Maryland Journal of International Law

Volume 37 | Issue 1 Article 2

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Recommended Citation
Kara Hartzler, *A Free Pass on Racism: Immigration and the Equal Protection Doctrine*, 37 Md. J. Int'l L. 1 (2022).
Available at: https://digitalcommons.law.umaryland.edu/mjil/vol37/iss1/2

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A Free Pass on Racism: Immigration and the Equal Protection Doctrine

KARA HARTZLER†

Imagine that in 2023, a new Congress wants to stop Black and Brown people from legally immigrating to the United States. Legislators give speeches on the House and Senate floors complaining about the infusion of "negro slave blood." They openly claim that the "Mexican peon" is "poisoning the American citizen." They refer to Black and Brown immigrants as "mongrels" who are "undesirable." They want to keep the country's blood "white and purely Caucasian." Congress then passes a law that doesn't *say* anything about race but gets the desired result: 99% of all people denied entry to the United States are Black or Brown.

Black and Brown litigants bring a constitutional challenge. They argue that Congress's racist motives deny them equal protection under the Fifth Amendment. They cite decades of precedent holding that such a law can only stand if the government shows it would have passed without a racist motive.

But the Attorney General defends the law. He claims it's not a law about *race*. It's really a law about *immigration*. Because it's a law about immigration, it doesn't matter whether it was racially motivated. All that matters is whether there's some hypothetical reason floating out there that could justify the law. And one reason is that it might, um... embarrass other countries? Yeah! See, if people from other countries want to come to the U.S., it'll, uh, humiliate their governments and cause foreign relations problems! So forget everything Congress said about how Black and Brown people are "poisoning the American citizen." This law stands because it might make other governments feel bad!

This legal position would be laughable if the Department of Justice weren't currently using it to defend the most commonly-prosecuted federal crime today.[1] Section 1326 of Title 8 criminalizes

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1. *See* U.S. SENTENCING COMM,, *Quick Facts Illegal Reentry Offenses* (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-

unlawfully reentering the United States after a prior deportation. When Congress first passed this law in 1929, legislators used the exact slurs quoted above—in fact, they all appear in the Congressional Record.[2] But because this criminal law purportedly "regulates" immigration, the DOJ now says that it doesn't matter whether hate and bigotry motivated its creation. All that matters is whether there's a rational basis for its existence (and yes, the DOJ actually cites "diplomatic embarrassment" as a basis).[3] This dangerous position would give Congress a free pass to enact blatantly discriminatory immigration laws and has no place in an administration committed to racial justice.

I. EUGENICS, RACE, AND THE CREATION OF ILLEGAL ENTRY AND REENTRY

This article is not a comprehensive account of the shameful history underlying the crime of illegal reentry—scholars have already spent thousands of pages telling that story.[4] But for purposes of understanding this legal challenge, here's a quick overview.

Let's go back to the 1920s. A new pseudoscience called "eugenics" is all the rage.[5] It claims that traits like intelligence and

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facts/Illegal_Reentry_FY20.pdf (stating that 19,654 people were convicted of illegal reentry in 2020, a 24.3% increase since FY 2016).

2. *See* 69 CONG. REC. 2817–18 (1928) (Rep. John C. Box-TX) (stating in a speech published in the Congressional Record that the "Mexican peon" is a mixture of the "Mediterranean blooded Spanish peasant," "low-grade Indians," and "much negro slave blood" who mixes with "other mongrels"); 70 CONG. REC. 3620 (1929) (Rep. W.T. Fitzgerald-OH) (stating that Mexicans were "poisoning the American citizen" and were "of a class" that is "very undesirable"); 69 CONG. REC. 2462 (1928) (Rep. Robert A. Green-FL) (stating in a speech read into the Congressional Record by Rep. William Lankford-GA that the "mixtured blood of white, Indian, and negro" imposes a "very great penalty upon the society which assimilates it," and puts the U.S. at a disadvantage to countries that have "kept their blood white and purely Caucasian").

3. Gov. Brief, United States v. Carrillo-Lopez, 21-10233, Dkt. No. 5 at 56 (arguing that it is "implausible" Congress would not have criminalized illegal reentry given that Mexico was "increasingly concerned about the continuing high level of illegal immigration, which it viewed as something of a diplomatic embarrassment").

4. *See, e.g.*, MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004); KELLY LYTLE HERNÁNDEZ, MIGRA!: A HISTORY OF THE U.S. BORDER PATROL (2010); S. DEBORAH KANG, THE INS ON THE LINE: MAKING IMMIGRATION LAW ON THE US-MEXICO BORDER, 1917–1954 (2017); BENJAMIN GONZALEZ O'BRIEN, HANDCUFFS AND CHAIN LINK (2018); Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051 (2022).

5. *See* DANIEL OKRENT, THE GUARDED GATE: BIGOTRY, EUGENICS, AND THE LAW THAT KEPT TWO GENERATIONS OF JEW, ITALIANS, AND OTHER EUROPEAN IMMIGRANTS OUT OF AMERICA (2019); *See* Fish, *supra* note 4, at 1059–65.

success and temperament boil down to biology. All our society needs to do is weed out the genetic "inferiors"—the criminals, the drunks, the imbeciles—and we can become the best version of ourselves.

Conveniently, "biology" is also code for "race." This novel field of eugenics helps fuel the enforcement of Jim Crow laws and the resurgence of the Ku Klux Klan.[6] It shapes the ideology of Hitler and the Third Reich.[7] And it provides justification for a rising anti-immigrant sentiment against people of color who are coming to the U.S. in ever larger numbers.

Congress now regards immigration law as the "protection of American racial stock from further degradation or change through mongrelization."[8] The official eugenicist for the House of Representatives warns that biology should drive immigration policy because "successful breeders of thoroughbred horses" would never consider "acquiring a mare or a stallion not of the top level" for their "stud farm."[9] So Congress sets about restricting immigration from all but the whitest of white places—northern and western Europe.[10]

But there's a problem. Southwestern agricultural businesses need cheap Mexican workers to harvest their crops. And these agribusinesses have a lot of political influence. So, Congress passes the National Origins Act of 1924, which effectively keeps any person of color from immigrating to the U.S. But under pressure from the agribusinesses, the law exempts people from Mexico and other Western Hemisphere countries.[11]

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6. *See* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925, 264–99 (1988).

7. *See* Fish, *supra* note 4, at 1064 (noting that a model sterilization law drafted by Dr. Harry Laughlin, an "expert eugenics agent" for the House Committee on Immigration and Naturalization from 1920-1931, was a "template for Nazi Germany's own sterilization law," and that the Nazi regime awarded Dr. Laughlin a Doctorate of Medicine from the University of Heidelberg to recognize his contributions to the "science of racial cleansing").

8. 69 CONG. REC. 2817–18 (1928) (Rep. John C. Box-TX).

9. *The Eugenical Aspects of Deportation: Hearings Before the H. Comm. on Immigr. And Naturalization*, 70th Cong., H.R. 44 (1928) (statement of Harry H. Laughlin).

10. *See* Fish, *supra* note 4, at 1061 (explaining how the National Origins Act of 1924 "ensur[ed] that future immigration would be heavily tilted towards the countries of Northern and Western Europe," thereby "preserv[ing] the United States as a white Anglo-Saxon nation").

11. *See id.* at 1065–66.

Congress is not happy. Legislators grumble that the law "leaves open the doors for perhaps the worst element that comes into the United States—the Mexican peon."[12] They spend five years unsuccessfully trying to pass a new bill.

Finally, they hit on a solution. What if we don't deny Mexicans visas? What if we just make it a crime to enter the U.S. and then prosecute and deport them *after* they're here?[13] You know, a few months later, once the harvest is over?

The agribusinesses are on board. A senator known for being an "unrepentant white supremacist" introduces a bill.[14] He sends it to the head of the House Committee on Immigration, a noted eugenicist.[15] It's recommended by the Secretary of Labor, another noted eugenicist.[16] The bill becomes law in a matter of weeks.[17]

II. "ZERO TOLERANCE," CHILD SEPARATION, AND UNCOVERING A RACIST PAST

Fast forward about a century. The two crimes this bill created (8 U.S.C. §§ 1325 and 1326) regularly account for over half of all federal criminal prosecutions.[18] These criminal prosecutions have

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12. Gonzalez O'Brien, *Handcuffs and Chain Link* (quoting Rep. Patrick O'Sullivan-CT) (2018).

13. *See* Fish, *supra* note 4, at 1080–85.

14. Isaac Stanley-Becker, *Who's Behind the Law Making Undocumented Immigrants Criminals? An 'Unrepentant White Supremacist,'* WASH. POST (June 17, 2019), https://www.washingtonpost.com/nation/2019/06/27/julian-castro-beto-orourke-section-immigration-illegal-coleman-livingstone-blease/.

15. OKRENT, THE GUARDED GATE: BIGOTRY, EUGENICS, AND THE LAW THAT KEPT TWO GENERATIONS OF JEW, ITALIANS, AND OTHER EUROPEAN IMMIGRANTS OUT OF AMERICA, 271, 326 (2019).

16. *See* HANS P. VOUGHT, THE BULLY PULPIT, 173 (2004); *See* Fish, *supra* note 4, at 1082; 71 CONG. REC. 1919 (1929).

17. 70 CONG. REC. 2091 (1929) (introducing the bill in the Senate on Jan. 23, 1929); 70 CONG. REC. 3621 (House passes the bill on Feb. 16, 1929); S. 5094, 70th Cong. (1929) (bill enacted on Mar. 4, 1929).

18. *See* Fish, *supra* note 4, at 1053 (noting that in 2019, federal prosecutors brought 106,312 charges for illegal entry and reentry). Although the number of federal immigration prosecutions decreased during the COVID pandemic, the Department of Homeland Security recently stated that it expects to see "a potential increase in the number of border encounters" and intends to refer for criminal prosecution "[a]ny single adult apprehended along the Southwest Border a second time, after having previously been apprehended and removed under Title 8"). U.S. DEP'T. OF HOMELAND SEC'Y, *Fact Sheet: DHS Preparations for a*

nothing to do with whether a person is civilly deported, which will happen regardless of whether they're convicted. All they do is cage a person for up to 20 years *before* they're deported,[19] to the tune of $1.3 billion in taxpayer dollars a year.[20]

Then in April 2018, Attorney General Jeff Sessions announces a "zero tolerance" policy for illegal entry.[21] Sure, President George W. Bush already implemented a version of this along the border a dozen years earlier.[22] But this time they're serious. And to show how serious they are, they're going to separate parents from their children during these prosecutions and send the children off to who-knows-where with no plan to ever reunite them.[23] Suddenly the penalty for a first-time misdemeanor illegal entry isn't a maximum of six months in jail.[24] It's never seeing your two-year-old again.

Luckily, the moral conscience of a nation rises up. Images of Border Patrol agents ripping crying toddlers out of their parents' arms strikes a universal chord that transcends race and citizenship.[25] A national outcry ensues—even from people who never thought or cared much about immigration before.

Potential Increase in Migration (Mar. 30, 2022), https://www.dhs.gov/news/2022/03/30/fact-sheet-dhs-preparations-potential-increase-migration.

19. *See* 8 U.S.C. § 1326(b)(2).

20. *See* Kit Johnson, *A Cost-Benefit Analysis of the Federal Prosecution of Immigration Crimes*, 92 DENV. U. L. REV. 863, 875 (2015) (noting in 2015 that the incarceration costs for illegal entry and reentry prosecutions was $1.3 billion).

21. OFF. OF THE ATT'Y GEN., PRESS RELEASE NO. 18-417, MEMORANDUM FOR FEDERAL PROSECUTORS ALONG THE SOUTHWEST BORDER (2018).

22. *See generally* Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CAL. L. REV. 481 (2010).

23. *See* HOUSE COMMI. ON OVERSIGHT & REFORM, *Trump Administration Briefings Reveal No Plan to Reunite Children Before Sessions Announced "Zero Tolerance" Policy*, (Jul. 19, 2018), https://oversight.house.gov/news/press-releases/trump-administration-briefings-reveal-no-plan-to-reunite-children-before ("In a startling admission, Trump Administration officials admitted under questioning that they had no interagency plan to reunite children when Attorney General Jeff Sessions announced the President's 'zero tolerance' policy.").

24. 8 U.S.C. § 1325(a).

25. *See* Sarah Schulte and Rob Elgas, "*As outcry against separation of families at border grows, Trump defends policy*," ABC 7 NEWS (Jun. 18, 2018), https://abc7chicago.com/trump-family-separation-zero-tolerance-laura-bush-immigration/3618266/.

This cruel policy sparks conversations about the laws underlying it. Julián Castro calls for the repeal of the law governing misdemeanor illegal entry, and the proposal takes center stage during the Democratic presidential debates.[26] Most of the other candidates agree.[27] And the Washington Post publishes an article citing research by Dr. Kelly Lytle Hernández, a UCLA professor and recipient of a MacArthur 'Genius Grant,' that exposes the ugly history behind these laws.[28]

Most federal public defenders—even those who had represented people charged under these laws for decades—had no idea this history existed. Together with immigrant rights and grassroots organizations, they start brainstorming legal challenges based on the laws' racist origins.[29] They draw on the well-known case of *Arlington Heights*, which says that a law violates equal protection if it was passed with a discriminatory purpose.[30] They draft briefs and bring in professors to testify about the history of the law, including Dr. Lytle Hernández.[31] They file dozens of equal protection challenges, in California, Virginia, Nevada, the Virgin Islands, Texas, Oregon, Kansas, Illinois, Washington, Arizona, Colorado, Oklahoma, North Carolina, New York, and other states.[32] They always lose.

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26. *See* Jennifer Medina, "Democrats Veer Left on Immigration at Debates, Pleasing Base (and Trump)," WASH. POST (Jun. 29, 2019), https://www.nytimes.com/2019/06/29/us/politics/democratic-debates-immigration.html.

27. *See id.* (noting that at least eight Democrats appeared to raise their hands when asked if they supported the repeal of § 1325).

28. Isaac Stanley-Becker, *Who's Behind the Law Making Undocumented Immigrants Criminals? An 'Unrepentant White Supremacist.'*, WASH. POST (Jun. 27, 2019), http://www.washingtonpost.com/nation/2019/06/27/julian-castro-beto-orourke-section-immigration-illegal-colemanlivingstone-blease/.

29. *See* Debbie Nathan, *Opinion: Challenging the racist underpinnings of laws criminalizing undocumented immigration,* EL PASO MATTERS (Nov. 9, 2021), https://elpasomatters.org/2021/11/09/opinion-challenging-the-racist-underpinnings-of-laws-criminalizing-undocumented-immigration/.

30. *See* Village of Arlington Heights v. Metropolitan Housing Development Corp, 429 U.S. 252, 265 (1977).

31. *See, e.g.,* United States v. Machic-Xiap, 552 F. Supp. 3d 1055 (D. Ore. 2021) (ECF No. 43, 47, 49); United States v. Carrillo-Lopez, 555 F. Supp. 3d 996, 1001 (D. Nev. 2021); United States v. Munoz-De la O, No. 2:20-cr-134-RMP-1 2022 WL 508892 (E.D. Wash. Feb. 18, 2022) (ECF No. 92).

32. *See, e.g.,* United States v. Rios-Montano, 438 F. Supp. 3d 1149 (S.D. Cal.); United States v. Palacios-Arias, No. 3:20-cr-62-JAG 2022 WL 1172167 (E.D. Va. Apr. 20, 2022); United States v. Hernandez-Lopez, No. H-21-440 2022 WL 313774 (S.D. Tex. Feb. 2, 2022); United States v. Wence, No. 3:20-cr-0027, 2021 WL 2463567 (D.V.I. Jun. 16, 2021); United States v. Gutierrez-Barba, No. CR-19-01224-001-PHX-DJH 2021 WL

Until one day they don't. One day a court in Nevada agrees with them, holding that the law violates equal protection under *Arlington Heights*.[33] Not only did Congress act with discriminatory intent in 1929, the court finds, Congress also did so when it reenacted illegal reentry in the Immigration and Nationality Act of 1952.[34] In fact, Congress has *never* "confronted the racist, nativist roots" of this law.[35] And because the government presented no evidence that the law would have passed without this impermissible motive, it's unconstitutional.[36]

This decision affects only one person's case. But two days later, the Department of Justice files an appeal.[37] And in a highly unusual move, they don't have a Nevada federal prosecutor brief and argue the appeal. Instead, they bring in a senior DOJ official from Washington D.C.[38]

III. THE DEPARTMENT OF JUSTICE'S DANGEROUS POSITION

Before the district court, the Nevada federal prosecutor had conceded that racism motivated the original 1929 law.[39] Every historian who has studied the law agrees.[40] But on appeal, the DOJ retracts this concession, refusing to admit that Congress was motivated (even in part) by racism.[41]

2138801 (D. Ariz. May 25, 2021); United States v. Leonides-Seguria, 21-cr-390 (N.D. Ill); United States v. Quintanilla-Dominguez, 21-cr-406-RM-1 (D. Col. Feb. 8, 2022); United States v. Maldonado, No. 18-cr-308 (E.D. NY); United States v. Hernandez-Avila, No. 20-cr-448 (M.D. N.C.); United States v. Amador-Bonilla, No. 21-cr-187 (W.D. Okla.).

33. United States v. Carrillo-Lopez, 555 F. Supp. 3d 996, 1001 (D. Nev. 2021).

34. *Id.* at 1017.

35. *Id.* at 1027.

36. *Id.*

37. *See* Brief of Petitioner-Appellant, United States v. Carrillo-Lopez, No. 21-10233 (9th Cir. Nov. 19, 2021).

38. *See id.* at Dkt. No. 2.

39. *Carrillo-Lopez*, 555 F. Supp. 3d at 1007 ("The government ultimately conceded that discriminatory intent motivated the passage of the Act of 1929.").

40. *See* Transcript of Testimony of Dr. Deborah Kang, United States v. Munoz-de la O, Jan. 28, 2022, 20-cr-134, Dkt. No. 92, pp. 23–24.

41. Brief of Petitioner-Appellant at 12 n.3, United States v. Carrillo-Lopez, No. 21-10233, (9th Cir. Nov. 19, 2021) (stating that its prior concession was "improvidently made" and maintaining that "the historical record does not support the conclusion that Congress as a whole was motivated in part by discriminatory intent in enacting the 1929 Act").

The Department of Justice then goes a step further. It argues that even if Congress *did* create illegal reentry for racist reasons, it doesn't matter.[42] It doesn't matter because illegal reentry is an "immigration law," and *Arlington Heights* doesn't apply to immigration laws.[43] So to decide whether illegal reentry violates equal protection, the DOJ claims, courts can't consider the fact that Congress' goal was to "keep America's identity white."[44] Courts can't look at whether lawmakers considered Mexicans to be "illiterate, unclean, peonized masses" whose "evil stream will continue to pour its pollution into the mass of our population."[45] Instead, courts must turn a blind eye to this history so long as there is any "rational basis" for the law's existence.[46]

For non-lawyers, "rational basis" is where equal protection challenges go to die. Courts normally apply a demanding "strict scrutiny" standard to race-based equal protection challenges, which requires the law's defender to show a "compelling" government interest that is "narrowly tailored" to achieve its result.[47] But for challenges to laws that don't single out a historically disfavored group, courts apply a toothless standard that only requires the law to be "rationally related to a legitimate government purpose."[48]

Practically speaking, this puts the law's challenger in a nearly impossible position. The person claiming discrimination has to prove that there is no "reasonably conceivable state of facts" that could justify the law.[49] So all a court has to do is come up with *some* reason for it—even if it's not the *actual* reason Congress used. And in most cases, an eight-year-old could come up with such reasons. Not

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42. *See id.* at 19–32.

43. *See id.*

44. *Carrillo-Lopez*, 555 F. Supp. 3d at 1015 (quotations omitted).

45. 69 CONG. REC. 2817–18 (1928) (Rep. Box-TX).

46. Gov. Brief, United States v. Carrillo-Lopez, 21-10233, Dkt. No. 5, at 23–24 (arguing that courts may not undertake a "a searching judicial inquiry into legislative or executive motivations even when the political branches have drawn express distinctions that would trigger close scrutiny outside of the immigration context").

47. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

48. *See generally Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 188 (1980).

49. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

surprisingly, courts almost never find laws unconstitutional under this standard.[50]

So, here's the bottom line—the DOJ's position would allow Congress to pass blatantly racist immigration laws with impunity. What if the Speaker of the House proposes cutting visa numbers from Mexico while running around in a sombrero? Fine. What if the minority whip argues to renew the prostitution ground of inadmissibility while wearing a kimono? No problem. The DOJ's position would literally allow Congress to march onto the Senate and House floors in white robes, burn a cross, and salute the Aryan race during a vote on an immigration bill. And if that bill became law, no judge could consider whether it was racially motivated.

IV. A FREE PASS ON RACISM

If the DOJ's position prevails, Congress could pass an immigration law tomorrow for the same reason it did in 1929—to keep the country's blood "white and purely Caucasian."[51] No court could stop it. An agency committed to Justice should never be asking for this.

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50. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) ("[I]t should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny.").

51. 69 CONG. REC. 2462 (1928) (Hon. Green-FL).