, *supra* note 33 (internal citations omitted).

122. *Regents*, 140 S. Ct. at 1917 (Sotomayor, J., concurring in part). This misinterpretation stemmed from the Court's holding in *Trump v. Hawaii*. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2438 n.3 (2018) (Sotomayor, J., dissenting) ("The Government urges us to disregard the President's campaign statements. . . . [However,] courts must consider 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history.'" (citation omitted)).

the plurality's dismissal of the history leading up to rescission and its unwillingness to attribute the President's anti-Latinx statements to the Department of Homeland Security (DHS) Secretary's decision to rescind DACA.[123] Through this "blinkered approach"[124] the Court did not even need to hide behind plenary power jurisprudence because of the insurmountable hurdle of the intent doctrine.[125]

In *Trump v. Hawaii*, the Court considered the constitutionality of a proclamation issued by the President prohibiting entry of noncitizens into the United States from five majority-Muslim countries, North Korea, and Venezuela.[126] This was not clearly a disparate impact case, but the rationale, and particularly the role of plenary power, are relevant to understanding how the Court might approach an equal protection challenge to immigration detention at the border. Unlike in *Regents*, where the President's overtly discriminatory rhetoric could not be attributed to the DHS Secretary directly responsible for rescinding DACA, the proclamation here fell on the heels of the President's anti-Muslim statements, pre- and post-election, and indisputably would have, and has had, a disproportionate discriminatory impact.[127] Chief Justice Roberts upheld the ban and rejected the argument that the national security rationale was a pretext for anti-Muslim intentions and violated the Establishment Clause.[128] Under the cover of the plenary power doctrine, the Court deemed the proclamation "facially neutral" with respect to religion, applied rational basis review, and found the proclamation survived that level of scrutiny.[129]

Reminiscent of the rationale in affirming the legality of Japanese internment in *Korematsu*, the Court's *Trump v. Hawaii* decision deemed the alleged national security concern a weightier interest than the equal protection and anti-discrimination norms embedded—albeit too tenuously—in the Constitution. Dissenting Justices Sotomayor and Ginsburg reminded the plurality that this logic was no different than "the

123. *See Regents*, 140 S. Ct. at 1918 (Sotomayor, J., concurring in part).

124. *Id.* at 1917.

125. *Id.* at 1915–16 (plurality opinion).

126. *Trump v. Hawaii*, 138 S. Ct. at 2417 ("[P]laintiffs allege that the primary purpose of the Proclamation was religious animus and that the President's stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims."). Those affected by the proclamation included people attempting to return to school, and other pursuits, in the United States, which they would have been authorized to do but for the ban.

127. "Plaintiffs therefore ask the Court to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements—many of which were made before the President took the oath of office." *Id.* at 2418.

128. *See id.* at 2417–19.

129. *Id.* at 2423. Admittedly, while discussing this case in the context of plenary power, there is reason to believe the intent doctrine would still not have helped to establish discriminatory purpose. *Supra* Part II.

same dangerous logic underlying *Korematsu.*"[130] In both *Trump v. Hawaii* and *Korematsu*, the Court did not require the government to meet any evidentiary burden regarding the claim of a national security threat.[131] Instead, like *Korematsu*, the *Trump v. Hawaii* plurality "blindly accept[ed] the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security."[132] The Court's statement that it was overruling *Korematsu* rang hollow because, effectively, it did not overrule the case.[133] It did so in name only, upholding and relying on the rationale of *Korematsu*.[134]

B. The Effects of the Termination of TPS

Advocates in several cases have also raised equal protection challenges to the Trump Administration's termination of Temporary Protected Status (TPS).[135] The district courts that heard those cases found in favor of the plaintiffs; one case has since been appealed to the Second Circuit on this issue.[136] Congress created the TPS program as a part of the 1991 amendments to the Immigration Act, which empowered DHS to designate countries struck with civil unrest, violence, or natural disaster

130. *Trump v. Hawaii*, 138 S. Ct. at 2448 (Sotomayor, J., dissenting) (internal citations omitted).

131. *Id.* at 2447.

132. *Id.* at 2448.

133. Karen Korematsu, *Carrying on* Korematsu*: Reflections on My Father's Legacy*, 9 CALIF. L. REV. ONLINE 95, 105 (2020) ("Although [the Court] correctly rejected the abhorrent race-based relocation and incarceration of Japanese Americans, it failed to recognize—and reject—the rationale that led to *Korematsu."); Lorraine K. Bannai, Korematsu Overruled? Far from It: The Supreme Court Reloads the Loaded Weapon*, 16 SEATTLE J. FOR SOC. JUST. 897, 899–900 (2018) ("[W]hat still persists is the very real danger that whenever the government claims its actions are based on national security—even actions that may, in intent or impact, single out racial or religious groups—the courts will, as they did in *Korematsu* and *Trump v. Hawaii*, step aside and defer to the government's judgment, fail to serve their democratic function as a check on government power, and fail to protect vulnerable communities as well as the rights and values contained in our constitution and laws."); John Ip, *The Travel Ban, Judicial Deference, and the Legacy of* Korematsu, 63 HOW. L.J. 153, 155 (2020) ("Justice Sotomayor's charge that the [*Trump v. Hawaii*] majority is guilty of repeating the error of *Korematsu* is valid, and . . . Chief Justice Roberts' attempt to cast *Korematsu* as an odious relic of the benighted past, distant and unrelated to the travel ban litigation, is ultimately unconvincing.").

134. Neal Kumar Katyal, Trump v. Hawaii*: How the Supreme Court Simultaneously Overturned and Revived* Korematsu, 128 YALE L.J. F. 641, 648–49 (2019) (the *Trump v. Hawaii* Court effectively recreated the *Korematsu* doctrine under another name); Richard A. Dean, Trump v. Hawaii *Is* Korematsu *All Over Again*, 29 GEO. MASON U. C.R. L.J. 175, 176 (2019) ("In both cases, the Supreme Court abandoned judicial review over alleged infringement of constitutional rights asserted by American citizens arising from screening procedures. *Trump v. Hawaii* is *Korematsu* all over again.").

135. *See, e.g.*, Saget v. Trump, 375 F. Supp. 3d 280, 367 (E.D.N.Y. 2019); Ramos v. Nielsen, 336 F. Supp. 3d 1075, 1101 (N.D. Cal. 2018), *vacated and remanded sub nom*, Ramos v. Wolf, 975 F.3d 872 (9th Cir. 2020); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1916 (2020) (plurality opinion).

136. *See Saget*, 375 F. Supp. at 367.

and authorized TPS holders to remain in the United States and obtain work permits.[137]

In November 2017, the Trump Administration terminated TPS for Sudan, Nicaragua, Haiti, and El Salvador.[138] TPS holders facing termination sued contending that the Administration's decisions to terminate TPS programs were motivated by racial animus and violated the Equal Protection Clause.[139] At least three lower courts have applied the *Arlington* factors, which include determination of: whether the impact was disparate; whether there was an unusual sequence of events leading up to the decision; and whether there was presidential animus against the impacted groups, "non-white, non-European aliens," or statements by other relevant officials.[140] These cases, and their review in district and

137. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733. Pursuant to 8 U.S.C. § 1254a, the Attorney General was authorized to administer the TPS program; designation authority was transferred from the Attorney General to the Secretary of Homeland Security in 2003. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. The Secretary of Homeland Security has discretion to issue TPS for periods of six to eighteen months. 8 U.S.C. § 1254a(b)(1)–(2). Thereafter, the Secretary reviews the conditions in the foreign state and determines whether the reasons for the designation persist. 8 U.S.C. § 1254a(b)(3); *see also* Raymond Audain, *Not Yet Forgiven for Being Black: Haiti's TPS, LDF, and the Protean Struggle for Racial Justice*, 52 LOY. L.A. L. REV. 409, 430 (2019); *Pulling Back the Curtain-Analysis of New Government Data on Temporary Protected Status*, CATH. LEGAL IMMIGR. NETWORK, INC. (Apr. 9, 2021), https://cliniclegal.org/resources/humanitarian-relief/temporary-protected-status-and-deferred-enforced-departure/pulling [https://perma.cc/EJ9Q-3SAH]

138. Press Release, Kirstjen M. Nielson, Sec'y, Dep't of Homeland Sec., Secretary of Homeland Security Kirstjen M. Nielson Announcement on Temporary Protected Status for El Salvador (Jan. 8, 2018), https://www.dhs.gov/news/2018/01/08/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected [https://perma.cc/5WGS-QQ34]; JILL H. WILSON, CONG. RSCH. SERV., RS20844, TEMPORARY PROTECTED STATUS AND DEFERRED ENFORCED DEPARTURE 5 (2021), https://fas.org/sgp/crs/homesec/RS20844.pdf; Saget v. Trump*: Unlawful Termination of TPS for Haitians*, NAT'L IMMIGR. PROJECT OF THE NAT'L LAWS. GUILD, https://www.nationalimmigrationproject.org/our_lit/impact/2018_15Mar_saget-v-trump.html [https://perma.cc/88GV-NMZE] ("The Administration announced that TPS for Haitian nationals will expire on July 22, 2019, endangering the lives of over 50,000 Haitians and their 27,000 U.S. citizen children."); Nicole Acevedo, *Trump's Timing for Ending TPS Immigrant Protections Was Tied to 2020 Race, Senate Democrats Say*, NBC NEWS (Nov. 8, 2019), https://www.nbcnews.com/news/latino/trump-s-timing-ending-tps-immigrant-protections-was-tied-2020-n1078751 [https://perma.cc/REE6-QT4S].

139. For a list of pending lawsuits, see *Challenges to TPS and DED Terminations and Other TPS-Related Litigation*, CATH. LEGAL IMMIGR. NETWORK, INC. (Jan. 5, 2021), https://cliniclegal.org/resources/humanitarian-relief/temporary-protected-status-and-deferred-enforced-departure/challenges [https://perma.cc/GU9E-24WR].

140. *See, e.g.*, Ramos v. Nielsen, 321 F. Supp. 3d 1083, 1123 (N.D. Cal. 2018) ("Defendants do not deny that President Trump's alleged statements evidence racial animus; rather, they argue the President's animus is irrelevant because the Secretary of Homeland Security, not the President, terminated TPS for Sudan, Haiti, Nicaragua, and El Salvador."); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2448 (2018) (Sotomayor, J., dissenting).

appellate courts, provide some insight into how courts could assess a challenge to immigration jails at the southern border.[141]

Pursuant to *Arlington*, a potential indicator of bias is when a decision charged with being discriminatory does not seem to follow the established criteria.[142] In *Saget v. Trump*, the United States District Court for the Eastern District of New York applied an expansive interpretation and review of the record when considering and affirming an equal protection challenge to the Trump Administration's termination of TPS for Haitians.[143] The court considered both disparate impact[144] and historical background.[145] In finding that the trajectory to termination of TPS was indicative of discriminatory intent, the court considered evidence that the decision was "political"—or contrary to the established criteria for the relevant decision-making process.[146] Specifically, Administration officials looked for reasons to terminate TPS for Haitians—one said "[b]e creative"[147]—and the White House encouraged DHS "to ignore statutory guidelines, contort data, and disregard objective reason to reach a predetermined decision to terminate TPS to reduce presence of non-white immigrants in the country."[148] Rather than objectively considering whether country conditions in Haiti warranted termination, the *Saget* court used the evidentiary record to depart from the established criteria for making such a decision and concluded the decision was motivated by

141. Simon Romero, Zolan Kanno-Youngs, Manny Fernandez, Daniel Borunda, Aaron Montes & Caitlin Dickerson, *Hungry, Scared and Sick: Inside the Migrant Detention Center in Clint, Tex.*, N.Y. TIMES (July 9, 2019), https://www.nytimes.com/interactive/2019/07/06/us/migrants-border-patrol-clint.html [https://perma.cc/4NR7-24HA].

142. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–67 (1977)). *But see* Ramos v. Wolf, 975 F.3d 872, 899 (9th Cir. 2020). Yet, when assessing similar facts in a separate case challenging the TPS terminations, the Ninth Circuit, interpreted that same politicized history of the decision-making process as appropriate, even if politically motivated to emphasize a different set of guiding principles, preference for a "merit-based" system, in making immigration decisions.

143. Saget v. Trump, 375 F. Supp. 3d 280, 379 (E.D.N.Y. 2019).

144. "[I]t is axiomatic the decision to terminate TPS for Haitians impacts one race, namely non-white Haitians, more than another." *Id.* at 367.

145. *See id.* ("[T]he Court should consider additional factor, including: '[t]he historical background of the decision . . . , particularly if it reveals a series of official actions taken for invidious purposes,' '[s]ubstantive departures' . . . and the 'administrative history . . . , especially where there are contemporary statements by members of the decisionmaking body[.]'" (first and last bracket added) (omissions in original) (quoting *Arlington Heights*, 429 U.S. at 266–68)).

146. *Id.*

147. *Id.* at 372 ("[T]he sequence of events leading up to the decision to terminate Haiti's TPS was a stark departure from ordinary procedure, suggestive of a pre-determined outcome not anchored in an objective assessment, but instead a politically motivated agenda.").

148. *Id.* at 369.

discrimination.[149] The government appealed to the Second Circuit Court of Appeals where the case is pending at the time of writing.[150]

In a separate district court case concerning TPS terminations, the court similarly relied on evidence to establish that the series of events leading up to the termination was marred by irregularity, thus suggesting "a pre-determined outcome not based on an objective assessment."[151] The district court applied the *Arlington* factors, considered the "'specific sequence of events leading up to the challenged decision'" and the "'[d]epartures from the normal procedural sequence,'"[152] and determined that there was circumstantial evidence that race was a motivating factor on the basis of disparate impact.[153]

On appeal, the Ninth Circuit in *Ramos* declined to apply the lower standard of rational basis review as employed by the *Trump v. Hawaii* Court, but reversed the district court's equal protection ruling.[154] The *Ramos* court relied on the *Regents* Court's rationale[155] and found that the plaintiffs did not present "serious questions" on the merits of their claim that the DHS Secretary's TPS terminations were improperly influenced by the President's "animus against non-white, non-European immigrants."[156]

The Ninth Circuit found that TPS terminations would not necessarily "bear more heavily on 'non-white, non-European' countries" where the Trump Administration extended TPS designations for other "non-white" countries.[157] However, it is illogical to contend that disparate impact

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149. *See id.* at 302–03, 368.

150. Brief for Plaintiffs-Appellees, Saget v. Trump, No. 19-1685 (2d Cir. Oct. 2, 2019).

151. Ramos v. Wolf, 975 F.3d 872, 887 (9th Cir. 2020) ("[G]iven the record evidence of, 'after receiving Decision Memos from career DHS employees, higher-level DHS employees—i.e., the political appointees—'repackaging' the memos in order to get to the President/White House's desired result of terminating TPS.'" (citations omitted)) *vacating and remanding* Ramos v. Nielsen, 336 F. Supp. 3d 1075, 1101 (N.D. Cal 2018).

152. *Ramos*, 336 F. Supp. 3d at 1101 (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–67 (1977)).

153. "TPS terminations clearly bears more heavily on non-white, non-European individuals," indicative of disparate impact. *Id.*

154. *Ramos*, 975 F.3d at896 (finding the facts to align with *Regents* (DACA rescission) more than *Trump v. Hawaii* (noncitizens seeking admission to the US)).

155. *Id.* at 896 (The court reasoned that "the executive's administration of the TPS program, which provides widescale, nationality-based humanitarian harbor for foreign citizens, also involves foreign policy and national security implications, albeit to a lesser extent than the executive order suspending the entry of foreign nationals in *Trump v. Hawaii"* and stating that it is the "fundamental authority of the executive branch to manage our nation's foreign policy and national security affairs without judicial interference.").

156. *Id.* at 897.

157. *Id.* at 898; *see Extension of South Sudan for Temporary Protected Status*, 82 Fed. Reg. 44,205 (Sept. 21, 2017); *Extension of the Designation of Syria for Temporary Protected Status*, 83 Fed. Reg. 9329 (Mar. 5, 2018); *Extension of the Designation of Yemen for Temporary Protected Status*, 83 Fed. Reg. 40,307 (Aug. 14, 2018); *Extension of Designation of Somalia for Temporary Protected Status*, 83 Fed. Reg. 43,695 (Aug. 27, 2018).

requires all TPS holders be threatened with revocation. All of those facing the threat of losing TPS were immigrants of color, even if not all TPS holders would lose status. The Ninth Circuit's framing of the question of disparate impact was illogical and contrary to the purposes of deterring or eliminating the harmful role of race.

With respect to the nature of the decision to terminate, the Ninth Circuit rejected the evidence that connected the President's alleged discriminatory intent to the specific TPS terminations.[158] This included evidence that the President personally sought to influence the TPS terminations and that Trump Administration officials engaged in the TPS decision-making were themselves motivated by animus against "non-white, non-European" countries.[159]

The Ninth Circuit faulted the district court for allegedly making a leap "by relying on what appears to be a 'cat's paw' theory of liability—wherein the discriminatory motive of one governmental actor may be coupled with the act of another to impose liability on the government."[160] The court suggested that that theory of liability could not lie in "governmental decisions in the foreign policy and national security realm," implicitly referring to plenary power.[161] The Ninth Circuit disregarded the circumstantial evidence to purport that "these statements occurred primarily in contexts removed from and unrelated to TPS policy or decisions."[162]

Perhaps most tellingly, the *Ramos* court found the historical background of the decision to terminate TPS, even if predetermined, did not show racial animus.[163] It instead concluded, paradoxically, "the record indicates that any desire to terminate TPS was motivated by the

158. *Ramos*, 975 F.3d at 897.

159. *Id.* at 897–98.

160. *Id.* ("The mere fact that the White House exerted pressure on the Secretaries' TPS decisions does not in itself support the conclusion that the President's alleged racial animus was a motivating factor in the TPS decisions.").

161. *Id.* at 897.

162. *Id.* at 898 (noting that the "'President's critical statements about Latinos,' which were 'remote in time and made in unrelated contexts . . . do not qualify as "contemporary statements" probative of the decision at issue'" (*citing* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1916 (2020) (plurality opinion))); *id.* ("Here, the only 'contemporary statement' might be the President's comments at the January 11, 2018[,] meeting with lawmakers, during which TPS terminations were discussed; however, the influence of these remarks on the actual decisions to terminate TPS is belied by the fact that the meeting occurred three days *after* the TPS termination notices for Haiti and El Salvador issued. Without evidence that the President's statements played any role in the TPS decision-making process, the statements alone do not demonstrate that the President's purported racial animus was a motivating factor for the TPS terminations."); *see Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1261 (9th Cir. 2016) (holding that "offensive quotes about Mexican nationals attributed to Sherriff Arpaio" that did "not mention" the policy in question did not "lead to any inference" that the policy "was promulgated to discriminate against Mexican nationals").

163. *Ramos*, 975 F.3d at 898–99.

administration's immigration policy, with its emphasis on a 'merit-based entry' system, its focus on America's economic and national security interests, and its view on the limitations of TPS and the program's seeming overextension by prior administrations."[164]

What has been described as a "merit-based" immigration policy could be described as a thinly veiled white nationalist agenda.[165] Rose Cuison Villazor and Kevin Johnson explain that the "immigration policies that the Trump Administration has adopted or seeks to deploy reveal the [E]xecutive [B]ranch's war on immigration diversity in both admissions and deportations."[166] Calls for a merit-based system are one manifestation of anti-diversity, equality-oriented immigration policies. The family unification policies adopted after the end of the national origins quota system[167] resulted in more racial diversity, and a merit-based system is calculated to reverse that trajectory.[168] The national origin quotas did not restrict migration from the Western Hemisphere but were nearly a complete ban in migration from the African continent and southeast Asia. They were based on census data and heavily influenced by eugenics.[169] Instead of quotas, migration from Mexico was controlled via enforcement actions and tacit consent to unauthorized migration to meet labor needs. The 1965 reforms were intended to convey a departure from more overtly national origin and race-based preferences.

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164. *Id.* at 899 (emphasis added); *see also id.* at 898 ("[T]he historical background of the TPS terminations" did not reveal "a series of official actions taken for invidious *purposes*." (emphasis added)).

165. *See generally* Srikantiah & Sinnar, *supra* note 120; Villazor & Johnson, *supra* note 121, at 593(The Reforming American Immigration for Strong Employment (RAISE) Act "would change the racial make-up of the entering immigrant population through creation of a 'merit'-based 'points' system.").

166. Villazor & Johnson, *supra* note 121, at 578.

167. *See* Act of May 19, 1921, ch. 8, 42 Stat. 5 (repealed 1952); Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1503 (1976 & Supp. V 1981)).

168. Kevin R. Johnson, *Proposition 187 and Its Political Aftermath: Lessons for U.S. Immigration Politics After Trump*, 53 U.C. DAVIS L. REV. 1859, 1891 (2020) ("Family reunification policies have contributed significantly to the current racial demographics of immigration in the United States, which includes many people of color from the developing world").

169. *See* James F. Hollifield, Valerie F. Hunt & Daniel J. Tichenor, *Immigrants, Markets, and Rights: The United States as an Emerging Migration State*, 27 WASH. U. J.L. & POL'Y 7, 21 (2008) (Immigration law's national origins quota system enacted during the 1920s "was deeply informed by a new scientific theory—eugenics—that reinvigorated old distinctions between desirable and unworthy immigrants on the basis of race, ethnicity and religion," explaining that the "new quota system was explicitly planned to favor northern and western European immigrants, and to exclude Asians, Africans, as well as southern and eastern Europeans."); NGAI, *supra* note 15, at 3; Johnson, *supra* note 17, at 1115–16 (explaining the connection between quotas and racialized exclusion, and the evolution "into more subtle forms of exclusion."). *See generally* Rachel Silber, Note, *Eugenics, Family, and Immigration Law in the 1920's*, 11 GEO. IMMIGR. L.J. 859 (1997) (arguing eugenics was at the center of immigration policy in the early twentieth century).

The Trump Administration's immigration agenda begged the question: where does express racism or discriminatory intent cross the line and become systemic racism? The Trump Administration's immigration agenda was both rhetorically and strategically designed to create an immigration policy, without the consent of Congress, that favored those considered "white" or who had European national origins.[170] Not attempting to hide his preferences or motivation, President Trump carelessly and regularly made public remarks like, "[W]e should have more people from Norway."[171] As was indicative of his presidency, many believed that he gave voice to the "politically incorrect" but genuinely held perspectives of a segment of the population.[172]

If the *Ramos* court viewed the TPS termination in connection with the Trump Administration's "merit-based" immigration agenda, it may have been clearer that the TPS termination was, as the district court found, evidence of discriminatory intent. Instead, the court effectively inverted the meaning behind the merit-based system cleansing the TPS decision of its background and implicit, yet racial, motivation.

The decisions in *Trump v. Hawaii*, *Regents*, and *Ramos* show both the potential of "historical" circumstantial evidence and the limitations of the current intent analysis; the courts' reasoning implies a world where disparate impact is mere coincidence. The courts' requirement of a certain kind of express bias, even if not on the face of the law or government action, effectively converts the intent doctrine into a requirement for express discrimination—in effect, an overt confession. By requiring an express intention to discriminate, the evidentiary burden becomes nearly identical to that of intentional discrimination cases.

Jennifer Chacón writes that Chief Justice Roberts' "see no evil" approach to equal protection implicit bias challenges "ignore[s] all the ways that powerful majoritarian forces seek to use racial constructs to enhance white supremacy," which fails to stop, and even facilitates,

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170. *See* Johnson, *supra* note 17, at 1113.

171. Nurith Aizenman, *Trump Wishes We Had More Immigrants from Norway. Turns Out We Once Did*, NPR (Jan. 12, 2018, 6:32 PM), https://www.npr.org/sections/goatsandsoda/2018/01/12/577673191/trump-wishes-we-had-more-immigrants-from-norway-turns-out-we-once-did [https://perma.cc/3VCY-CECK].

172. Dan Sweeney, *Donald Trump Just Saying What People Are Thinking – Even Liberals*, SUNSENTINEL (Feb. 15, 2016, 1:00 PM), https://www.sun-sentinel.com/news/politics/sfl-donald-trump-just-saying-what-people-are-thinking-even-liberals-20160215-htmlstory.html [https://perma.cc/Z3BZ-8H7A]; Yascha Mounk, *Americans Strongly Dislike PC Culture*, ATLANTIC (Oct. 10, 2018), https://www.theatlantic.com/ideas/archive/2018/10/large-majorities-dislike-political-correctness/572581/ [https://perma.cc/MJV5-B8C9]. Stephen Miller, an aid to the President and highly influential in his immigration policy, has expressed anti-immigrant views favoring white supremacism. *See* Katie Rogers & Jason DeParle, *The White Nationalist Websites Cited by Stephen Miller*, N.Y. TIMES (Nov. 18, 2019), https://www.nytimes.com/2019/11/18/us/politics/stephen-miller-white-nationalism.html [https://perma.cc/PHV8-8K9U].

discrimination.[173] This blindness is a matter of individual perception and highlights the challenge of finding discriminatory intent in a judicial system tainted by its origins in a neocolonial legal order.[174]

It is possible, however, that lower court rulings could carve a path for revision of the narrow view of the *Arlington* factors—including taking a more expansive view of the evidentiary record and attempting to grapple with history to find discriminatory intent. However, until and unless the Court recognizes the constitutional due process and habeas rights of immigrants at the border, equality-based claims will never be heard at all.[175]

III. DOES THE EXPEDITED REMOVAL IMMIGRATION STATUTE AUTHORIZING DETENTION VIOLATE EQUAL PROTECTION?

If the Supreme Court did not invoke plenary power and instead engaged in an expansive view of the evidentiary record, it could find that a facially neutral immigration statute discretionarily authorizing imprisonment of noncitizens at the southern border violates equal protection.[176] The facially neutral statute, INA § 235(b)(1)(A), authorizes discretionary detention or imprisonment of immigrants at the southern border between the United States and Mexico. While advocates have brought due process (and conditions of confinement) challenges, INA § 235(b)(1)(A) has not been challenged as violativeof the Equal Protection Clause. This Part of the Article introduces and discusses a hypothetical claim from the standpoint of the existing framework—the *Arlington* factors.[177] The analysis underscores the way in which plenary power is a significant obstacle to meaningful review by undermining full consideration of the evidentiary record, including evidence of relevant historical bias. It also allows for a critique of the limitations of *Arlington*

173. Chacón, *supra* note100, at 254.

174. *See infra* Part IV.

175. *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1961 (2020).

176. The Immigration and Nationality Act uses the term "detention" because immigration law is civil; therefore, imprisonment is not considered punishment and happens in "detention" centers rather than prison. However, because detention is effectively experienced as punishment, and prisons and jails serve as detention centers, I use the terms "prison," "imprisonment," or "incarceration." *See, e.g.*, César Cuauhtémoc García Hernández, *The Perverse Logic of Immigration Detention: Unraveling the Rationality of Imprisoning Immigrants Based on Markers of Race and Class Otherness*, 1 COLUM. J. RACE & L. 353, 364 (2012) ("'They call immigration detention civil confinement, but prison is prison no matter what label you use[.]'"(citation omitted)).

177. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977). *See generally* Eyer, *supra* note48. This analysis will necessarily not be as complete as briefing would be in such a case and is intended to demonstrate the challenges with the equal protection intent doctrine in immigration law.

and the potential of an effects-based invalidation approach to disparate impact claims.

A. Justiciability—Plenary Power

In a challenge to the immigration detention statute, INA § 235(b)(1)(A), the role of plenary power and the standard of review would potentially be outcome determinative. The Court would have to decide if plenary power allowed any review at all because an immigration law is in question.[178] If the Court determined that the claim was justiciable, it would then consider which level of scrutiny applied—merely rational basis review,[179] as was the case in *Trump v. Hawaii*,[180] or a more thorough application of the *Arlington* factors, as indicated in *Regents*.[181]

The *Trump v. Hawaii* Court reasoned that a narrow standard of review applied because, pursuant to *Kleindienst v. Mandel*, the Executive had provided a "facially legitimate and bona fide reason" for its decision and national security justifications gave rise to the need for a less searching review.[182] However, the *Trump v. Hawaii* Court chose to engage in an unconventional application of *Mandel*,[183] effectively applying rational basis review to look slightly beyond the apparent facial neutrality of the order and at extrinsic evidence.[184]

Whether the noncitizen is already in the United States is also relevant to the Court's determination of the level of review. The TPS holders and DACA recipients were considered to have a vested interest in remaining because they were already in the United States. Plenary power was less robust when the noncitizens were already in the country; thus, the Court gave less deference to the Executive's attempted termination as compared to foreign nationals abroad, like those excluded by the Travel Ban in

178. *See supra* Part III.

179. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018) ("For our purposes today, we assume that we may look behind the face of the Proclamation [(travel ban)] to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes.").

180. *See, e.g.*, *id.* at 2419–20 ("'Any rule of constitutional law that would inhibit the flexibility' of the President 'to respond to changing world conditions should be adopted only with the greatest caution,' and our inquiry into matters of entry and national security is highly constrained." quoting *Mathews v. Diaz,* 426 U.S. 67, 81–82 (1976))).

181. *See supra* notes 112–18 and accompanying text.

182. *Trump v. Hawaii*, 138 S. Ct. at 2402 (finding that the Executive's "facially legitimate and bona fide" reason was sufficient to support the government's denial of admission to a Belgian journalist and Marxist (citing *Kleindienst v. Mandel,* 408 U.S. 753, 764–65 (1972))).

183. *Id.* at 2420. Justice Sotomayor and Ginsburg's dissent, however, asserted that the cases the plurality relied on in limiting judicial review did not apply if the Trump policy was contextualized within the scope of a broader interpretation of the circumstances of discriminatory intent. *Id.* at 2440–41 (Sotomayor, J., dissenting).

184. *Id.* at 2420 (majority opinion).

Trump v. Hawaii.[185] The Court generally gives foreign nationals lawfully present in the United States greater constitutional protection than it does to those outside it.[186]

One could make the argument that while the noncitizen challengers of the immigration detention statute may not uniformly have extensive ties to the United States, because they have just arrived, their lack of presence is a legal fiction.[187] The Mexican and Central American immigrants who could challenge the statute are here in immigration jails.[188] In addition, their claims for humanitarian protection could elevate the recognition of their presence, justifying greater deference to their constitutional claims and less deference to the government's exercise of discretionary authority to detain them. If the government contended that they presented a security threat justifying detention as deterrence,[189] the Court could require proof of the threat.[190] Further, while their constitutional rights are low because of their presence at the threshold of entry, and plenary power is at its peak, the Court could consider that those factors are outweighed by the pretextual claim of national security.[191]

If INA § 235 were to be challenged on the basis of having a disproportionate impact on Latinx persons, or those of Mexican, Central

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185. *See, e.g.*, *id.*

186. *See* Zadvydas v. Davis, 533 U.S. 678, 693–94 (2001) (collecting cases); *see also* Saget v. Trump, 375 F. Supp. 3d 280, 367 (E.D.N.Y. 2019).

187. *See, e.g.*, Eunice Lee, *The End of Entry Fiction*, 99 N.C. L. REV. 565 (2021); *see also* César Cuauhtémoc García Hernández, *Invisible Spaces and Invisible Lives in Immigration Detention*, 57 HOW. L.J. 869, 876 (2014) (discussing the "entry fiction" which denies "constitutional due process protections to detained individuals on the basis that they were not in fact present in the United States").

188. They may also have ties to the United States and may have been living here for an extended period and left to visit family.

189. R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (issuing a preliminary injunction "[i]n light of the Court's conclusion that DHS's current policy of considering deterrence is likely unlawful, and that the policy causes irreparable harm to mothers and children seeking asylum, the Court finds that these last two factors favor Plaintiffs as well.").

190. *See* Dora Schriro, *Women and Children First: An Inside Look at the Challenges to Reforming Family Detention in the United States*, *in* CHALLENGING IMMIGRATION DETENTION: ACADEMICS, ACTIVISTS AND POLICY-MAKERS 28 (Michael J. Flynn & Matthew B. Flynn eds., 2017); *see also* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 48 (2010) ("[E]xisting policies and practices almost certainly have caused *overdetention*: detention of individuals who pose no actual flight risk or danger to public safety or are held under overly restrictive circumstances."); Mitzi Marquez-Avila, Comment, *No More* Hieleras*:* Doe v. Kelly's *Fight for Constitutional Rights at the Border*, 66 UCLA L. REV. 818, 832 (2019) ("Hand in hand with the punitive immigration detention conditions is the growing anti-immigrant sentiment in the United States that is easily seen in political rhetoric, the characterization of 'immigration law as a weapon in the war on terror,' and the view that immigrants arriving at the U.S.-Mexico border are a threat to national security." (citations omitted)).

191. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2438 (2018) (Sotomayor, J., dissenting) ("Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications.").

American, and African descent, the Court would ask whether (1) Congress had an invidious intent to discriminate, (2) DHS had an invidious intent to discriminate when it decided to exercise its discretion to detain, or (3) if both Congress *and* DHS had invidious intent to discriminate. If the Court found discriminatory intent, the burden would shift to the government, and the Court would consider whether there was an alternative, nondiscriminatory purpose for INA § 235 that might justify the law. The detailed analysis would likely follow the *Arlington* factors.

The *Arlington* factors include (1) the "historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes"; (2) departures from normal procedures; (3) legislative and administrative history; (4) contemporary statements by members of the decision-making body; and (5) a specific series of events leading up to the challenged action.[192] The Court will focus on disparate impact and the unusual history of the statute because that is often the most contentious component of the analysis.[193]

B. Disparate Impact on Central American and Mexican Asylum Seekers

The large percent of Central American and Mexican nationals in immigration detention at the southern border demonstrates the disparate impact of INA § 235(b)(1)(A). As more families from the Central American countries of El Salvador, Honduras, and Guatemala (the Northern Triangle) have attempted to request humanitarian relief at the southern border, the discretionary policy to detain has become more consistently punitive.[194] Punitiveness may be relevant both to disparate impact and the unusual history of enforcement of the law.

The Executive Office of Immigration Review's data suggests that Central Americans are disproportionately subjected to family detention at

192. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977).

193. Statements by lawmakers are not being considered here because the Trump regime was an aberration and express statements of bias by lawmakers are rare, although that factor deserves separate consideration.

194. *See* Lee, *supra* note 189, at 634 (explaining that "[u]nder policies of the outgoing Trump Administration, the aims of detention and removal grew more punitive by executive design" and examining the lack of appropriate constitutional protection with respect to border entry issues in the context of intentionally punitive immigration policy "combined with virtually unrestricted enforcement authority by lower officials"); Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 792, 829–30 (2018) (compiling data concerning the immigration court process as it pertains to detained asylum seekers and referencing "punitive conditions" in family detention facilities) (citing ELEANOR ACER & JESSICA CHICCO, HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON 45 (2009), https://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf [https://perma.cc/B9QL-FUTS] ("For arriving asylum seekers in particular, many expressed surprise at being handcuffed, imprisoned and treated like criminals . . . .")).

the United States–Mexico border. Eighty percent of individuals in family detention proceedings over a fifteen year study period from 2001–2016 were Central Americans from El Salvador (34%), Honduras (27%), and Guatemala (19%).[195] The remaining twenty-one percent were from Mexico (6%), China (2%), Iraq (1%), Colombia (1%), and twenty-four other countries (10%).[196] By 2016, ninety-four percent of families detained were from the Northern Triangle,[197] while the proportion of detained families from other countries declined significantly.[198]

Along with that shift in the composition of border arrivals, the Trump Administration increased border apprehensions; monthly reports in early 2019 indicated a 434% increase in apprehensions compared to previous years.[199] The shift in migration patterns corresponded with the Administration's increase in apprehensions and detentions of border arrivals.[200] The ethnic or racial composition of those being imprisoned suggests that race is relevant to immigration imprisonment practices at the border.[201]

In *Regents*, the Roberts plurality suggested that the correlation between race and the Administration's DACA decision was not proof of discriminatory intent because more Mexican nationals would be injured by the rescission of DACA than other groups because a majority of DACA holders were Mexican nationals.[202] Similarly, a disproportionate number of Mexicans and Central Americans are fleeing and arriving at the United States' southern border and thus disproportionately detained.[203] However,

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195. *Id.* at 829.

196. *Id.*

197. *Id.*

198. *Id.*

199. Hamilton-Jiang, *supra* note 6, at 59 (citing Kristen Bialik, *Border Apprehensions Increased in 2018-Especially For Migrant Families*, PEW RSCH. CTR. (Jan. 16, 2019), https://www.pewresearch.org/fact-tank/2019/01/16/border-apprehensions-of-migrant-families-have-risen-substantially-so-far-in-2018/ [https://perma.cc/7JS5-QNP9]); *see also* Robert Moore, *Border Patrol Apprehensions Are at an 11-Year High. Most Are Families and Children*, TEX. MONTHLY (Mar. 5, 2019), https://www.texasmonthly.com/news/border-patrol-apprehensions-are-at-an-11-year-high-most-are-families-and-children/ [https://perma.cc/ENU4-WGGW].

200. Robert Moore & Abigail Haslohner, *Trump Administration Working to Close Immigration 'Loopholes'—But Border is Still a Crisis, Officials Say*, WASH. POST. (Oct. 29, 2019, 3:54 PM), https://www.washingtonpost.com/immigration/trump-administration-says-it-is-closing-immigration-loopholes-but-border-is-still-a-crisis/2019/10/29/99bbc9ac-fa62-11e9-ac8c-8eced29ca6ef_story.html [https://perma.cc/VD63-WEN5].

201. Hamilton-Jiang, *supra* note 6, at 59–60.

202. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020) (plurality opinion) (recognizing that, because Latinxs make up a large share of the unauthorized alien population, one would expect them to make up an outsized share of recipients of any cross-cutting immigration relief program).

203. Eagly, Shafer & Whalley, *supra* note 196, at 829–30; *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-36, IMMIGRATION ENFORCEMENT: ARRESTS, DETENTIONS, AND REMOVALS, AND ISSUES RELATED TO SELECTED POPULATIONS 14–16 (2019),

the Roberts plurality's perspective discounts discriminatory motivation. The decision to detain pursuant to INA § 235(b)(1)(A) may only apply to this population precisely because they are from Mexico and Central America. It is not necessary to compare racial groups to identify disparate impact.[204]

Whether in connection with the DACA rescission or an immigration detention statute, the relevant question in determining discriminatory impact is whether the choice to implement such a policy has a disparate impact, not whether one group is disadvantaged more than another. A law does not need to be applied to one group in a way that is different than another to meet the disparate impact element. It only needs to apply to one group: the group that is experiencing disparate impact. Alternatively, a law can fall heavily on a protected class and an unprotected class and still be discriminatory.

Based on this hypothetical where the law is facially neutral but noncitizens imprisoned pursuant to it are disproportionately of Mexican or Central American descent, equal protection challengers could demonstrate disparate impact because more Central American and Mexican nationals are detained than any other group. Even if they had to show that the law was not neutrally applied, they would be able to because of the discretionary decision to detain all persons at the southern border.

C. Background and History of INA § 235(b)(1)(A) and the Role of Race in Immigration Law

The role of race in, and particularly enforcement of, immigration law is all encompassing and provides a background for understanding the relationship between race and immigration prisons at the southern border. This history is relevant in assessing discriminatory intent, particularly in an equal protection challenge to immigration prisons at the border.[205]

The historical treatment of Mexican and Central American nationals at the border could be considered relevant to the invidious intent determination.[206] The *Arlington* Court provided little explanation of its

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https://www.gao.gov/assets/710/706604.pdf [https://perma.cc/5UW8-SSP3]; *Southwest Land Border Encounters*, U.S. CUSTOMS & BORDER PROT. (Apr. 9, 2021), https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters [https://perma.cc/3ZKW-PPMM].

204. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–71 (1977) (focusing on discriminatory purpose and distinguishing *Washington v. Davis*, 426 U.S. 229 (1976), which found that racially disproportionate impact was not sufficient to establish racial discrimination).

205. *See id.* at 267; *see also supra* Section II.B.

206. *See e.g.*, RUBÉN G. RUMBAUT & WALTER A. EWING, IMMIGR. POL'Y CTR., THE MYTH OF CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN 3 (2007); *see also* BRIAN N. FRY, NATIVISM AND IMMIGRATION: REGULATING

"historical background" factor;[207] it only instructed that, "The historical background of the decision is one evidentiary source [of discriminatory intent], particularly if it reveals a series of official actions taken for invidious purposes."[208] The Court could, and should, expansively interpret the "historical background of the decision."[209] With the Court's sole instruction in mind, the history paints a picture of INA § 235(b)(1)(A) as both unusual and usual to the extent that it reinforces the invidious role of race in immigration enforcement at the southern border.

Immigration law's role in the manufacturing of race has been pernicious and persistent in American culture and political and legal institutions.[210] The 1924 National Origins Act[211] and the 1952 Immigration and Nationality Act[212] are both built on a history of racializing national origin exclusion.[213] The national origin quotas, which established a numerical maximum of immigrants per country, institutionalized discrimination in immigrant admissions and were considered in conflict with equality principles at the time.[214] In 1965, Congress repealed national origin quotas on the heels of the 1964 Civil Rights Act and 1965 Voting Rights Act.[215]

Mexico was exempt from the quotas because of demands of agribusiness for what became an exploitable, and particularly precarious,

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THE AMERICAN DREAM 2 (2006); JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 (1963).

207. *Arlington*, 429 U.S. at 267.

208. *Id.*

209. *Id.* ("[H]istorical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.").

210. *See, e.g.*, Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297, 298 (2009) (arguing that "English-Only movements are a present-day form of lynching for Latinos"). As evidenced throughout this Article, these movements arise out of the discriminatory culture of U.S. immigration law.

211. Immigration (National Origins) Act of 1924, Pub. L. No. 68-139, § 2, 43 Stat. 153.

212. Immigration and Nationality Act, Pub. L. No. 82-414, § 101, 66 Stat. 163, 169-70 (1952) (codified as amended at 8 U.S.C. § 1101).

213. The process of expressing preference or disfavor based on national origin was part of the way in which immigration law served to manufacture the construct of race. *See* NGAI, *supra* note 15, at 26, 33–34 (describing national origin quotas and race); *see also* Rose Cuison Villazor, *The Other Loving: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1394 (2011) ("By barring certain racial groups, Congress sought to create and reify a White nation through immigration law.")

214. Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 BERKELEY LA RAZA L.J. 42, 81 (1995) (arguing that these quotas had institutionalized discrimination in admissions of immigrants into the United States and effectively limited immigration of people of color to this nation).

215. *See* Act of Oct. 3, 1965, Pub. L. No. 89-236, § 2(a), 79 Stat. 911, 911–12 (amending the INA); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 to 1973bb-1); *see also* NGAI, *supra* note 15, at 227–28 (discussing reformation of National Origin Quotas).

class of workers.[216] Anti-Mexican immigrant sentiment was codified and executed without quotas on migration. Instead, the government opted for enhanced policing of the southern border and rigorous enforcement of deportation laws against Mexican nationals.[217] As Ingrid Eagly writes, the enforcement of criminal laws to prosecute illegal entry and reentry against Mexican border crossers, particularly in the 1950s, also contributed to criminalization and racialization of Mexican immigrants and persons of Mexican descent.[218] These policies manipulated public perception of Mexican nationals in the United States, sending a message that all were undocumented and inferior.[219] Immigration law has uniquely impacted Salvadorans and Guatemalans seeking asylum in the United States, particularly in the 1980s during civil wars in those countries.[220] Biased adjudication of asylum claims resulted in a consent decree.[221]

Racialized border enforcement and exclusion is not only embedded in United States immigration history but continues to shape migration and demographics. The Haitian asylum seekers interdicted at sea in the 1980s are indicative of this problem.[222] Critics alleged that the Haitian interdictions were motivated by race, on the basis of African ancestry or heritage, but effectuated via the proxy of alienage and immigration status.[223] The Haitian interdictions were never invalidated on equal protection grounds because in *Jean v. Nelson* the Eleventh Circuit stated

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216. NGAI, *supra* note 15, at 54.

217. *See, e.g.*, Douglas S. Massey, The New Latino Underclass: Immigration Enforcement as Race-Making Institution 3–5 (April 2012) (unpublished manuscript), https://inequality.stanford.edu/sites/default/files/media/_media/working_papers/massey_new-latino-underclass.pdf [https://perma.cc/DLD7-62YJ].

218. Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1282 (2010).

219. *See, e.g.*, NGAI, *supra* note 15, at 89.

220. See M. Kathleen Dingeman & Rubén G. Rumbaut, *Deportation Experiences: The Immigration-Crime Nexus and Post-Deportation Experiences: En/countering Stereotypes in Southern California and El Salvador*, 31 U. LA VERNE L. REV. 363, 387–88 (2010) (describing the significance of the civil war in El Salvador from 1980 to 1992 that led to an exodus to flee "political repression, armed conflict, and economic disruptions" but where the US government had financially and militarily supported the right-wing government and engaged in "systematic denial of refugee status and political asylum to Salvadoran migrants" and subsequently experienced poor or hostile reception in the United States).

221. *See* Am. Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991) (Stipulated Order Approving Class Action Settlement Agreement) (ordering settlement decree in national class-action regarding biased adjudication of Salvadoran and Guatemalan asylum applications and ordering reconsideration of applications by approximately 250,000 class members).

222. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (May 24, 1992); *see* Ingrid Eagly and Steven Shafer, *The Institutional Hearing Program: A Study of Prison-Based Immigration Courts in the United States*, 54 LAW & SOC'Y REV. 788 (2020), (discussing this period, including the legacy INS racialized border enforcement against Cubans at that time).

223. Malissia Lennox, Note, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687, 710 (1993).

that "excludable aliens" were not entitled to equal protection under the Fifth Amendment.[224] The Eleventh Circuit distinguished *Yick Wo v. Hopkins,*[225] an alienage case, where the Court had found an equal protection violation.[226] The Eleventh Circuit reasoned that while the *Yick Wo* Court, for the purposes of the Fifth and Fourteenth Amendments, "recognized that aliens are 'persons' . . . and ' . . . entitled to the same constitutional protections afforded all persons within the territorial jurisdiction of the United States,' . . . the decision to parole or detain an excludable alien" is distinguishable.[227] Instead, the circuit court deemed the alienage decision as "an integral part of the admissions process and . . . the grant of discretionary authority to the Attorney General under 8 U.S.C. § 1182(d)(5)(A) permits the Executive to discriminate on the basis of national origin in making parole decisions."[228] In other words, the circuit court rationalized national origin discrimination on the basis of the federal government's plenary power, or complete authority, over immigration law.

Immigration status is analogous to national origin, yet courts fail to apply the same analysis. This is in part because immigration law is written in nonracial language that inhibits "inquiries into legislative intent" in spite of having "a disproportionate impact" along lines of race.[229] Where

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224. Jean v. Nelson, 863 F.2d 759, 764 (11th Cir. 1988); *see* Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1940 (1996) (reviewing PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995)); Geoffrey Heeren, *Distancing Refugees*, 97 DENV. L. REV. 761 (2020). But note that a district and circuit court upheld equal protection claims on the grounds that the "Haitian Program" violated the plaintiffs' equal protection and due process rights. Haitian *Refugee Ctr. v. Civiletti,* 503 F. Supp. 442, 532 (S.D. Fla. 1980), *aff'd as modified sub nom.* Haitian Refugee Ctr. v. Smith, 676 F.2d 1023 (5th Cir. 1982); *see also* Lennox, *supra* note225, at 715 n.222 ("[W]e do not address the Equal Protection contentions any more than to observe that we do not approve the sweeping conclusions of the district court." (quoting *Smith*, 676 F.2d at 1041)).

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

226. Jean v. Nelson, 727 F.2d 957, 962–63 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

227. *Id.* at 963 (internal citations omitted).

228. *Id.*

229. Motomura, *supra* note 226, at 1951. *See generally* Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995) (noting the difficulties in proving a discriminatory intent of the drafters of California Proposition 187). The limits of an intent-based Equal Protection doctrine seem particularly evident in the immigration field. *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987). *But cf.* Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and the Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279, 2280 (2001) (proposing that the challenge is even deeper because Lawrence's proposal "only captured only a partial truth about race and racism. Ideal factors—thoughts, discourse, stereotypes, feelings, and mental categories—only partially explain how race and racism work. Material factors—socioeconomic competition, immigration pressures, the search for profits, changes in the labor pool, nativism—account for even more.").

national origin, like immigration status, serves as a proxy for race, and the discrimination is not in the language of the statute, it remains difficult to identify national origin as an equal protection violation.[230]

1. Brief History of Immigration Incarceration Pursuant to INA § 235 and Differential Treatment of the United States-Mexico and United States-Canada Borders

The use of immigration imprisonment is not new, nor is its relationship to race. Congress first introduced mandatory detention into immigration enforcement in 1988.[231] The 1988 legislation, however, was not designed to deter migration because it did not target noncitizens seeking entry into the United States.[232] INA § 235 was part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which reformed certain aspects of immigration policy and was responsible for criminalizing immigration law.[233]

It has not always been true that the United States imprisoned tens of thousands of immigrants a day, nor was it inevitable[234] The 1980's "War on Drugs," was partically responsible for stimulaing the growth of immigration prisons when the Executive and Legislative Branches expanded both authority to detain and to set capacity.[235] Immigration detention was "an outgrowth of the increasingly harsh penal norms gaining

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230. Although in *Jean* the statute was also neutral with respect to national origin. *See Jean*, 727 F.2d at 963.

231. Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 147 (2013) ("Congress passed the first mandatory immigration detention law, requiring the detention of a specified class of noncitizens and depriving federal immigration officials of the authority to release those individuals on bond pending their removal proceedings."); *see also* Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, 584 (1998) (warning, two years after enactment of IIRIRA, of the border as the new criminal justice frontier and noticing that imprisonment, distributed "on the basis of race or nationality" might pose a constitutional problem).

232. *See* 8 U.S.C. § 1225.

233. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; *see also* Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1344 (2011) ("While there have been a number of significant events marking the increased criminalization of immigration law, all pale in comparison to the 1996 passage of the [IIRIRA].").

234. *See* Philip L. Torrey, *Immigration Detention's Unfounded Bed Mandate*, IMMIGR. BRIEFINGS 15-04, at 1 (Apr. 2015) ("The United States immigration detention system is largely driven by a congressional directive that requires the U.S. Department of Homeland Security (DHS) to maintain 34,000 beds in immigration detention at all times."); *see also Abolishing Immigration Prisons*, *supra* note 23, at 248.

235. García Hernández, *supra* note 24, at 248. *See also* Eagly & Shafer, *supra* note 224, at 792, 798–99 (characterizing the drive to control border entry and even asylum claims as another rationale for the emergence of the use of prisons to detain migrants).

popularity during that period."[236] The shift towards penality in immigration enforcement "gained popularity at roughly the same time that penal incarceration was growing exponentially."[237] Punishing migration coincided with an influx of Haitian and Black refugees in the 1980s.[238] Use of mandatory detention in response to Haitian arrivals set the stage for the current immigration carceral state.

The United States' immigration carceral state is racially skewed in a manner analogous to criminal incarceration rates, for similarly dubious reasons.[239] The media and politicians characterized Haitian refugees criminals and illegal aliens, rather than refugees lawfully seeking protection pursuant to international and federal law.[240] The similarity to racialization of other groups in prior eras, and contemporary migration is striking, albeit not surprising. The political and popular discourse concerning the Haitians was consistent with earlier demonizing rhetoric that associated ethnicity or race with criminality in immigration law, including Chinese migrants in the 19th Century, Mexican migrants before and after the Bracero Program.[241] The treatment of Mexicans and Central Americans at the border pursuant to INA § 235(b)(1)(A) is characteristic of this punitive and racializing response and fits within the usualness of the role of race in immigration law.

INA § 235(b)(1)(A) was but one component of the 1996 legislation; the statute also empowered Customs and Border Protection (CBP) to more easily detain and rapidly and deport noncitizens who present themselves at the border, even when requesting humanitarian protection. This is known as expedited removal.[242] Expedited removal is administrative,

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236. César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1372 (2014).

237. *Id.* at 1375.

238. Deborah Anker, *U.S. Immigration and Asylum Policy: A Brief Historical Perspective*, *in* 13 IN DEFENSE OF THE ALIEN 74, 79 (Lydio F. Tomasi ed., 1990) ("The legal fiction" of an immigrant seeking asylum but not having made an entry for the purposes exercising due process rights arose out of the Haitian arrivals in the 1970s - the "first substantial group of black refugees." This "denial of a hearing was the result of a legal fiction that, apprehended on the shores of Miami, they were 'outside' the United States and thus entitled to no constitutional protections." This prompted "[a] major civil rights movement . . . [and] some of the most important class-action litigation in recent years concerning due process and asylum rights.").

239. García Hernández, *supra* note24, at 288 (demonstrating the way in which racial bias in criminal law and confinement mirrors that of immigration incarceration and, specifically, "[b]y [disproportionately] confining migrants of color, especially Latinos, immigration imprisonment perpetuates their subordinated status").

240. García Hernández, *supra* note238, at 1376.

241. *See* NGAI, *supra* note 16; Johnson, *supra* note17; Motomura, *supra* note110; García Hernández, *supra* note24; Vázquez, *supra* note30.

242. *See* THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON, JULIET P. STUMPF & PRATHEEPAN GULASEKARAM, IMMIGRATION AND CITIZENSHIP 327 (9th ed. 2020) ("In 1996, Congress enacted an expedited removal procedure, INA

meaning procedural due process does not require an immigration hearing before a noncitizen is either detained or removed.[243]

This criminalization of migration via expedited removal arose in the context of a long history of disparate treatment of Mexican migrants, and of migration via the Mexican and Canadian borders, and respective racialization specific to each port of entry. Canadian migrants were generally racialized as white, whereas Mexican migrants were racialized as non-white, except for a brief moment after the 1897 Treaty of Guadalupe Hidalgo when it served certain political aims and the needs of labor to racialize them as white.[244] As a result, Canadian nationals have generally enjoyed less restricted access to the United States compared to Mexican nationals. For example, in the 1920s, Europeans could enter the United States lawfully after residing in Canada for five years—an option not available to migrants from the Mexican border.[245]

With the advent of Border Patrol, admission through the Mexican border became more arduous and included invasive and degrading processes.[246] As historian Mae Ngai explained, "Racial presumptions about Mexican laborers, not law, dictated procedures at the Mexican

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§ 235(b)(1), to apply to 'arriving aliens,' if they are inadmissible under either of two grounds. One is INA § 212(a)(6)(C), if the noncitizen has attempted to obtain admission or other immigration benefits through fraud or misrepresentation, even in the past. The other is § 212(a)(7), if the noncitizen lacks a valid passport, visa, or other required document. And - The same statute gives the Secretary of Homeland Security (formerly the Attorney General) the 'sole and unreviewable discretion' to apply expedited removal to noncitizens who have not been admitted or paroled into the United States, if they do not 'affirmatively show[ ], to the satisfaction of an immigration officer,' that they have been continuously present in the United States for the preceding two years. INA § 235(b)(1)(A)(iii), 8 C.F.R. § 235.3(b)(1).") (internal citations omitted).

243. For important scholarly commentary on the rise of deportation without judicial process, see Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L. J. 595, 611–32 (2009) (summarizing the methods, aside from removal hearings, that the government uses to deport noncitizens); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 181 (2017) (documenting that "the vast majority of persons ordered removed never step foot inside a courtroom"); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 1 (2014) ("In 2013, the majority of people deported never saw a courtroom or immigration judge.").

244. NGAI, *supra* note 16, at 50. But see *In re Rodriguez*, 81 F. 337 (W.D. Tex. 1897), the first case where a Mexican citizen was considered for naturalization on an individual basis, depending on whether he was deemed "white," which the Court found he was. *See also* IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 43–44 (1996) (describing the Supreme Court's decision to treat some persons of Mexican descent as "white" for the purposes of granted U.S. citizenship after the 1848 Treaty of Guadalupe Hidalgo where the US naturalized 115,000 Mexicans (collectively) although they were not treated as "white" by within their communities depending on socio-economic status); *see also* LAURA E. GOMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE 139–41 (2007) (describing the Court's decision as finding them not truly white, but white enough, and contextualizing the decision within the labor shortage influenced by Asian exclusion).

245. *Id.* at 66–67.

246. *Id.* at 68.

border."[247] This continues to be true today, although the role of race in shaping the law takes colorblind forms that Equal Protection cannot easily reach. Members of the Ku Klux Klan, one of the country's most notorious violent racist hate groups, were formally welcomed into the enforcement arm of the state as Border Patrol officers.[248] Even today, white supremacists and sympathizers are employed by the United States as law enforcement officers, members of the military, Border Patrol, and DHS.[249]

The laissez-faire approach to migration from the north harkens back to the earliest immigration restrictions.[250] The 1930s immigration reform created a process called "pre-examination" that favored Canadians and migrants of European descent.[251] By 1945 the Immigration and Naturalization Service (INS) employed a *race neutral* policy, and effectively "categorically den[ied] relief to Mexican and Caribbean

247. *Id.*

248. *Id.* KKK members were also known to be in local law enforcement as police officers. Robin D. Barnes, *Blue by Day and White by (K)night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 IOWA L. REV. 1079, 1089 (1996); Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205 (2019) (describing an "epidemic of white supremacists in police departments and proposing prosecutors be required to seek out information about police officers racial bias in line with the principle established by the Supreme Court that the government must disclose any information that is favorable to the defense"); *see also, e.g.*, United States v. Price, 383 U.S. 787, 790 (1966) (explaining sheriffs in Mississippi conspired with members of the KKK to kidnap and murder out-of-state civil rights workers).

249. *See, e.g.*, MICHAEL GERMAN, BRENNAN CTR. FOR JUST., HIDDEN IN PLAIN SIGHT: RACISM, WHITE SUPREMACY, AND FAR-RIGHT MILITANCY IN LAW ENFORCEMENT (2020), https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law [https://perma.cc/RHH7-E6Y9]; Greg Grandin, *The Border Patrol Has Been a Cult of Brutality Since 1924*, THE INTERCEPT (Jan. 12, 2019, 6:00 AM), https://theintercept.com/2019/01/12/border-patrol-history/ [https://perma.cc/T55C-CAC9]; A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, PROPUBLICA (July 1, 2019, 10:55 AM), https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes [https://perma.cc/9VYF-HZNH].

250. NGAI, *supra* note 15, at 63–64 (explaining that both history and policy constructed the US-Mexican and US- Canadian borders differently).

251. NGAI, *supra* note 15, at 86–87; *see also* Elwin Griffith, *The Road Between the Section 212(C) Waiver and Cancellation of Removal Under Section 240A of the Immigration and Nationality Act—The Impact of the 1996 Reform Legislation*, GEO. IMMIGR. L.J. 65, 68–69 (1997) ("It was not unusual for an alien to go to Canada and return with an immigrant visa, after living in the United States illegally for some time."); Leti Volpp*, Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1602–03 (2005) ("The program allowed Europeans to take voluntary departure to Canada, obtain a visa for permanent residence from the United States consul there, and then reenter as legal immigrants. Asians did not qualify for the program, as they were categorically excluded from immigration on grounds of racial ineligibility; while one district director tried to grant pre-examination to Mexicans, he was stopped after 1938 . . . . Between 1935 and 1959, the INS processed nearly 58,000 cases and granted approval in the vast majority of them . . . .Thus, Europeans could convert their status from illegal aliens to lawful immigrants through pre-examination.") (reviewing NGAI, *supra* note 15); ASHLEY JOHNSON BAVERY, BOOTLEGGED ALIENS: IMMIGRATION POLITICS ON AMERICA'S NORTHERN BORDER (Univ. of Penn Press 2020).

migrants."[252] The system was "profound" in its colorblind, remedy-proof racism.[253] In line with this history, enforcement of INA § 235 is drastically different at the southern border compared to the northern border.[254] These are only some of the relevant historical components necessary to contextualize whether the Court should consider INA § 235 to be marred by discriminatory intent.[255]

2. Expansion of Expedited Removal and One-Direction (Darkside) Discretion

From the standpoint of consistent and fair administration of justice, one of the most dangerous aspects of the expedited removal statute is that it authorizes CBP officers to use discretion, without review, to detain noncitizens at the border. The statute does not mandate expedited removal nor detention.[256] Yet in recent years, ICE and CBP have applied this discretionary authority in one direction: punitively, choosing expedited removal and detention. Professor Shoba Sivaprasad Wadhia aptly named this "darkside discretion."[257] This "darkside discretion" could also be evidence of discriminatory intent.[258]

The consistently punitive exercise of discretion to prosecute, is circumstantial evidence of discriminatory intent when it aligns with a pattern of disparate impact.[259] With respect to INA § 235, the pattern has been stark. DHS's exercise of discretion has resulted in disparate imprisonment of Mexican and Central Americans.[260] Exercising discretion

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252. NGAI, *supra* note 15.

253. NGAI, *supra* note 15, at 87.

254. Some contend that there are fewer attempts at undocumented migration from Canada because it is a wealthier country. *See, e.g.*, Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 830 (2007). Cox and Posner also propose that "American immigration law may have begun to rely more on ex post screening as it has become less racist." *Id.* at 839. However, there is evidence that immigration law remains as racist as it was in the past but hides it better. *See* Peter Andreas, *A Tale of Two Borders: The U.S.-Mexico and U.S.-Canada Lines After 9-11* (Ctr. for Comparative Immigr. Studies, Working Paper No. 77, 2003), https://ccis.ucsd.edu/_files/wp77.pdf [https://perma.cc/XW2L-6KS2].

255. Significantly more evidence of historic anti-Mexican and anti-Latinx bias in immigration enforcement could be presented in support of this component of the *Arlington* analysis.

256. INA § 235.

257. Shoba Sivaprasad Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367, 375 (2020) (arguing that instead of "humanitarian concerns," the government "uses the tool of discretion negatively, even in the face of a robust statute and subsequent harms").

258. *See* Alia Al-Khatib & Jayesh Rathod, *Equity in Contemporary Immigration Enforcement: Defining Contributions and Countering Criminalization*, 66 U. KAN. L. REV. 951, 955 (2018) ("[T]he absence of any discretion at the margins will compromise a system's moral legitimacy."); García Hernández, *supra* note24; García Hernández, *supra* note 238

259. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

260. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the

in a punitive manner, absent evidence of a national security threat, in combination with expansion of expedited removal, was unusual. DHS's use of detention pursuant to this statute, to deter these particular migrants can be understood in the historical context of racialization, exclusion, and exploitation of Mexicans and Central Americans.

The United States' use of immigration imprisonment to control borders as an expression of sovereignty[261] has often disproportionately burdened racialized immigrants of color. The expedited removal statute is indicative of this means of policing migration. It was not inevitable that increased migration from Central America and Mexico resulted in more detention.[262] However, even under prior administrations, from a policy standpoint, immigration detention was considered an appropriate means of deterring migration from particular regions.[263]

Beginning in 2004, the Executive expanded expedited removal to noncitizens who entered without inspection. As a result, noncitizens are stopped within 100 miles of the United States–Mexico border or the United States–Canada border, unless they could prove that they have been continuously present in the United States for more than fourteen days.[264] By 2019, the Trump Administration, through the Secretary of Homeland Security, expanded expedited removal "in his sole and unreviewable discretion" to all noncitizens located anywhere in the United States who had not been admitted or paroled, unless they could prove that they have been continuously present in the United States for the prior two year period.[265] In September 2019, the District Court for the District of

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state action even when the governing legislation appears neutral on its face.") (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886); Guinn v. United States, 238 U.S. 347 (1915); Lane v. Wilson, 307 U.S. 268 (1939); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

261. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004) (authorizing the DHS to place a designated class of immigrants in expedited removal proceedings).

262. *See* Eagly, Shafer & Whalley, *supra* note196, at 833 (noting that ICE has the discretion to grant release on parole to immigrants with a credible or reasonable fear of persecution are placed into removal or withholding-only proceedings).

263. *See, e.g.*, R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 174 (D.D.C. 2015). The court in *R.I.L-R*, determined that the plaintiff's claim that "DHS policy directs ICE officers to consider deterrence of mass migration as a factor in their custody determinations, and that this policy has played a significant role in the recent increased detention of Central American mothers and children" had merit. *Id.* Though the plaintiffs did not make an Equal Protection challenge in *R.I.L-R*, it remains true that absent a legitimate national security threat, there is at least an implication that the policy decision was improperly influenced or motivated by race. Reinforcing racial disparities and oppression may or may not be inherently a part of enforcing borders and honoring sovereignty.

264. ALEINIKOFF, MARTIN, MOTOMURA, FULLERTON, STUMPF & GULASEKARAM, *supra* note 242.

265. Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409, 35,410 (July 23, 2019); *see* Designating Aliens for Expedited Removal, 69 Fed. Reg. at 48,880; *see also* Eagly, Shafer & Whalley, *supra* note196. On January 25, 2017, President Trump issued an Executive Order directing

Columbia enjoined the expansion because of violations of the Administrative Procedure Act.[266] By June 2020, the D.C. Circuit reversed the district court and permitted the expansion determining that it was within the DHS Secretary's unreviewable discretion.[267]

Access to an immigration judge is radically curtailed pursuant to the expedited removal statute. A noncitizen in immigration prison can only secure an immigration court hearing if they (1) express a fear of returning to their country; and (2) an asylum officer, or a CBP officer determines that the noncitizen has a credible fear.[268] CBP agents are law enforcement agents, not neutral arbiters. Unlike asylum officers, CBP agents do not work within an agency intended to offer humanitarian protection nor are they trained to provide such protection. If an agent determines that the noncitizen has a credible fear, Immigration and Customs Enforcement (ICE) has the discretion to grant the noncitizen's release on parole; however, as in recent years, the noncitizen is summarily detained without a hearing or a formal adjudicatory process.[269] Empowering CBP officers

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DHS to expand the use of expedited removal to include those arrested anywhere within the United States within two years of entry. Exec. Order 13,767, 3 C.F.R. § 263 (2018) ("Pursuant to section 235(b)(1)(A)(iii)(I) of the INA, the Secretary shall take appropriate action to apply, in his sole and unreviewable discretion, the provisions of section 235(b)(1)(A)(i) and (ii) of the INA to the aliens designated under section 235(b)(1)(A)(iii)(II)."). On February 20, 2017, DHS Secretary John Kelly issued preliminary guidance on implementing the President's Executive Order. Memorandum from John Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Prot., on Implementing the President's Border Security and Immigration Enforcement Improvement Policies to Thomas D. Homan, Acting Dir., U.S. Immigr. & Customs Enf't, Lori Scialabba, Acting Dir., U.S. Citizenship and Immigr. Servs., Joseph B. Maher, Acting Gen. Couns., Dimple Shah, Acting Assistant Sec'y for Int'l Affs., & Chip Fulghum, Acting Undersecretary for Mgmt (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf [https://perma.cc/JSA5-9AFH] (directing DHS to expand the category of individuals subject to expedited removal and directing both the CBP and Immigration and Customs Enforcement to "conform the use of expedited removal procedures to the designations made in this notice"); *Practice Alert: Implementation of Expedited Removal Expansion*, AILA (Oct. 16, 2020), https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/trump-administration-expands-expedited-removal [https://perma.cc/MYN3-Y5B2] ("[A]ny noncitizen apprehended anywhere within the United States who is inadmissible under INA § 212(a)(6)(C) or (7), has not been admitted or paroled at a port of entry, and who cannot prove that he or she has been present in the United States for 2 years or more."). Note that the lack of Notice and Comment rulemaking and other Administrative Procedures Act challenges, however, may be factors the Court could consider in determining whether the expansion, and the nature of the expansion signified the kind of unusual history indicative of discriminatory intent.

266. Make the Road N.Y. v. McAleenan, 405 F. Supp. 3d 1, 72 (D.D.C. 2019), *rev'd sub nom*. Make the Road N.Y. v. Wolf, 962 F.2d 612 (D.C. Cir. 2020), *reh'g en banc denied*, Sept. 22, 2020.

267. *Wolf*, 962 F.3d at 631–35 (finding that it did not require notice-and-comment rulemaking).

268. Eagly, Shafer & Whalley, *supra* note196, at 808 n.111.

269. Immigration and Nationality Act (INA) of 1952, § 212(d)(5), 8 U.S.C. § 1182(d)(5)(A) (providing for temporary parole of migrants applying for admission to the United States "for urgent humanitarian reasons or significant public benefit"); *see also* 8 C.F.R. §§ 212.5(b)(1), 235.3(b)(2) (2018) (allowing for parole of individuals "who have serious medical

instead of impartial adjudicators raises due process concerns and is one piece of the puzzle in assessing discriminatory intent.[270]

Expedited removal and detention practices have received extensive criticism for undermining due process and access to humanitarian protections but demonstrating a violation of the equal protection doctrine is more challenging.[271]

3. Does Punitiveness Signify "Unusualness" of a Civil Immigration Statute Expressly Intended to Deter and Not Punish?

INA § 235 could be characterized as unusual, or a departure from immigration legislative norms, because the statute created an expedited removal system and made detention at the border a means of deterrence. Yet at the same time, it was entirely usual, or historically consistent with the increasing punitiveness of immigration enforcement.[272] Whether characterized as usual or unusual, Section 235 fits within the *Arlington* framework for assessing discriminatory intent.

In response to a 2015 challenge to immigration detention as a deterrent, the government argued that "one particular individual may be civilly detained for the sake of sending a message" to others "who may be considering immigration."[273] The court recognized however, that "the potential migrants to whom the federal government has sought to send such a message are," not just any migrants, but "by and large, [those] from Mexico and Central America."[274] The court's observation reads as if it was considering a discriminatory impact equal protection claim. This reflection evinces an enforcement history where deterrence has more heavily burdened Latinx migrants—but has historically not worked to deter migration.[275] Moreover, immigration detention's failure to deter

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conditions in which continued detention would not be appropriate" and "who have been medically certified as pregnant"); Eagly, Shafer & Whalley, *supra* note196.

270. *See, e.g.*, Ava C. Benach, *The Border: How We Got Here*, 34 CRIM. JUST., Summer 2019, at 27, 29 (explaining "metering," the process CBP used to refuse to process asylum seekers); *see also* Daniela Ruiz Ferreyra, *Stolen Childhoods: A Chance at Survival Through Asylum in the United States*, 16 SEATTLE J. FOR SOC. JUST. 1029, 1047 (2018) (discussing the role of bias in CBP adjudication limiting access to asylum).

271. Rosenbaum, *Immigration Law's Due Process Deficit*, *supra* note24, at 121 ("Expedited removal is one critical legal mechanism facilitating the rise in immigration incarceration of asylum seekers in particular. Expedited removal allows a [DHS] official to summarily remove a noncitizen, without a hearing before an immigration judge, and precludes appeal to the Board of Immigration Appeals (BIA). Alternatively, expedited removal authorizes detention where a noncitizen expresses a credible fear of harm." (internal citations omitted)).

272.García Hernández, *supra* note24;García Hernández, *supra* note238.

273. R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 188–89 (D.D.C. 2015).

274. Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE 237, 237 (2019).

275. *Id.* (first citing Adam Cox & Ryan Goodman, *Detention of Migrant Families as "Deterrence": Ethical Flaws and Empirical Doubts*, JUST SEC. (June 22, 2018),

migration suggests that it serves another policy goal, even if implicitly—to punish.[276] Professor Emily Ryo suggests that in immigration law, criminal law, and other areas of law,

> [G]overnment officials often assume, without sound theoretical or empirical basis, that legal or policy changes can change behavior. Yet criminal deterrence literature suggests that people generally do not know the law[;] are bad at rational decision-making[;], and even if they can make rational decisions, will choose to commit the crime because the perceived benefits often outweigh the perceived costs.[277]

Given the failure of deterrence immigration imprisonment may serve an entirely different societal purpose as a smokescreen for punitiveness. If that were the case, or even if policymakers employ deterrence lacking a punitive intent, in spite of evidence that it does not work, use of a policy that never achieves its goal is evidence of an ulterior purpose.[278]

If INA § 235 (1) was deemed to fit within the broader setting of the 1996 immigration law reforms; (2) was a natural outgrowth of the criminalization of immigrants; and (3) had followed all formal procedures with respect to the legislative process, the statute would be exceptional in its ordinariness. Put differently, when discriminatory intent manifests in colorblind state action, and is ordinary and usual, equal protection is handicapped. Discriminatory impact becomes ordinary and usual, and a legitimate governmental purpose is always available because proving a negative is impossible.

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https://www.justsecurity.org/58354/detention-migrant-families-deterrence-ethical-flaws-empirical-doubts/ [https://perma.cc/X9SF-LMLB]; and then citing Tom K. Wong, *Do Family Separation and Detention Deter Immigration?*, CTR. FOR AM. PROGRESS (July 24, 2018), https://www.americanprogress.org/issues/immigration/reports/2018/07/24/453660/family-separation-detention-deter-immigration/ [https://perma.cc/L6YJ-DTDS]).

276. *See, e.g.*, Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992); *see also* MICHAEL WELCH, DETAINED: IMMIGRATION LAWS AND THE EXPANDING I.N.S. JAIL COMPLEX 89 (2002); MICHAEL WELCH, SCAPEGOATS OF SEPTEMBER 11TH: HATE CRIMES & STATE CRIMES IN THE WAR ON TERROR 90 (Raymond J. Michalowski ed., 2006).

277. Ryo, *supra* note274, at 250.

278. I raised this issue in the context of a critical race critique of the *Jennings* decision where I suggested that

> Mexican and other racialized immigrants of color have also been subject to "selective enforcement." Such selective enforcement encompasses policies like the public charge bar, preventing the immigration of an otherwise qualified applicant, based on financial factors. Similarly, Mexican nationals who entered the United States unlawfully from Mexico and were permitted to work, then some were later deported. Racialized immigrants of color who had been given temporary permission to stay, many who have lived in the United States for decades, are soon to lose their status as a result of Trump [A]dministration policy changes.

Rosenbaum, *Immigration Law's Due Process Deficit*, *supra* note24, at 146.

Perhaps "usual" rather than "unusual" history of the challenged law or policy is a relevant benchmark for assessing discriminatory purpose or intent. What the *Arlington* Court meant by unusual underscores the inutility of the test. At times, the Court has narrowly emphasized unusual history behind the government action, instead of broadly viewing the "historical background" of the challenged act.[279] Immigration imprisonment in particular—as opposed to DACA rescission, TPS rescission, or other policies challenged as discriminatory—is similar to the use of prisons in the criminal justice system in regard to the role it plays in society. Therefore, the usual historical background concerning the role of race is uniquely relevant to the Equal Protection analysis.

Pursuant to the *Arlington* factors, a court could find that INA § 235 results in discriminatory impact with respect to immigration detention at the border. Particularly, a court could analyze the record expansively to consider the history of policing the southern border, the role of "darkside discretion," the relationship between criminal and immigration imprisonment, and the failure of deterrence and resulting punitiveness. However, the *Arlington* factors can be interpreted narrowly, and the government can rebut the presumption of discrimination with a nondiscriminatory purpose. Policing borders is a nondiscriminatory purpose that is always readily available. Accordingly, a doctrinal shift toward an effects-based method of invalidation would increase the equal protection effectiveness in immigration law.

IV. DOCTRINAL SHIFT TOWARDS PROTECTION

This Article adds to the literature critiquing the intent doctrine finding it largely counterproductive to anti-discrimination and anti-racism goals.[280] While the *Arlington* factors could be interpreted and applied in a manner more likely to invalidate discriminatory government action, there are better solutions. The hypothetical crimmigration law scenario explored here highlights the problems with the doctrine.[281] This final section provides additional examples of how *Arlington* could be more effective,

279. *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

280. *See* Eyer, *supra* note48, at 74; Siegel, *supra* note 41; Strauss, *supra* note41; Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (discussing the doctrine's dissonance between black letter law declaring discrimination unlawful and continued non-violative discrimination); *see also* Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275 (2012) (discussing evidence suggesting that most people perceive discrimination explicit and intentional); Selmi, *supra* note41.

281. For more on this apparent constitutional drift, see Eyer, *supra* note48, at 7 (first citing MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 130–32 (1999); then citing Jack M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869 (1993); and then comparing David Schraub, *Sticky Slopes*, 101 CALIF. L. REV. 1249 (2013)).

and turns to alternatives that would better reflect *Arlington*'s progressive, racial justice impetuses.[282]

A. Increased Equal Protection Efficacy

Immigration law has been deemed exceptional because of its departure from constitutional norms[283] and its racializing effects. The *Arlington* analysis, combined with plenary power, fails to remedy the longstanding implicit bias fostered by immigration law. An equal protection challenge to INA § 235 would have more potential if the Court looked to the pre-1970s equal protection intent jurisprudence.[284] For example, the Court could embrace a more expansive view of historical discrimination evidence, particularly in light of the role of race in immigration law. Justice Sotomayor has already endorsed such an approach in *Trump v. Hawaii* and *Regents*.[285] Additionally, either the "intent-based" or "effects-based" iteration of the method of assessing disparate impact cases would better curtail systemic bias in immigration law.

Equal protection is particularly limited in regard to identifying discrimination in a reenacted or amended statute where the original statute evidences clear discriminatory motivation but the new statute does not. In such scenarios, where disparate impact is proven, the Court could require more than an absence of discriminatory intent in the record to find that the taint of discrimination was purged from the earlier statute.[286] This would be a step toward the effects-based invalidation model and could be used within the *Arlington* framework. However, pursuant to *Arlington*, the government could still avoid invalidation of the law if it could prove a nondiscriminatory justification.

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282. Eyer, *supra* note48, at 4 (explaining that for most of intent doctrine's history, it was a progressive project, believed to serve racial justice aims).

283. *See generally* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017) (describing immigration law as exceptional with respect to constitutionality and rights).

284. While there was an era of pre-*Arlington* jurisprudence that was more effective, particularly *Brown v. Board of Education*, 349 U.S. 294 (1955), when the Court responded to the South's persistent refusal to integrate schools, even that case did not mark a radical shift away from what has been called "effects-focused" intent and relevant jurisprudence. *See, e.g.*, Eyer, *supra* note48, at 12 ("[I]n sweeping away the separate-but-equal doctrine, the Court did not wipe the slate of Equal Protection doctrine clean.")

285. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2448 (2018) (Sotomayor, J., dissenting); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1918 (2020) (Sotomayor, J., concurring in part).

286. A district court recently did exactly that, validating an equal protection challenge to 8 USC 1326, a criminal, illegal reentry statute. *See* United States v. Carrillo-Lopez, 555 F. Supp. 3d 996 (D. Nev. 2021).

Alternatively, the Court could go a step further and eliminate the intent doctrine and replace it with the prior effects-based invalidation model. Effects-based invalidation did not have an express intent requirement; it instead focused on the "stigmatizing" or "subordinating *effects*" *of state action as constitutive of* discrimination.[287]

Similarly, pre-*Washington v. Davis* intent-based invalidation was a "more permissive basis for invalidating invidiously intended" but race-neutral state action.[288] In the 1886 alienage law invalidated in *Yick Wo*, a Chinese national lawfully residing in the United States challenged a regulation on business licensing that disparately impacted ethnically Chinese-owned laundries.[289] The *Yick Wo* Court's invalidation of the regulation emphasized the arbitrary exercise of discretion. The Court further recognized it as sufficient evidence of infringement upon equal protection rights.[290] The question of discretionary authority is relevant to the hypothetical INA § 235 challenge. Following the *Yick Wo* intent-based invalidation model, a court could consider disparate impact plus the government's exercise of darkside discretion in uniformly exercising discretion to detain all Central American and Mexican migrants seeking admission at the southern border.

Another intent-based invalidation case, *Griffin v. County School Board*, effectively recognized implicit intent.[291] Prince Edward County, in Virginia, closed public schools in an effort to avoid integration.[292] The Court found an equal protection violation because the government stopped funding integrated schools.[293] The difference between the *Griffin* iteration of the intent doctrine and what came after it was the Court's willingness to recognize broader historical and contextual clues indicative of systemic

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287. *See* Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1155–56 (1991); Eyer, *supra* note48, at 10 ("look[ing] to numbers or effects as the primary metric of a constitutional violation"); *see also* Palmer v. Thompson, 403 U.S. 217, 225 (1971) (holding that "the actual effect of the enactments" and not the motive was the relevant question for a disparate impact equal protection challenge).

288. Eyer, *supra* note48; *see also* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954); *Palmer,* 403 U.S. at 225.

289. *See* Yick Wo v. Hopkins, 118 U.S. 356, 368 (1886) (finding the ordinance "divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure"); *see also* Eyer, *supra* note48, at 74 (citing Norris v. Alabama, 294 U.S. 587, 588, 596 (1935)).

290. *Yick Wo*, 118 U.S. at 373.

291. Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 231–32 (1964); *see* Eyer, *supra* note48, at 74 (citing *Griffin*, 377 U.S. at 231–32); *see also* Wright v. Rockefeller, 376 U.S. 52, 56 (1964) (using what may have been an intent-based approach).

292. *Griffin*, 377 U.S. at 231–32.

293. *Id.* at 221.

bias. The Court asserted that the measures taken were done to avoid school integration and that any "nonracial" justification was irrelevant and impliedly disingenuous.[294]

However, intent-based invalidation does not address the problem of "intentional blindness."[295] The problem *Griffin* sought to cure, following *Brown v. Board of Education*, still exists as schools suffer from de facto segregation. The Court has implicitly sanctioned this de facto segregation, particularly in the post-*Davis* era.[296] Although it remains true that even if the "discriminatory purpose standard" seems appropriate if the question is "whether a decision was made 'because of' race," it is still "a poor vehicle for identifying instances of such decisions"[297] because of unconscious racism and systemic bias.[298] Equally as important, the intent test needlessly focuses on the perpetrator's perspective rather than the victim's experience.[299]

Deployment of discretion to detain at the southern border lacks a national security rationale or good faith, and fails to achieve the legislative

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294. *Id. at* 231–32 ("Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional . . . . [I]t is plain that both were created to accomplish the same thing: the perpetuation of racial segregation.").

295. Haney-López, *supra* note50; Eyer, *supra* note48, at 31 (explaining that the *Court* [in Palmer v. Thompson, 403 U.S. 217 (1971)] would later contort that ruling to suggest that *Griffin* was concerned with the "actual effect[s]" of the government's action, "not upon the motivation which led the States to behave as they did," such that "the *Palmer* majority thus refused to allow intent-based invalidation despite undisputed evidence of segregationist intent").

296. *See* James M. McGoldrick, Jr., *Two Shades of Brown: The Failure of Desegregation in America; Why It Is Irremediable (and A Modest Proposal)*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 271, 272 (2018) (arguing that since *Brown v. Board of Education* (*Brown I*), 347 U.S. 483 (1954), the Supreme Court's decisions made the current segregated state of our public schools almost inevitable); Joseph O. Oluwole & Preston C. Green III, *Riding the* Plessy *Train: Reviving* Brown *for A New Civil Rights Era for Micro-Desegregation*, 36 CHICANX LATINX L. REV. 1, 2 (2019) ("Decades after the United States Supreme Court's *Brown v. Board of Education* decision, America's public schools remain segregated."); Justin Driver, *The Keyes of Constitutional Law*, 106 CALIF. L. REV. 1931, 1933–34 (2018) ("*Keyes* [*v. Sch. Dist. No. 1*, 413 U.S. 189 (1973)] acknowledged that unconstitutionally segregated schools existed outside of the South, the Court nevertheless imputed liability to non-southern jurisdictions *only by identifying intentionally discriminatory acts*-a technique that made it unduly difficult for civil rights plaintiffs to prevail on desegregation suits.") (italics and emphasis added). Katie Eyer, however, explains that "de facto" segregation is a term of more nuanced meaning: it "was the term used in the 1970s to describe segregation that was not caused by intentional segregationist state action (intentionally or facially segregationist state action was referred to as "*de jure*" segregation)." Eyer, *supra* note48, at 74 n.131 (parenthetical in original) (emphasis added) (*citing* John W. Hanley, Jr., Case Comment, Keyes v. School District No. 1*: Unlocking the Northern Schoolhouse Doors*, 9 HARV. C.R.-C.L. L. REV. 124, 124 & n.5 (1974)).

297. Eisenberg & Johnson, *supra* note286, at 1161 (citing Strauss, *supra* note41, at 956).

298. *See, e.g.*, Lawrence, *supra* note231.

299. Eisenberg & Johnson, *supra* note286, at 1161 (citing Freeman, *supra* note280).

goal of deterring migration.[300] In considering an alternative approach to discerning intent that could similarly address this problem, scholar Angela Onwuachi-Willig undertook an exploration of the shift in intent that occurred pursuant to *Washington v. Davis.* Onwuachi-Willig hypothesized about what the outcome might have been if the intent analysis followed the *Loving v. Virginia* decision striking down interracial marriage.[301] Onwuachi-Willig suggested that the Davis Court could have explored two questions: (1) "[W]hether the government's actions made sense in light of its stated purpose," which suggests what the Court may have determined if it "had looked underneath" the relevant government action to ask whether it "made sense" with respect to the relevant purpose;[302] or (2) whether the outcome may have been different if "the Court had more closely evaluated the [D.C. Metropolitan Police] Department's actions to assess whether its" actions "had been in good faith."[303] If such an evaluation was employed to consider whether INA § 235 violated equal protection, the Court could ask, (1) whether immigration prisons made sense in deterring migration; and (2) whether the imprisonment to deter migration was in good faith. Before even considering any humanitarian concerns, the Court could determine that if immigration prisons do not prevent migration, then they do not achieve the intended aim.

While the equal protection intent history demonstrates a possibility of achieving greater protectiveness, the persistent role of race in all facets of social, political, and economic life too often evades redress. If equal protection embodies a commitment to end "subordination, stigma," and "second-class citizenship," including for noncitizens at the border or in immigration jails, the Court should eliminate this subordination[304] and stigma[305] in its jurisprudence. A disparate impact test that does not analyze intent, but instead analyzes the foreseeability of disparate impact, or disparate impact in addition to the history of past discrimination, could be a meaningful and reasonable doctrinal shift.[306]

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300. *See* Emily Ryo, *The Unintended Consequences of US Immigration Enforcement Policies*, 118 PROC. NAT'L ACAD. SCIS. e2103000118 (2021).

301. Angela Onwuachi-Willig, *From* Loving v. Virginia *to* Washington v. Davis*: The Erosion of the Supreme Court's Equal Protection Intent Analysis*, 25 VA. J. SOC. POL'Y & L. 303, 309 (2018).

302. *Id.*

303. *Id.*

304. *See, e.g.*, Diana R. Donahoe, *Not-So-Great Expectations: Implicit Racial Bias in the Supreme Court's Consent to Search Doctrine*, 55 AM. CRIM. L. REV. 619, 621 (2018) (discussing the Court's institutionalization of racial subordination through equal protection jurisprudence).

305. Strauss, *supra* note41, at 941–46.

306. Eisenberg & Johnson, *supra* note286, at 1162 (citing Owen M. Fiss, *Groups and the Equal Protection Clause,* 5 PHIL. & PUB. AFF. 107, 154–55 (1976)); *see also* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 31–36 (1976).

The current political moment and the question of an equal protection remedy for those in border immigration jails can be understood through the lens of the late critical race theorist Derrick Bell's concept of interest convergence. To explain and contextualize *Brown v. Board of Education*, Bell stated that the interest of people who identify as Black and those who are considered white had momentarily converged to bring about the judicial outcome.[307] Bell argued that self-interest motivated white people to end segregation.[308] Desegregation was motivated by concerns about the international perception of the United States resulting from poor treatment of Black Americans who fought in World War II, but came home to segregation and racism. Segregation was also a barrier to industrialization and economic development.[309]

Interest convergence theory helps explain the Court's decision in cases other than *Brown*. Professor Richard Delgado applied interest-convergence theory to explain an outcome in a case concerning exclusion of Mexican-Americans from juries.[310] He contended that the theory was applicable narrowly to Mexican-American jurists and more broadly applicable to Latinx history in the United States.[311] Similarly, the Court, in *Plyler v. Doe*[312] recognized an undocumented child's right to an education as an equal protection win indicative of interest convergence.[313] The nation's interest to support an educated populace merged with Latinx immigrants and minority students. Today, in the face of a rise in white supremacist terrorism, the Court should examine the meaning and significance of membership in the community.[314] It may be particularly important to recognize the rifts caused by implicitly biased government

307. Bell, Jr., *supra* note 39, at 523 ("'[I]nterest convergence' provides: The interest of [B]lack [people] in achieving racial equality will be accommodated only when it converges with the interests of white[people].").

308. *Id.* at 524–26.

309. *Id.* at 535.

310. Delgado, *supra* note212.

311. *See* Richard Delgado, *Rodrigo's Roundelay:* Hernandez v. Texas *and the Interest Convergence Dilemma*, 24 HARV. C.R.-C.L. L. REV. 23, 63 (2006) (applying interest-convergence to explain the Court's decision prohibiting the exclusion of Mexican-Americans from juries and contending that interest-convergence is a helpful method for understanding "all of Latino history").

312. Plyler v. Doe, 457 U.S. 202 (1982).

313. María Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond* Plyler v. Doe, 35 SETON HALL L. REV. 1373, 1377 (2005). López notes that unless undocumented students have a path to legal status, their education is of limited value to their participation in and contribution to the country. *Id.* López complicates the question of interest convergence by suggesting that *Plyler* demonstrates "the nation's interest [in] the maintenance of an underclass of undocumented, low-wage earners who fuel the nation's economy." *Id.*

314. *See* Ursula Moffitt, *White Supremacists Who Stormed the US Capitol Are Only the Most Visible Product of Racism,* THE CONVERSATION (Jan. 15, 2021, 8:22 AM), https://theconversation.com/white-supremacists-who-stormed-us-capitol-are-only-the-most-visible-product-of-racism-152295 [https://perma.cc/T2BA-UGDW].

action in order to repel ever encroaching white supremacy and xenophobic nationalism.[315] The treatment of those at our border has symbolic and real significance in how the United States is perceived and the power it can wield.

The current political moment is more like the Cold War period, or the period in which *Plyler* was adjudicated than may be evident at first blush. The need to shore up our democracy both from within and for the purposes of public perception is even more important now than it was then.[316] For instance, the Trump Administration "torpedoed" the United States' standing and moral authority in the international community.[317] Now, President Biden recognizes the challenge of defending our democracy and democratic values of equality and justice, and that by doing so, we define ourselves in opposition to China and Russia.[318] In the words of President Biden:

> [W]e must start with diplomacy rooted in America's most cherished democratic values: defending freedom, . . . upholding universal rights, respecting the rule of law, and treating every person with dignity. That's the grounding wire of our . . . global power.[319]

Treatment of immigrants and the recognition of asylum law as a question of racial justice is intrinsically bound in the pursuit of democratic values—respecting the rule of law, dignity, and universal rights. Thus, we are again at a moment where the interest of white people aligns with those in need of equal protection. A more robust equal protection remedy to address disparate impact in southern border immigration jails would bolster the nation's stature as a global leader, with no adverse

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315. Natsu Taylor Saito, *Why Xenophobia?*, BERKELEY LA RAZA L. J. (forthcoming 2021).

316. *See, e.g.*, Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 33–34, 224 (2020) (describing the recent degradation of the American democracy, attributed in part, to Trump's racism—"autocrats frequently vilify minority racial and religious groups to unify supporters and divert attention from their own failures" and warning that the Supreme Court failed to protect democracy).

317. Ryan Bort, *America Last: How Trump Torpedoed the U.S. International Standing*, ROLLING STONE (Nov. 3, 2020, 10:45 AM), https://www.rollingstone.com/politics/politics-features/trump-foreign-policy-destroyed-international-standing-1084802/ [https://perma.cc/FE2M-UEBW]; *see also* Eliot A. Cohen, *How Trump is Ending the American Era*, THE ATLANTIC (Oct. 2017), https://www.theatlantic.com/magazine/archive/2017/10/is-trump-ending-the-american-era/537888/ [https://perma.cc/PU68-Q4ZG] ("Trump has abdicated leadership and the moral high ground."); Alissa J. Rubin, *Allies Fear Trump is Eroding America's Moral Authority*, N.Y. TIMES (Mar. 10, 2017), https://www.nytimes.com/2017/03/10/world/europe/in-trumps-america-a-toned-down-voice-for-human-rights.html [https://perma.cc/P2Y8-KU4E].

318. Joseph R. Biden, President of the U.S., Remarks by President Biden on America's Place in the World (Feb. 4, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/04/remarks-by-president-biden-on-americas-place-in-the-world/ [https://perma.cc/X4ZS-U5RU].

319. *Id.*

consequences.[320] The American democratic project would benefit from lower- and middle-class white people recognizing the commonality of shared struggle with historically oppressed minorities.[321] The socioeconomic stagnation of the American economy is a threat to national stability—a problem better addressed through finding common cause and enhancing equality.[322]

This discussion shows how enhancing equal protection review in immigration asylum and detention cases is desirable, feasible, and necessary not just morally but doctrinally and politically. Ending the needless cruelty at our border furthers the goal of elevating the United States and distinguishing it from countries with poor human rights records. Given the rising tide of civil rights movements and the threat of white nationalist extremism, ending racially disparate immigration detention should be an interest in which policymakers and the courts can find merit.

CONCLUSION

This Article explored the equal protection intent doctrine inside and outside of immigration law, plenary power in immigration law, and the way the two work together. In an effort to understand the systemic failure of equal protection in remedying and deterring invidious discrimination, it then examined a hypothetical equal protection challenge to an immigration statute that resulted in disproportionate imprisonment of migrants from the Northern Triangle in search of protection.

The equal protection failure directly and proportionately relates to the persistence of white supremacy and racial caste.[323] The continued

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320. Bell, Jr., *supra* note39, at 523 (suggesting that "the [F]ourteenth [A]mendment, standing alone, will not authorize a judicial remedy providing effective racial equality for [B]lack[people] where the remedy sought threatens the superior societal status of middle and upper class white[people]."). *But see* Melvin J. Kelley IV, *Retuning Bell: Searching for Freedom's Ring as Whiteness Resurges in Value*, 34 HARV. J. RACIAL & ETHNIC JUST. 131, 140 (2018) (reconfiguring and merging Bell's interest convergence theory with Professor Cheryl Harris' concept of Whiteness as property and suggesting that "more robust judicial remedies" are less likely to advance equality interests but will create change by "inspire[ing] future social justice movements").

321. *See, e.g.*, IAN HANEY LÓPEZ, MERGE LEFT: FUSING RACE AND CLASS, WINNING ELECTIONS, AND SAVING AMERICA 194 (2019); *see also* Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 92 (2020) ("The United States 'is not a democracy.' Our political system is 'dominate[d]' by 'the wealthiest Americans' and 'well-funded interest groups,' whereas 'working-class and middle-class Americans exercise almost no influence on political outcomes across a wide array of issues.'") (alteration in original) (internal citations omitted).

322. *See, e.g.*, Ganesh Sitaraman, *Economic Structure and Constitutional Structure: An Intellectual History*, 94 TEX. L. REV. 1301, 1302 (2016) (arguing that "the American middle class has been hollowed out" and that "growing that economic inequality is leading to political inequality" such that the "collapse of the middle class" could threaten our constitutional system).

323. Hamilton-Jiang, *supra* note 6, at 62 & n.169 ("As a result, while the manifestation of racism may have evolved in the United States, race and racism continue to provide the avenue to maintain white supremacy and sustained racial caste. The systemic permanency of race alone suggests that race

failure to meaningfully strive for equality and anti-discrimination norms, particularly with respect to how our democracy treats immigrants, undermines the nation's legitimacy.[324] The United States' response to Mexican, Central American, and Latinx migration—prisons, precarity, and exclusion—is fundamental to the equality equation. If equal protection effectively protected people from discrimination, perhaps immigration prisons would no longer be necessary.

may be intertwined with the experiences of Latinx unaccompanied children entering the border.") (internal citations omitted) (citing DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACE (1992) (declaring "the permanence of racism as an integral and permanent part of American society.")).

324. S*ee* Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 664 (2015) ("Any normatively justifiable deportation system requires equity.").