

(UN)EQUAL IMMIGRATION PROTECTION

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I. INTRODUCTION

The Supreme Court’s recent ruling in *Department of Homeland Security (DHS) v. Regents*¹ 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 administration’s criticized Deferred Action for Childhood Arrivals (DACA) rescission.² 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

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1. 140 S. Ct. 1891 (2020).

2. *Id.* At times throughout this article, I refer to this as the “DACA case.”

program.³ By the time of the rescission, DHS had granted deferred action to over 800,000 individuals.⁴

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.⁵ 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 (APA) grounds.⁶ 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.⁷

This article will contribute to immigration equal protection jurisprudential discussions by highlighting the way in which plenary power in immigration equal protection cases creates a barrier parallel to the intent doctrine—both prohibit curtailment of government action, resulting in racialized harm. The scant recognition of the double duty done by plenary power and the intent doctrine reflects the banality of what may appear as a mere redundancy at first glance. However, the insidiousness of the double-barrier all but ensures that equal protection challenges to facially race-neutral immigration laws with disparate impact will fail. Plenary power is effectively duplicative of the intent doctrine because the intent doctrine already results in great deference to lawmakers. Disproportionate impact is insufficient alone to invalidate a facially nondiscriminatory law on equal protection grounds.⁸ In decision after decision, the Court contorts itself to

3. Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar et al., Acting Comm’r, U.S. Customs and Border Prot., (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. Recipient had to have been under age thirty-one on the date of the announcement; continuously present in the country since June 15, 2007; under age sixteen at the time they entered the United States; in school, possess the equivalent of a high school degree, or have an honorable military discharge; and free of convictions for felonies or significant misdemeanors. *Id.* at 1.

4. Gustavo López & Jens Manuel Krogstad, *Key Facts About Unauthorized Immigrants Enrolled in DACA*, PEW RESEARCH CENTER (Sept. 25, 2017), <https://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/>.

5. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-68 (1977).

6. *Regents*, 140 S. Ct. at 1915.

7. See *id.*

8. *Arlington Heights*, 429 U.S. at 264-65.

find some other nondiscriminatory purpose to avoid a finding of discriminatory intent.⁹ Even without plenary power, the intent doctrine would need to be reimagined for immigration equal protection claims to receive consideration indicative of equality principles.¹⁰

Interestingly, the Court has applied equal protection guarantees within civil alienage laws, which pertain to noncitizens within the United States. This was done while denying the relevance of equal protection within immigration law, which dictates who can become and remain a member of the legal and political community within the United States.¹¹

At the same time that equal protection has been less than protective in immigration law, immigration regulation has been a prime factor in the making (“social construction”) of race¹² through national origin quotas, racial restrictions on naturalization,¹³ exploitive policies influenced by labor needs and capitalism, like the Bracero Program,¹⁴ and mass deportation programs targeting or disproportionately burdening particular ethnic groups

9. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2419-21 (2018).

10. 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).

11. See BETH C. CALDWELL, *DEPORTED AMERICANS: LIFE AFTER DEPORTATION TO MEXICO* 20-22 (2019) (describing the “contradictory legal framework that imbues noncitizens with constitutional protections in some cases but not in others”).

12. NATALIA MOLINA, *HOW RACE IS MADE IN AMERICA: IMMIGRATION, CITIZENSHIP, AND THE HISTORICAL POWER OF RACIAL SCRIPTS* (Earl Lewis et al. eds., 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.”); 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); 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) [hereinafter Lawrence, *Unconscious Racism Revisited*] (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 as “conduct . . . it is perpetuated and reinforced through an ongoing process of contemporaneous speech and acts” (citing Kendall Thomas, Nash Professor of Law and Co-Director of the Center for the Study of Law & Culture at Columbia Law School, Comments at Panel on Critical Race Theory, Conference on Frontiers of Legal Thought, Duke Law School (Jan. 26, 1990))); 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.”).

13. IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (10th ed. 2006).

14. See KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (2010) (criticizing guest worker, Bracero Program); ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* (1964) (critically recounting the Mexican Bracero story).

or persons of particular national origins, like the 1930s era repatriation of Mexican nationals¹⁵ or Operation Wetback in 1954.¹⁶ More recently, other race-neutral immigration policies hide discrimination in colorblind¹⁷ or race-neutral terms yet reflect President Trump's demonization of racialized immigrants, like immigration bans targeting persons from Muslim majority countries,¹⁸ migrant detention centers on the border imprisoning Latinx migrants,¹⁹ and attempted cancellation of programs like Temporary Protected Status (TPS)²⁰ and Deferred Action for Childhood Arrivals (DACA).²¹ Donald Trump's "Colorblind Repatriation of Latinx Noncitizens," as

15. 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).

16. See JUAN RAMÓN 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, 631-33 (1981). Further, 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, Mexican nationals were welcomed 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. Bill Ong Hing, *No Place for Angels: In Reaction to Kevin Johnson*, 2000 U. ILL. L. REV. 559, 583 n.31 (2000) (citing Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1136 (1998)).

17. John Tehranian, *Playing Cowboys and Iranians: Selective Colorblindness and the Legal Construction of White Geographies*, 86 U. COLO. L. REV. 1, 2 (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.").

18. See Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

19. See generally César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245 (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 of TPS, and litigation in response to historic oppression and mistreatment of Central American asylum seekers, including the 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) (arguing for a path towards the constitutional mainstream for immigrants that are historically and racially mistreated through the increased use of punitive and discretionary detention, which further erodes their rights and equal treatment).

20. 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. 2648 (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. 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).

21. Kevin R. Johnson, *Trump's Latinx Repatriation*, 66 UCLA L. REV. 1444 (2019).

described by Kevin Johnson, may have resulted in repatriation of more Latinx noncitizens than any prior administration using national origin as a race-neutral and colorblind proxy to inflict literal and metaphoric violence on Latinx families in the United States.²²

However, when noncitizens raise equal protection challenges to facially race-neutral immigration laws, their claims generally fail. Why does immigration law exert such a stronghold on the making of race, and why does it so fiercely resist curtailment? Immigration equal protection challenges seem to face an impenetrable wall comprised of immigration plenary power and the equal protection intent doctrine. The plenary power doctrine stands for the proposition that the Court shows great deference to Congress and the Executive branch because of the political branch's authority over immigration law, which results in a dilution of constitutional protections for noncitizens at the expense of constitutional rights.²³ The Court's recent rejection of the equal protection claim in *DHS v. Regents*²⁴ represents the interplay of plenary power and equal protection intent doctrine as overlapping and mutually reinforcing barriers to the curtailment of racial discrimination in immigration law. Because disparate impact equal protection claims require a showing of discriminatory intent, one might expect immigration law's longstanding racist history²⁵ to bolster an equal protection claim.²⁶ That same discriminatory history could plausibly undermine the validity of plenary power. However, neither has been true.

22. *Id.* at 1497 (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”); see also CALDWELL, *supra* note 11 (tracing the consequences of colorblind deportation policies and their disparate impacts on Latinx communities).

23. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); see generally David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015) (examining the plenary power doctrine's persistence); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (contending that the plenary power doctrine has been eroded by the courts to some extent as a result of statutory interpretation).

24. 140 S. Ct. 1891 (2020).

25. See, e.g., Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1941 (1996) (describing U.S. policy toward Haitians as treating a predominantly black group unfavorably); Malissia Lennox, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687, 714-23 (1993); see also *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799-800 (N.D. Cal. 1991); *Am. Baptist Churches v. Meese*, 712 F. Supp. 756, 772 (N.D. Cal. 1989) (“[G]overnmental policy that makes nationality-based distinctions should at least be reviewed for equal protection violations” and purporting to end US practice of treating Guatemalan and Salvadoran asylum seekers differently.).

26. Motomura, *supra* note 25, at 1943-44.

Accordingly, the first section of this article will analyze relevant aspects of the Court's shaping of the equal protection intent doctrine outside of the immigration setting. The second section will examine the role of plenary power in immigration equal protection jurisprudence, and the third section will consider the Supreme Court's equal protection ruling in *DHS v. Regents*²⁷ and situate it within immigration equal protection jurisprudence.

II. EQUAL PROTECTION INTENT DOCTRINE

An equal protection challenge to a facially neutral law with discriminatory impact hinges on the intent doctrine and its respectively complex jurisprudence. 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 course of the past five decades.²⁸ Some critics contend that the intent doctrine has evolved to undermine the promise of Fifth Amendment equal protection to protect racial minorities from government enacted harm.²⁹

Before the intent doctrine comes into play, in all equal protection challenges, the Court has to establish which level of scrutiny applies to the contested state action.³⁰ When the Court applies strict scrutiny, the government faces a higher likelihood of losing because its action receives the least degree of deference. Strict scrutiny³¹ generally applies to cases turning on discrimination against suspect classes (national origin, race)³² or ones having to do with fundamental rights, like voting.³³ Racial classifications are

27. 140 S. Ct. 1891 (2020).

28. See generally *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*, 429 U.S. 229 (1976); *Obergefell v. Hodges*, U.S. 576 U.S. 644 (2015).

29. 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).

30. The Court developed this highly criticized tiered scrutiny system during the 1940s and 1960s, introducing rational basis review, see, e.g., *Railway Express Agency Inc. v. New York*, 336 U.S. 106 (1949), and strict scrutiny, see, e.g., *Loving*, 388 U.S. 1, and then a middle-ground—intermediate scrutiny—in the 1970s, which generally applied to sex and legitimacy classifications, see, e.g., *Craig v. Boren* 429 U.S. 190, 197 (1976).

31. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (applying strict scrutiny to Arizona and Pennsylvania laws that denied welfare benefits to lawfully present immigrants defined as a “discrete and insular minority”); 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.”).

32. *McLaughlin*, 379 U.S. at 192.

33. See *Reynolds*, 377 U.S. at 562 (“[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement

the quintessential “suspect” class.³⁴ If either of those factors is present—suspect class or a fundamental right—the Court must invalidate the discriminatory measure, unless it finds that the discrimination is necessary to achieve compelling state goals.³⁵ Rational basis scrutiny lies at the other end of the spectrum, according the most deference to the state action.³⁶ It applies to all nonsuspect classifications³⁷ and only requires that the state action have a rational relationship to a legitimate government interest.³⁸ Intermediate scrutiny falls between strict scrutiny and rational basis scrutiny and has been used in considering laws that employ gender-based classifications.³⁹

After courts began applying this tiered scrutiny approach, state actors attempted to avoid strict scrutiny by discriminating by proxy, or on the basis of criteria that did not implicate a suspect class.⁴⁰ The intent doctrine was meant to create space for the Court to uncover covert classifications so they might not evade more rigorous examination, such as discrimination that is not effectuated via a designated protected class but instead by proxy.⁴¹ However, instead, it largely created a cover for proxies because the party

of the right of citizens to vote must be carefully and meticulously scrutinized.”); see also CALDWELL, *supra* note 11, at 174-86 (2019) (discussing strict scrutiny and the right to marry).

34. See Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1118 (1989).

35. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273-74 (2007).

36. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 81-82, 84-85 (1975) (applying rational basis review to uphold a federal law denying lawful permanent residents Medicare for five years but also implicating plenary power in bumping scrutiny down to rational basis review because of “a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization”).

37. Undocumented students is one example of a nonsuspect class. See Rosenbaum, *supra* note 10, at 517-18.

38. See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) (“A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.”); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (and in even more deferential terms to the government “[w]here . . . there are plausible reasons . . . our inquiry is at an end. It is, of course, ‘constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.’” (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1960))).

39. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Clark v. Jeter*, 486 U.S. 456, 461 (1988); see also *Califano v. Webster*, 430 U.S. 313, 317-20 (1977) (applying intermediate review in considering a Social Security provision employing a gender classification that benefited women); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (applying intermediate scrutiny and invalidating a Texas law because it did not further “some substantial state interest” and deprived undocumented children—not a suspect class, a quasi-fundamental right—free public school education).

40. See Ortiz, *supra* note 34, at 1118 (“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.”).

41. An example of proxy discrimination might be a law that names a group that is not a suspect class, like a certain group of noncitizens, instead of naming a racial group, Latinos, who are a majority of those comprising that noncitizen group.

challenging the law has to prove improper motivation.⁴² A party then must show that race was a motivating factor and that the state could not have reached the same result in another nondiscriminatory manner.⁴³

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).”⁴⁴ Prior to about the 1970s, a facially neutral government action could violate equal protection, and parsing a government actor’s mental state for intent was potentially “irrelevant” if the circumstances as a whole and discriminatory impact suggested an equal protection violation.⁴⁵

That approach quickly gave way over the course of the 1970s and 1980s. In the shift away from situational scrutiny of racially discriminatory intent, the Court determined it could not and should not consider the motivation (or intent) of the lawmakers.⁴⁶ Their rationale was that considering the purpose motivating a government actor’s legislative action was futile because it is so subjective, making it hard to discern.⁴⁷ In addition, the Court recognized that legislators could almost always find a way to try to implement the legislation again but without evidence of the alleged invidious intent.⁴⁸ The Court continued to erode the intent doctrine by rejecting the possibility that a government action and its impact could have anticipated outcomes that were reasonably intended.⁴⁹ Implicit consideration of motives behind a government action was no longer a part of the analysis.

During this same period, in 1979, the Court narrowed the consideration further to what may have been part of the undoing of the *Regents* equal protection claim. The Court required proof of the government action evincing an “illegitimate purpose,” conscious antipathy, or malice to find

42. However, intent may have been intended to uncover covert classifications but devolved to undermine the analysis and ensure hyper deference to government action, treating them as void of discriminatory intent towards what would have been a suspect class absent the proxy in the facially neutral law.

43. Ortiz, *supra* note 34, at 1118. “But by asking . . . whether the same result ‘could’ have, rather than ‘would’ have, been reached, the Court seriously subverts the overall process.” *Id.*

44. Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1785 (2012).

45. *Id.* at 1798 (citing Ian Haney López & Michael A. Olivas, *Jim Crow, Mexican Americans, and the Anti-subordination Constitution: The Story of Hernandez v. Texas*, in RACE LAW STORIES 273, 304-05 (Rachel F. Moran & Devon Wayne Carbado eds., 2008) (placing *Hernandez* in the context of Jim Crow practices)) (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 v. Thompson, 403 U.S. 217, 225 (1971).

46. *Palmer*, 403 U.S. at 224-25.

47. *Id.* at 225.

48. *Id.*

49. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973).

intent.⁵⁰ Thus, if a facially neutral law had a nonracial explanation or justification, the law would be upheld.⁵¹ The malicious intent requirement made direct proof of injurious motives a prerequisite and eliminated the relevance of contextual evidence.⁵² And, any nondiscriminatory, legitimate government purpose that could be gleaned from the context of the policy or law would insulate the government act from an equal protection challenge.

In 1976, the Supreme Court's ruling in *Washington v. Davis* foreclosed recognition of structural inequality by circumscribing intent.⁵³ The Court held that a facially neutral law or government action resulting in an adverse racial impact was not subject to strict scrutiny, and evidence of the impact alone was insufficient to show discriminatory purpose, particularly where a legitimate purpose and evidence were available to rebut the claim of discriminatory motivation.⁵⁴ 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.⁵⁵ 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.⁵⁶ 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

50. Haney-López, *supra* note 44, at 1803-04, 1833 (citing Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135 (1997)). The Court also rejected the notion that a person intends the natural and foreseeable consequences of voluntary actions. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 278-79 (1979).

51. See Ortiz, *supra* note 34, at 1115-16.

52. Haney-López, *supra* note 44, at 1785 & n.18; cf. *Feeney*, 442 U.S. at 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).

53. 426 U.S. 229, 242, 245-46 (1976). "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 44, at 1812-13; 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* note 12, 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").

54. *Davis*, 426 U.S. at 242; see Haney-López, *supra* note 44, at 1785 (discussing how *Davis* did not actually require "proof regarding individual mindsets" but rather only "helped formalize the Court's long-established contextual approach to proving intent").

55. Ortiz, *supra* note 34, at 1118.

56. *Id.* at 1118-19.

action does not receive scrutiny beyond the rational basis test.⁵⁷ 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.⁵⁸ However, even in a discriminatory impact case, the Court can apply strict scrutiny to a facially neutral law.⁵⁹

The 1977 *Arlington Heights v. Metropolitan Housing Development Corporation*⁶⁰ ruling embodied the evolution of the modern intent doctrine. The *Arlington* Court found 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.⁶¹ The Court emphasized that proof that discriminatory purpose was a motivating factor would eliminate judicial deference, but that proof of motivation was required.⁶² An “official action” would not be “held unconstitutional solely because it results in a racially disproportionate impact.”⁶³

Motivation could be proven by objective factors, like the “historical background of the decision, . . . particularly if it reveals a series of official actions taken for invidious purposes.”⁶⁴ 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.⁶⁵ The *Arlington* Court did not spell out or mandate a particular test but provided factors that, if demonstrated, would help confirm evidence of discriminatory

57. Barnes & Chemerinsky, *supra* note 29, at 1301 & n.31 (explaining that “[t]o prove a violation of the Equal Protection Clause—or at least to shift the burden to the government to prove a non-race explanation for its action—requires a showing of discriminatory intent”).

58. *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (framing the question as whether the ban was “plausibly related” to the government’s stated objectives and analyzing the facts of the case under a rational basis review).

59. See *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (striking down Alabama’s criminal disenfranchisement provision because evidence demonstrated that the legislature’s intent in enacting the provision was to disproportionately harm African American voters).

60. 429 U.S. 252 (1977).

61. *Id.* at 265, 271. Looking to the lower court’s finding to support its decision, the Court noted:

[T]he District Court held that the petitioners were not motivated by racial discrimination or intent to discriminate against low-income groups when they denied rezoning, but rather by a desire “to protect property values and the integrity of the Village’s zoning plan.” The District Court concluded also that the denial would not have a racially discriminatory effect.

Id. at 259 (citation omitted); see also *Hunter*, 471 U.S. at 233 (considering whether a decision not to re-zone for low- and moderate-income housing, which would likely be racially integrated, violated Equal Protection).

62. *Arlington Heights*, 429 U.S. at 265-66.

63. *Id.* at 264-65.

64. *Id.* at 267.

65. *Id.* at 266-68.

motivation.⁶⁶ Such factors were not to be considered an exhaustive list but were the same factors employed by the *Regents* Court in its analysis.⁶⁷

Arlington and subsequent rulings required “real evidence” of discriminatory motivation.⁶⁸ Strict scrutiny would not apply to a facially neutral law unless “the invidious quality of a law claimed to be racially discriminatory” could be “traced to a racially discriminatory purpose.”⁶⁹ Ten years later, in *McCleskey v. Kemp*, the Court held statistical evidence to be insufficient to meet that test and found a “legitimate and unchallenged explanation” to negate the relevance of the statistical evidence.⁷⁰

In his dissent, Justice Brennan considered the significance of the history of slavery and racial oppression with the criminal justice system in keeping with the *Arlington* rationale of examining historical background.⁷¹ However, that substantial racially discriminatory history of the criminal justice system was not enough to prove intent with respect to McCleskey himself. The decision rejected the historical evidence and discounted the statistical data, finding those two did not suffice to prove malicious intent⁷² in part because, contrary to the logic of the *Arlington* Court’s implications, historical evidence did not prove current intent.⁷³ In *Regents*, advocates for the DACA recipients (also unsuccessfully) contextualized the rescission of DACA in the

66. *Id.*

67. Compare *id.* at 267-68, with *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915-16 (2020).

68. *Arlington Heights*, 429 U.S. at 266-70; Ortiz, *supra* note 34, at 1113.

69. *Washington v. Davis*, 426 U.S. 229, 240, 242 (1976); see also Barbara J. Flagg, “Was Blind, but Now I See”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 962 (1993).

70. 481 U.S. 279, 292, 297 (1987); see also Haney-López, *supra* note 44, at 1833-46 (using the Malice Standard of *Feeney* to reject statistical evidence of a racially discriminatory motive); Ralph Richard Banks & Richard Thompson Ford, (How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality, 58 EMORY L.J. 1053, 1073-1100 (2009) (arguing that statutory and constitutional prohibitions on discrimination make no distinction between conscious and unconscious bias, notwithstanding compelling statistical evidence). But see Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002) (discussing the impact of stereotypes in advocacy work); Flagg, *supra* note 69 (advocating for race consciousness in the law); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (discussing the effects of implicit bias against minorities); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (finding that unintentional cognitive biases and not discriminatory intent primarily effect equal employment opportunity law); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993) (finding that liability for discrimination should extend to negligent discrimination rather than just intentional).

71. *McCleskey*, 481 U.S. at 328-31 (Brennan, J., dissenting).

72. *Id.* at 297.

73. *Id.* at 298 n.20.

extensive history of racial discrimination against Latinos in immigration law.⁷⁴

This new standard became impenetrable—stating a need for proof of discriminatory intent, but declining to do the work of decoding mental states or grappling with historical background evidence or contemporary statements of decision-making bodies to ever find it.⁷⁵ Requiring proof that government actors harbored “malicious intent” quite simply became a technique for not finding discrimination.⁷⁶ After *McCleskey*, showing a discriminatory purpose required “proof that the government desired to discriminate” such that “prov[ing] that the government took an action with knowledge that it would have discriminatory consequences” would not suffice.⁷⁷

What sounds like a distinction without a difference was inflated to create an absolute wall to finding intent.⁷⁸ By the time lawmakers learned to cleanse government acts of racial or other classifications based on protected status, the Court adopted an interpretation of the intent doctrine that evaded intent detection when it was not clearly spelled out in the government action. It remains true that the Court has never considered the “actual motives of today’s government officials.”⁷⁹ Even without setting foot into the realm of immigration exceptionalism, the current state of the equal protection intent doctrine all but assured the equal protection ruling in *DHS v. Regents*.⁸⁰

74. Amici Curiae Brief of American Historical Association, Organization of American Historians, 42 Historians, and the Fred T. Korematsu Center for Law and Equality in Support of Respondents at 7-8, 10-13, *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (Nos. 18-587, 18-588, 18-589).

75. Haney-López, *supra* note 44, at 1786-88.

76. *Id.* at 1854.

77. Barnes & Chemerinsky, *supra* note 29, at 1306.

78. Thanks to Phil Torrey for pointing out this idea that the difference is one that appears to have no meaning.

79. Haney-López, *supra* note 44, at 1855-56, 1855 n.339; see 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.”); see also Gayle Binion, *“Intent” and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397, 441-42 (1983) (“Because it must be shown that the decisionmakers were motivated by that which they deny, the plaintiffs must prove them to be liars.”); Krieger, *supra* note 70, at 1163 (recounting the story of a Title VII case which, in essence, required proof that the defendant was a “racist and a liar”). But see Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1164 (1978) (“[A] judge’s reluctance to challenge the purity of other officials’ motives may cause her to fail to recognize valid claims of racial discrimination even when the motives for governmental action are highly suspect.”).

80. See Jennifer M. Chacón, *The Inside-Out Constitution: Department of Commerce v. New York*, 2019 SUP. CT. REV. 231, 247 (2019); Robinson, *supra* note 31, at 172-73; Siegel, *supra* note 50, at 1139-46; see also Neil Gotanda, *A Critique of “Our Constitution Is Colorblind”*, 44 STAN.

The discriminatory intent requirement embodies the “colorblindness perspective insofar as it views all, and only, decisions that overtly or covertly take race into account as constitutionally impermissible, but rejects the view that unequal outcomes ought to be equally constitutionally suspect.”⁸¹ 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.”⁸²

III. IMMIGRATION UNEQUAL PROTECTION

The Equal Protection Clause does not confine itself, in the language of the Constitution, to United States citizens. Nevertheless, the Court has interpreted noncitizens to lack full entitlement to all of the promises of the U.S. Constitution.⁸³ In the realm of equal protection, the Court has shown greater deference to the government at the expense of preventing government harm of racial minorities who are not United States citizens. This is the legacy and the present reality of the plenary power doctrine.⁸⁴

Jenny-Brooke Condon aptly described the equal protection doctrine’s application to immigrant rights (referring to both alienage and immigration laws) as “an amalgam of super-deference, suspect class treatment, and even intermediate scrutiny, depending upon whether immigrants are present in the United States lawfully or not, and whether a state or federal classification is at issue.”⁸⁵ In the context of facially race-neutral immigration laws, the tiered

L. REV. 1 (1991) (explaining that intent in the “colorblind” equal protection doctrine serves as subterfuge for avoiding acknowledging continuing racism).

81. Flagg, *supra* note 69, at 958 n.24; *see id.* at 968-69 (discussing how “the existing discriminatory intent rule reflects the dominant white ideology of race”).

82. Barnes & Chemerinsky, *supra* note 29, at 1301-02.

83. This has caused much critique and consternation. *See, e.g.,* Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 497-98 (2001) (arguing for constitutional protection in the face of state alienage discrimination).

84. 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).

85. Jenny-Brooke Condon, *Equal Protection Exceptionalism*, 69 RUTGERS UNIV. L. REV. 563, 563 (2017). Plenary power also works to dilute equal protection scrutiny. *See, e.g.,* Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 2 (1998) (describing that the plenary power doctrine is responsible for undermining equal protection).

scrutiny of equal protection is effectively limited to rational basis review.⁸⁶ The Court generally only applies rational basis or intermediate scrutiny to claims of discrimination on the basis of immigration status, whereas strict scrutiny would apply if such discrimination was on the basis of race.⁸⁷ At the same time, the distinctions blur on the margins as far as race and national origin discrimination and levels of scrutiny. The lesser scrutiny and greater deference applied to race-neutral immigration laws consistently undermine equality. It does so in a way that is obscure, yet also so transparent that it seems to defy common sense.⁸⁸

Immigration law presents two categories of equal protection claims—those contesting alienage laws or those challenging immigration laws. When Congress or the Executive branch makes laws regulating immigration, or who can be excluded or deported and under what circumstances, the Court shows the greatest level of deference to federal lawmakers.⁸⁹ At the same time, the construction of race, and the Court's interchangeable use of racial⁹⁰ and national origin terminology, has made deciphering alleged intent to discriminate on the basis of race versus national origin similarly as nebulous as discerning whether the Court has denied an equal protection claim on the basis of intent, plenary power, or a combination of both. The Court's inconsistent and unclear application of the levels of scrutiny on the basis of alienage, race, and national origin are similarly confounding.⁹¹ This

86. Condon, *supra* note 85, at 571 (noting that the tiered approach to equal protection scrutiny has effectively collapsed “under the burdens of its own complexity and contradiction”).

87. *Compare, e.g., Fiallo v. Bell*, 430 U.S. 787 (1977) (holding that Congress' power to expel or exclude aliens is largely immune from judicial control and the case does not warrant a more searching judicial scrutiny than generally applied in immigration cases), and *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that the State's denial of free public education to undocumented children must be justified by a showing of substantial state interest), with *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny where a low bidder on a federal contract was denied the contract because a presumptive preference was given to minority business entities).

88. It is obscure in that it is inconsistent and effectuated through a muddled and incoherent legal doctrine but transparent in the outcomes. Immigrants never benefit from full equal protection rights, which from a rights perspective, is counterintuitive given the double vulnerability of lacking citizenship status and facing implicit racial bias.

89. Matthew J. Lindsay, *Disaggregating “Immigration Law”*, 68 FLA. L. REV. 179, 189-90, 194 (2016); see also Siegel, *supra* note 50, at 1141; Rachel Zoghlin, *Insecure Communities: How Increased Localization of Immigration Enforcement Under President Obama Through the Secure Communities Program Makes Us Less Safe, and May Violate the Constitution*, 6 MOD. AM. 20, 27 (2010).

90. Outside of immigration law, all racial classifications have been characterized as necessitating strict scrutiny. See, e.g., *Adarand Constructors*, 515 U.S. at 226-27.

91. The combination of status and alienage versus immigration law can complicate the analysis further. See, e.g., *Reno v. Flores*, 507 U.S. 292, 305-06 (1993) (applying rational basis scrutiny to evaluate an immigration policy concerning detaining non-citizen juveniles); c.f. *Plyler*, 457 U.S. at 230 (rationalizing free public school education as an important right and using alienage, instead of

inconsistency is perhaps part of the underlying problem, or at least characteristic of the lack of accessibility of equal protection, especially when the intent doctrine comes into play.⁹²

A. *Equal Protection Challenges to Alienage Laws*

The Court has struck down alienage laws, or civil laws dictating treatment of noncitizens in the United States in a handful of cases,⁹³ but not in any discriminatory impact cases.⁹⁴ *Graham v. Richardson* was the first case where the Court determined that alienage was a suspect classification.⁹⁵ Yet, a few years later, it invoked the plenary power doctrine in *Mathews v. Diaz* to find that the federal government could create federal alienage distinctions in distributing public benefits without violating equal protection, determining that the Constitution, especially the Equal Protection Clause, applied differently in connection with federal immigration regulations.⁹⁶ In other words, the federal government enjoys greater latitude in this field of regulation than the states.⁹⁷

In *Plyler v. Doe*, the Court applied intermediate scrutiny to a facially discriminatory Texas law preventing undocumented primary or secondary school children from attending school on the basis of an alienage classification, affording lesser scrutiny than lawful immigrants considered in *Graham v. Richardson*.⁹⁸ The Court differentiated alienage from racial

immigration law, to apply intermediate scrutiny in the face of a challenge to a Texas law that deprived noncitizen children of access to education without furthering “some substantial state interest”).

92. This leads to the question—when *should* the Court treat a national origin or alienage classification the same as a racial classification?

93. See, e.g., *Graham v. Richardson*, 403 U.S. 365, 376 (1971); *Plyler*, 457 U.S. at 230.

94. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976).

95. 403 U.S. 365, 366 (1971); see Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457, 463-64 (2020) (contextualizing *Graham v. Richardson* and its striking down of two state statutes barring lawful permanent residents from welfare benefits within the framework of civil rights for noncitizens—permanent residents were a “discrete and insular minority”—and describing the uncertainties of extending civil rights to noncitizens and the resulting incompleteness and inconsistency of providing rights).

96. 426 U.S. at 79-80, 86-87.

97. See Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 FORDHAM L. REV. 155 (2014) (framing variegated equal protection application in the context of alienage and immigration laws as a kind of noncongruence where different levels of government assert different interests in defending their laws; and examining the relationship between federal preemption and equal protection in immigration equal protection).

98. *Plyler*, 457 U.S. at 223, 235-36 (“Undocumented aliens cannot be treated as a suspect class” and generally not entitled to strict or heightened scrutiny “because their presence in this country in violation of federal law is not a ‘constitutional irrelevancy.’”). “Persuasive arguments

discrimination focusing on the mutability and illegality of undocumented status (as they assumed, compared to race) in justifying a level of scrutiny lower than strict scrutiny.⁹⁹

Since *Plyler*, the Court has not applied intermediate scrutiny to another alienage classification. The Court has also never applied rational basis scrutiny in challenges to facially neutral laws with racially discriminatory impact, even though race and immigration status are often conflated politically, in popular culture, and rhetorically. The Court has yet to invalidate a facially neutral immigration law with racially, ethnically or national origin-based disparate impact.¹⁰⁰

B. Equal Protection Challenges to Racially Discriminatory Immigration Laws

Over twenty years ago, Gabriel Chin called discrimination in immigration law “segregation’s last stronghold,” contending that it was out of step with mainstream constitutional norms.¹⁰¹ While Chin was right from a broader cultural perspective, the Court’s equal protection intent jurisprudence and immigration law’s plenary power persistence have yet to align with contemporary democratic equality standards. More recently, Jennifer Chacón has remarked on the near impossibility of prevailing in claims of racial or religious discrimination with respect to historically

support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct.” *Id.* at 219. “Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action.” *Id.* at 220.

99. *Id.* at 220 n.19. It may be worthy of further exploration to consider how immutable race is compared to undocumented status and whether the two are so effectively, practically, and metaphorically interchangeable for some, that either discrimination on the basis of both should necessitate strict scrutiny, or perhaps the categories and analysis have been historically oversimplified and mis-defined such that they are not helpful at all. This problem of the Court’s assumption regarding what traits are immutable and which are not, and the significance of immutability in the first place, is indicative of what Brooke-Condon describes: the “equal protection doctrine in the realm of immigrant rights is laden with competing interpretive tools aimed at a mix of judicial goals based upon often unexamined assumptions.” Condon, *supra* note 85, at 603.

100. Note that equal protection challenges based on gender discrimination in immigration, when express and not implied, have been scrutinized per intermediate scrutiny and invalidated but in a leveling down way. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686, 1689 (2017) (holding that gender distinction in the Immigration and Nationality Act concerning acquisition of citizenship via a mother compared to a father violated equal protection and applying the stricter standard to both).

101. Chin, *supra* note 85, at 2 (“[T]he plenary power cases reflect values deeply at odds with those of contemporary society . . .”).

disadvantaged groups, even more true in cases involving noncitizens or implicating them indirectly.¹⁰²

The Court has cordoned off immigration law as exceptional, distinguishing it from other categories of civil or administrative law, deeming Congress's and the Executive branch's power at their apex, and most complete, when making immigration law.¹⁰³ When the Court reviews immigration law, it shows exceptional deference to the political branches. The people whose individual rights are most often limited by plenary power are racialized noncitizens of color who have been historically, politically, socially, and culturally marginalized and demonized.¹⁰⁴ Race-based discrimination in immigration law 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.¹⁰⁵

102. Chacón, *supra* note 80, at 235-36 ("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*. Both cases illustrate the near impossibility of vindicating claims of racial or religious animus against historically disadvantaged groups under existing constitutional antidiscrimination jurisprudence.").

103. See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

104. The Court has consistently upheld Congress's 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) (explaining that the Court must defer to Congress even when immigration policy relies on "discredited racial theories", "anti-Semitism or anti-Catholicism"); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 291 (1904); *United States v. Ju Toy*, 198 U.S. 253, 261 (1905); *Oceanic Steam Navigation*, 214 U.S. at 336; *Wong Wing v. United States*, 163 U.S. 228, 237 (1896); cf. *Reno v. Flores*, 507 U.S. 292, 305-06 (1993) ("[I]n the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens." (citation omitted)); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1911-12 (2020).

105. See Kevin R. Johnson & George A. Martinez, *Forging Our Identity: Transformative Resistance in the Areas of Work, Class, and the Law: Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1268-69 (2000) (contending that California Proposition 227 constituted unlawful racial anti-Latino discrimination by proxy of language, though the author notes that Prop 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 HAW. L. REV. 221 (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).

Because immigration law raises sovereignty and national security concerns,¹⁰⁶ the Court affords the government more leeway in engaging in practices that would otherwise be deemed intolerable. The plenary power doctrine came into being when the Court was asked to consider whether Congress could exclude and deport Chinese immigrants on the basis of race,¹⁰⁷ with national security and sovereignty as rationales for trumping anti-discrimination principles.¹⁰⁸ In the Chinese Exclusion Act era, from a legal and social point-of-view, Chinese descent or ethnicity was characterized as the artificial category of race, as was Mexican national origin.¹⁰⁹ Not only did the plenary power doctrine signify great deference to the government in making immigration law, but like the intent doctrine, it signaled the Court's unwillingness to probe a superficial rationalization of "national security" when the government needed a nondiscriminatory justification for a discriminatory law.¹¹⁰

106. See generally Martin, *supra* note 23 (exploring why the plenary power doctrine endures); Motomura, *supra* note 23 (exploring the partial erosion of the plenary power doctrine somewhat indirectly, through statutory interpretation).

107. At the time, "race" had yet to be imbued with the meaning that the Court would accord the concept of race over time on the basis of eugenics, or more benignly described as "science," or so-called "common knowledge," such that when the Court acknowledged that the government had discriminated on the basis of race, that racial category was described as "Chinese," which today would be characterized as a national origin or ethnicity. See, e.g., Helen F. Eckerson, *Immigration and National Origins*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 4, 10 (1966) (the 1882 Chinese Exclusion Act was "the first act that excluded a national or racial group rather than individuals."); see also Chacón, *supra* note 80, at 254 ("[R]acial categories—[are] products . . . of historical contingency and sociolegal construction."). The meaning of the category of race has not been constant over time and evolved from eugenics, social construct and meaning, and politics, and today is taken for granted entirely; racial categories have meaning only because we take for granted that they do, when they in fact, do not.

108. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606-09 (1889) (permitting the exclusion of Chae Chan Ping upon his attempted return to the U.S. because Congress invalidated the certificate he had before he left that would have authorized his return); *Fong Yue Ting v. United States*, 149 U.S. 698, 706 (1893) (finding that Congress could deport noncitizens whom it deemed an "undesirable race"); see Chin, *supra* note 85, at 1-2 (explaining that "[r]elying on the so-called plenary power doctrine, the Court has said that 'over no conceivable subject' is federal power greater than it is over immigration; even modern federal cases, for example, state that Congress may freely discriminate on the basis of race in this context . . . [and] the Court has defended this approach" yet calls for reexamination of this "unsound" body of law, out of sync with modern equality principles).

109. See, e.g., *Fong Yue Ting*, 149 U.S. at 706 (describing Chinese nationals identified by Congress in legislation as an "undesirable race" as opposed to a group classified by national origin).

110. See Motomura, *supra* note 23 (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) ("[W]hile 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.").

In 1889, in *Chae Chan Ping v. United States*,¹¹¹ the Court determined that Congress' decision to exclude Chinese immigrants on the basis of race fell within their sovereign power and not that of judges.¹¹² This was not because the legislation was facially neutral and caused a mere disparate impact, but because of the plenary power doctrine's role in triggering greater deference to the government when evaluating immigration laws.

Even though plenary power was born well before the civil rights era and, as I have explored in prior articles, was rooted in slavery in addition to immigration law,¹¹³ and the mid-1960s saw some recognition of the insidious role of race in immigration law with respect to national origin quotas, plenary power has continued to exempt immigration law from the already tenuous reach of equal protection.¹¹⁴ The limited extension of the anti-discrimination norms of the civil rights era speaks to the entrenchment of tacit complicity of differential treatment based on national origin, a proxy for race in immigration law.¹¹⁵

The National Origin Quota Act¹¹⁶ in the 1952 Immigration and Nationality Act¹¹⁷ built on a history of racializing national origin exclusion.¹¹⁸ In 1965, Congress repealed national origin quotas, which established numerical maximums per country, on the heels of the 1964 Civil

111. *The Chinese Exclusion Case*, 130 U.S. 581.

112. *Id.* at 606-09; see also *Fong Yue Ting*, 149 U.S. at 712-14.

113. See, e.g., Rosenbaum, *supra* note 10, at 48-51; Carrie L. Rosenbaum, *Anti-Democratic Immigration Law*, 97 DENV. L. REV. 797, 817 (2020) (characterizing plenary power as unlawful in a democratic republic if rule of law requires meaningful adherence to equality norms).

114. Peter Margulies argues that the Roberts' Court should have recognized the third Travel Ban in *Trump v. Hawaii* as contrary to the intent of Congress' 1965 elimination of the national origin quotas and that the third Executive Order was effectively a "de facto national origin quota." See Peter Margulies, *The Travel Ban Decision, Administrative Law, and Judicial Method: Taking Statutory Context Seriously*, 33 GEO. IMMIGR. L.J. 159, 207-08 (2019) (describing Congress' enactment of a nondiscrimination provision in the Immigration and Nationality Act (INA), barring national-origin discrimination in the issuance of immigrant visas).

115. Racial discrimination outside of immigration law requires strict scrutiny, but when alienage or immigration status is the basis for discrimination, lower levels of scrutiny apply. Yet often the immigration classification is a cover for racial bias or discrimination, as was the case in *Regents*—the evidence indicated racial animus against Latinos, but the proxy category to achieve that racialized harm was via immigration status—DACA. See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

116. Immigration Act of 1924, Pub. L. No. 68-139, ch. 2, 43 Stat. 153 (1924).

117. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 101, 66 Stat. 163, 169-70 (codified as amended at 8 U.S.C. § 1101 (2018)).

118. 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 MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 26, 32-34 (Princeton Univ. Press rev. ed. 2014) (describing national origin quotas and race).

Rights Act and 1965 Voting Rights Act.¹¹⁹ The national origin quotas institutionalized discrimination in immigrant admissions and were considered in contradiction with equality principles in contemporary discourse.¹²⁰ Yet immigration law's role in the manufacturing of race has been pernicious and persistent in American culture and political and legal institutions. The plenary power doctrine piggybacks on the equal protection intent doctrine to shield discriminatory immigration laws from remedy.

As a more contemporary example of racialized exclusion, the 1980s Haitian asylum seekers were interdicted at sea.¹²¹ If Justice Marshall had authored the majority opinion rather than the dissent, the outcomes in recent Trump era equal protection challenges may have turned out differently.

In *Jean v. Nelson*, representatives of undocumented Haitians alleged that detention without parole of undocumented Haitians arriving by sea (who could not present a prima facie case for admission) discriminated on the basis of race or national origin.¹²² The petitioners alleged that INS impermissibly denied them parole because they were black and Haitian.¹²³ The intent doctrine did not feature prominently in the Supreme Court's review of the case even though Petitioners contended that "low-level INS officials had invidiously discriminated" against the class members.¹²⁴

The Supreme Court declined to rule on the constitutional claim and made findings only on the statutory claims.¹²⁵ Haitian interdictions were never invalidated on equal protection grounds.¹²⁶ In his dissent, Justice Marshall, joined by J. Brennan, concluded that the government may not discriminate on the basis of race or national origin "in deciding which aliens will be paroled into the United States."¹²⁷ This was an example of the way in which

119. See Act of Oct. 3, 1965, Pub. L. No. 89-236, § 2(a), 79 Stat. 911, 911–12 (1965) (amending the INA); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections 52 U.S.C.); see also NGAI, *supra* note 118, at 227-28 (regarding the reform of National Origin Quotas).

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

121. Christopher Mitchell, *U.S. Policy toward Haitian Boat People, 1972-93*, 534 ANNALS AM. ACAD. POL. & SOC. SCI. 69, 69-71 (1994).

122. *Jean v. Nelson*, 472 U.S. 846, 848 (1985).

123. *Id.* at 849.

124. *Id.* at 853-54.

125. *Id.* at 857.

126. Motomura, *supra* note 25, at 1940-42; see generally Geoffrey Heeren, *Distancing Refugees*, 97 DENV. L. REV. 761 (2020).

127. Justice Marshall explained:

“immigration law is written in nonracial language” that inhibits “inquiries into legislative intent” in spite of having a “disproportionate impact” along lines of race.¹²⁸ Justice Marshall, however, was willing to countenance the government’s national origin-based discrimination as race-based discrimination and deem it just as unconstitutional as it was in alienage law.¹²⁹

In this regard, as if he were foretelling the future *Regents* Court DACA case, in 1996, Hiroshi Motomura rhetorically asked, “When does an immigration law discriminate based on race so as to violate equal protection,”¹³⁰ recognizing that it was not “enough to show that race was one of several factors considered by the policymakers.”¹³¹ Similarly, in 1999, the Supreme Court failed to strike down the federal government’s targeting of a racialized group for deportation as a violation of equal protection, justifying “selective enforcement” on the basis of race in immigration enforcement decisions¹³²—a rationale the government employed in arguing that the Trump administration had the power to rescind DACA without violating the Constitution.¹³³ Such challenges face an uphill battle unless the Court were to eliminate plenary power, treat proxy discrimination on the basis of national origin as racial discrimination triggering strict scrutiny, and avoid or reimagine the intent doctrine.¹³⁴

The narrow question presented by this case is whether, in deciding which aliens will be paroled into the United States pending the determination of their admissibility, the Government may discriminate on the basis of race and national origin even in the absence of any reasons closely related to immigration concerns. To my mind, the Constitution clearly provides that it may not.

Nelson, 472 U.S. at 881-82.

128. Motomura, *supra* note 25, 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) [hereinafter Lawrence, *The Id, the Ego, and Equal Protection*].

129. *Nelson*, 472 U.S. at 881-82 (Marshall, J., dissenting).

130. Motomura, *supra* note 25, at 1941.

131. *Id.*

132. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 487 (1999).

133. *Dep’t of Homeland Sec. v. Regents*, 140 S. Ct. 1891, 1915-16 (2020).

134. See Motomura, *supra* note 25, at 1942 (asking whether “racial or national origin discrimination challenges to immigration decisions [should be treated] as if they arose in a domestic, nonimmigration context” or whether “discrimination challenges in immigration cases [are] different”); see also Chacón, *supra* note 80, at 265 (citing *Matthews v. Diaz*, 426 U.S. 67 (1976) (using rational basis review to a federal welfare law challenged as discriminating against lawful permanent residents)) (emphasizing that Chief Justice Robert’s *Department of Commerce v. New*

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 is erased by some other nondiscriminatory purpose.¹³⁵ Accordingly, the purpose of plenary power, deference to the Executive branch and Congress in matters of immigration, is redundant. In a disparate impact case, the Court already looks at whatever nondiscriminatory purpose may exist to avoid invalidating a law or policy. Plenary power may be tipping the scale in favor of the government's claim of a nondiscriminatory purpose and ignoring objective evidence of discriminatory intent.¹³⁶

The *Regents*¹³⁷ case is an example of the Court's refusal to recognize implicit and systemic racial bias, thus denying any utility of the intent doctrine as a means of enforcing equal protection. After *Washington v. Davis*,¹³⁸ in a seminal article authored in 1987, Charles R. Lawrence III proposed that instead of assuming that a facially neutral action was "either intentionally and unconstitutionally or unintentionally and constitutionally discriminatory," intent should be approached from the perspective of implicit bias and systemic racism.¹³⁹ Twenty years later, Lawrence emphasized that "the cultural meaning of racial texts" is "the central and most important idea in that article."¹⁴⁰ Because unconscious racism and cultural symbols have racial meaning, instead of the futile task of probing the mind of legislators, the Court could "evaluate governmental conduct to determine whether it

York decision effectively deraces the Latino community disparately impacted by framing them as "noncitizen households," in spite of the clear animus towards Latinos, not just "noncitizens," with the result of justifying the lower level of review—rational basis—that applies to noncitizens instead of strict scrutiny that is supposed to apply to race discrimination claims).

135. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (suggesting, per *Washington v. Davis* and *Arlington Heights v. Metropolitan Housing Development Corp.*, that a 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 44, at 1831 (discussing disproportionate impact and disproportionately adverse effect on a racial minority).

136. 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 just with an utterance of "national security"; in the intent doctrine realm, a plausible alternative justification to racial animus/motive is all that is needed to upend an equal protection claim.

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

138. 426 U.S. 229 (1976).

139. Lawrence, *The Id, the Ego, and Equal Protection*, *supra* note 128, at 322.

140. Lawrence, *Unconscious Racism Revisited*, *supra* note 12, at 938-39 (explaining also that the article explores "how white supremacy is maintained not only through the intentional deployment of coercive power, but also through the creation, interpretation, and assimilation of racial text").

conveys a symbolic message to which the culture attaches racial significance.”¹⁴¹ Such an approach would give immigration equal protection long-overdue validation.

The combination of intent and the plenary power doctrine created a perfect storm in *DHS v. Regents*. As in *Trump v. Hawaii*¹⁴² as well, Justice Sotomayor was the lone voice exposing the fallacy of the existence of equal protection in the context of a facially neutral law resulting in disparate impact.¹⁴³ The Court was unwilling in either case to genuinely probe the minds of the lawmakers or connect the dots between the President and his cabinet member with respect to the administration’s rescission of DACA.¹⁴⁴

IV. *DHS V. REGENTS* – INTENTIONAL BLINDNESS REDOUBLED

In *DHS v. Regents of California*, the Court rejected the plaintiffs’ preliminary equal protection claim, according to Justice Sotomayor, only by “discounting some allegations altogether and by narrowly viewing the rest.”¹⁴⁵ The plaintiffs contended that the Executive branch’s attempted rescission of DACA was motivated by racial animus against Latinx immigrants because statistical evidence of disparate impact indicated that ninety percent of the beneficiaries are Latinx, combined with evidence of the President’s anti-Latinx and anti-DACA rhetoric.¹⁴⁶ The Ninth Circuit accepted the plaintiffs’ argument that “the rescission of DACA disproportionately impacts Latinos and individuals of Mexican heritage, who account for ninety-three percent of DACA recipients.”¹⁴⁷ However, the Supreme Court determined that, pursuant to *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,¹⁴⁸ the plaintiffs did not “raise a plausible inference that an ‘invidious discriminatory purpose was a motivating factor’ in the relevant decision.”¹⁴⁹

141. Lawrence, *The Id, the Ego, and Equal Protection*, *supra* note 128, at 324 (emphasis added).

142. *Trump v. Hawaii*, 138 S. Ct. 2392, 2433-48 (2017) (Sotomayor, J., dissenting). It is quite possible that plenary power helps explain why the *Hawaii* Court chose rational basis review instead of strict scrutiny in spite of evidence of discriminatory intent and impact.

143. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1917-18 (2020) (Sotomayor, J., dissenting in part).

144. *See Trump*, 138 S. Ct. at 2420-23; *Regents*, 140 S. Ct. at 1915-16.

145. *Regents*, 140 S. Ct. at 1917 (Sotomayor, J., dissenting in part) (determining that the record supported further consideration of the possibility that discriminatory animus played a role in the rescission).

146. *Id.* at 1915-16 (majority opinion).

147. *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 518 (2018).

148. 429 U.S. 252, 266 (1977).

149. *Regents*, 140 S. Ct. at 1915 (2020) (citing *Arlington Heights*, 429 U.S. at 266).

The rhetoric and anti-immigrant policies of the Trump Administration were potentially as transparently discriminatory as those of the Chinese Exclusion Act era.¹⁵⁰ Former president Trump called Latinos, and even DACA recipients “criminals,”¹⁵¹ yet DACA recipients are not a suspect class, even though they are almost exclusively Latinx, and DACA status is likely broadly perceived as a proxy for the racial classification of Latinx persons.¹⁵² The plurality’s decision suggests that plenary power and the limitations of

150. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); see also *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); Chin, *supra* note 85, at 2 (arguing that “[j]ust as the Jim Crow laws were designed to exclude those of African descent from American society, the laws excluding Asian immigrants upheld in *Chae Chan Ping* and *Fong Yue Ting* betray a belief in racial separation” that was shielded or furthered by plenary power but is at odds with contemporary society, prior to the Trump administration); Stuart Chinn, *Trump and Chinese Exclusion: Contemporary Parallels with Legislative Debates over the Chinese Exclusion Act of 1882*, 84 TENN. L. REV. 681, 715 (2017); *Donald Trump Transcript: ‘Our Country Needs a Truly Great Leader’*, WALL ST. J.: WASH. WIRE (June 16, 2015, 2:29 PM), <http://blogs.wsj.com/washwire/2015/06/16/donald-trump-transcript-our-country-needs-a-truly-great-leader/> (“They’re bringing drugs. They’re bringing crime. They’re rapists.”); Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 159, 167, 189 (2016) (“That the ‘otherness’ of Latinos and African Americans was explicitly linked in Fox News’s fear-based narrative, and the otherness of Latinos, African Americans, and Muslims implicitly linked through Donald Trump’s invocation of similar narratives over time, reaffirms a truth recognized by Dean Kevin Johnson: ‘Foreign and domestic racial subordination . . . find themselves inextricably linked.’” (footnote omitted)); David Leonhardt & Ian Prasad Philbrick, *Donald Trump’s Racism: The Definitive List, Updated*, N.Y. TIMES: OPINION (Jan. 15, 2018), <https://www.nytimes.com/interactive/2018/01/15/opinion/leonhardt-trump-racist.html>.

151. See, e.g., Raul A. Reyes, *Justice Sotomayor Cites Trump’s Remarks Against Mexicans, Immigrants Behind Decision to End DACA*, NBC NEWS (June 18, 2020, 2:42 PM), <https://www.nbcnews.com/news/latino/justice-sotomayor-cites-trump-s-remarks-against-mexicans-immigrants-behind-n1231494>; John Woolfolk, *Trump Says Some DACA Dreamers Are ‘Very Tough, Hardened Criminals.’ Are They?*, MERCURY NEWS (Nov. 12, 2019, 12:51 PM), <https://www.mercurynews.com/2019/11/12/trump-says-some-daca-dreamers-are-very-tough-hardened-criminals-are-they/>; Allan Smith, *Trump Claims Some DACA Recipients ‘Hardened Criminals’ Ahead of Supreme Court Arguments*, NBC NEWS (Nov. 12, 2019, 4:50 AM), <https://www.nbcnews.com/politics/donald-trump/trump-claims-some-daca-recipients-hardened-criminals-ahead-supreme-court-n1080421>.

152. The Court could have discriminatory intention under many alternative approaches to intent since *Washington v. Davis*, including the recognition that the government intended the naturally anticipated outcome of the decision to rescind DACA—disparate impact on Latinos. Under the Charles Lawrence III approach, the Court could have asked whether “the culture thinks of [the] allegedly discriminatory governmental action,” here, DACA rescission, “in racial terms” that could indicate intent, even if subconsciously. See Lawrence, *The Id, the Ego, and Equal Protection*, *supra* note 128, at 324; see also Lawrence, *Unconscious Racism Revisited*, *supra* note 12, at 940, 952 (recognizing that the Supreme Court majority has not only ignored his “scholarly intervention but has marched relentlessly and radically, not to mention intentionally, in the opposite direction of [his] call to give attention to the meaning of racial text” and “cultural meaning of racially discriminatory acts”).

the equal protection doctrine in remedying racism remain stuck in a jurisprudence of “intentional blindness.”¹⁵³

In order to determine whether DACA status was a proxy for race, triggering heightened scrutiny, the plaintiffs had to prove discriminatory intent. It is unclear what the relationship was between the intent doctrine and plenary power in *Regents*, but the *Regents* Court did not need to hide behind plenary power jurisprudence because of the insurmountable hurdle of the intent doctrine.

The Court considered some but not all of the factors set forth by the *Arlington Heights* Court for demonstrating discriminatory motivation or evidence of discriminatory intent.¹⁵⁴ 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.¹⁵⁵ 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),¹⁵⁶ (2) the unusual history behind the rescission, and (3) pre- and post-election statements by former President Trump. However, the Court dismissed them as not attributable to the DHS Secretary, who was directly responsible for technically rescinding DACA.¹⁵⁷

In determining that individually or cumulatively, the evidence did not establish a “plausible equal protection claim,” the Court contended that because Latinx are a large share of unauthorized aliens, “one would expect them to make up an outsized share” of those disadvantaged by rescission.¹⁵⁸ However, disproportionately burdening a particular group does not prove

153. Haney-López, *supra* note 44, at 1784.

154. Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977)).

155. *Id.* (citing *Arlington Heights*, 429 U.S. at 266).

156. See Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc., and Latino Justice PRLDEF in Support of Respondents, Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (Nos. 18-587, 18-588, 18-589), 2019 WL 4954996, at *6-7 [hereinafter Brief of Amicus Curiae NAACP Legal Defense & Educational Fund and Latino Justice PRLDEF].

157. *Regents*, 140 S. Ct. at 1916. “The relevant actors were most directly Acting Secretary Duke and the Attorney General. As the *Batalla Vidal* court acknowledged, respondents did not ‘identif[y] statements by [either] that would give rise to an inference of discriminatory motive.’” *Id.* Similarly, in the Census 2020 case, the district court judge found Secretary Ross’s rationale was pretextual, and it was not clear that it was pretext for prohibited discrimination in part because even if there was evidence of animus by the President’s staff and advisors, there was no evidence that specific discriminatory purpose was conveyed to Secretary Ross and that he held that animus. *New York v. U.S. Dep’t of Com.*, 351 F. Supp. 3d 502, 670 (S.D.N.Y.), *aff’d in part, rev’d in part, remanded sub nom. Dep’t of Com. v. New York*, 139 S. Ct. 2551, *appeal dismissed*, No. 19-212, 2019 WL 7668098 (2d Cir. Aug. 7, 2019).

158. *Regents*, 140 S. Ct. at 1915.

racial bias, but it remains one of the relevant factors in determining discriminatory intent.¹⁵⁹

Disparate impact on Latinx persons as a result of rescission of DACA is evidence of racially discriminatory motivation.¹⁶⁰ The Court claimed that “virtually any generally applicable immigration policy could be challenged on equal protection grounds” if rescission of DACA, disparately targeting Latinx persons, was evidence of discrimination.¹⁶¹ Even if that were true and created a floodgates problem, subjecting much of immigration law to equal protection challenges, that should bolster and not undermine an equal protection claim. Such evidence would be the kind the *Arlington Heights* Court intended with respect to historical evidence of discriminatory motivation.¹⁶²

Under the pre-1970s intent doctrine,¹⁶³ the Court could have considered the rescission and its disparate impact as an anticipated outcome and presumed that outcome was reasonably intended. The intent question could have been resolved at that point because it is plausible that the DHS Secretary could have anticipated that the DACA rescission would have a disparate impact on Latinx persons and the government’s intent would be presumed as reasonably intended. If that were the test, and it was applied correctly, the Court would have found discriminatory intent.

159. See *id.* at 1918 (Sotomayor, J., dissenting in part) (“But the impact of the policy decision must be viewed in the context of the President’s public statements on and off the campaign trail. At the motion-to-dismiss stage, I would not so readily dismiss the allegation that an executive decision disproportionately harms the same racial group that the President branded as less desirable mere months earlier.”).

160. *Id.*

161. *Id.* at 1915-16 (majority opinion). The Court’s rationale echoes that of Justice White’s writing for the *Davis* majority, declaring an impact test as “far reaching” and potentially requiring the court to invalidate vast bodies of law and licensing statutes “that may be more burdensome to the poor and to the average black than the more affluent white.” *Washington v. Davis*, 426 U.S. 229, 248 (1976).

162. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 260 (1977) (“[T]he Court of Appeals ruled that the denial of rezoning must be examined in light of its ‘historical context and ultimate effect.’” (citing *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 517 F. 2d at 413 (7th Cir. 1975))). The Court stated, “The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.” *Id.* at 267. As an example, the Court said that “if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC’s plans to erect integrated housing, we would have a far different case.” *Id.* at 267 (footnote omitted). However, this approach decontextualized the state action and narrowly and illogically focused on whether a procedural or administrative decision fit within a tradition or context of how certain decisions were made, ignoring the relevance of a broader history of institutionalized racism that resulted in de facto segregation. Just as the Trump administration’s rescission of DACA was not necessarily radically aberrational from a procedural standpoint, it also was not abnormal with respect to this administration’s persistent undermining of lawful immigration.

163. See *supra* text accompanying notes 44-45.

Second, the Court summarily dismissed the history leading up to rescission,¹⁶⁴ most notably with respect to its unwillingness to attribute the former President's anti-Latinx statements to the DHS Secretary's decision to rescind DACA.¹⁶⁵ Trump's discriminatory statements and his appointment of ideologues who will carry out his vision are well-documented.¹⁶⁶ This political reality was disregarded entirely, and his animus was not attributed to the cabinet-level decisionmakers, in spite of their obligatory deference to him. The Court's failure in this respect both reinforced the undermining of equal protection and raises separation of powers and rule of law concerns.

The Court also misinterpreted and misapplied the *Arlington Heights*'s "contemporary statements" to deem the President's numerous statements not contemporary and therefore, not useful in evaluating the decision to rescind DACA.¹⁶⁷ The *Arlington* Court's use of the word "contemporary" was vague and broad, and the *Regents* Court's temporally narrow construction defied the common-sense meaning and reasonable implications of the *Arlington* Court's introduction of the contemporaneous statement factor into the analysis.¹⁶⁸ As Justice Sotomayor stated in both her *Hawaii* and *Regents* dissents, nothing in the Court's caselaw supported disregarding any of the campaign or other statements as "remote in time from later-enacted policies,"¹⁶⁹ such as the DACA rescission. And as Chacón wrote in connection with the failed Census 2020 equal protection claim on the basis of no-intent, "No administration in recent history has been as clear and transparent about its intent to increase white political power at the expense of communities of color."¹⁷⁰

Even if the statements were not contemporaneous, the Court could have considered them part of the historical background related to the decision,

164. *Regents*, 140 S. Ct. at 1916.

165. *Id.*

166. Jonathan Blitzer, *Why Trump's Fourth Secretary of Homeland Security Just Resigned*, NEW YORKER: NEWS DESK (Oct. 11, 2019), <https://www.newyorker.com/news/news-desk/why-trumps-fourth-secretary-of-homeland-security-just-resigned>. At the same time, as long as the government makes any colorable effort at hiding discriminatory purpose or intent, the Court will use that as a cover. Perhaps in the DACA and Census cases, the Court's approval of the Administrative Procedures Act (APA) claim was just a message to the Executive to hide the discriminatory intent better.

167. *Regents*, 140 S. Ct. at 1916 (citing *Arlington Heights*, 429 U.S. at 268).

168. The Court gave no clarification of what it meant by "contemporaneous" leaving it open to interpretation within what would be relevant for the purposes of a Court's intent analysis. *Arlington Heights*, 429 U.S. at 268 ("The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.").

169. *Regents*, 140 S. Ct. at 1917 (Sotomayor, J., dissenting in part) (citing *Trump v. Hawaii*, 138 S. Ct. 2392, 2438 n.3 (2018) (Sotomayor, J., dissenting)).

170. Chacón, *supra* note 80, at 252.

particularly where those statements revealed “a series of official actions taken for invidious purposes.”¹⁷¹ The Trump administration was widely perceived to have pursued racially discriminatory “draconian” immigration enforcement targeted at ceasing lawful forms of immigration of Latinx individuals, persons from Muslim-majority countries, and those he perceives as non-white.¹⁷² Aside from Trump’s consistent racist rhetoric levied at Latinos, the Court had evidence of the administration’s other anti-Latinx policies, including the use of family separation and immigration jails to deter migration of people from Central America and Mexico, Migration Protection Protocols,¹⁷³ the public charge rule restricting lawful migration with anticipated discriminatory impact,¹⁷⁴ and other historic evidence of immigration-related bias against racialized groups, including Latinos.¹⁷⁵

Unlike in *Trump v. Hawaii*, the Court did not examine whether the administration had a nondiscriminatory national security justification for DACA because it did not have to.¹⁷⁶ The *Regents* Court never got to the

171. *Arlington Heights*, 429 U.S. at 267.

172. Motomura, *supra* note 95, at 466 (citing Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 201 (2019)); *see also* Leonhardt & Philbrick, *Donald Trump’s Racism: The Definitive List, Updated*, *supra* note 150; Jeff Stein & Andrew Van Dam, *Trump Immigration Plan Could Keep Whites in U.S. Majority for up to Five More Years*, WASH. POST (Feb. 6, 2018, 7:15 AM), <https://www.washingtonpost.com/news/wonk/wp/2018/02/06/trump-immigration-plan-could-keep-whites-in-u-s-majority-for-up-to-five-more-years/>. Business interests want to maintain access to exploitable low-wage labor, including both undocumented immigrants and guest worker visas. Nativists want to maintain America’s traditional racial hierarchy, which is endangered less by a captive, temporary labor force, than by non-white immigrants who settle in America permanently. The result is an immigration “ban” that targets immigrants who may become American citizens but preserves the guest-worker programs nativists claim lock out American workers. Adam Server, *The Sinister Logic of Trump’s Immigration Freeze*, ATLANTIC: IDEAS (Apr. 29, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/trump-order-immigration/610822/>.

173. Sasha Abramsky, *Trump’s ‘Remain in Mexico’ Policy Isn’t Just Cruel, It’s Illegal*, NATION (Nov. 15, 2019), <https://www.thenation.com/article/archive/trumps-remain-in-mexico-policy-isnt-just-cruel-its-illegal/>.

174. Masha Gessen, *Trump’s Immigration Rule is Cruel and Racist But It’s Nothing New*, NEW YORKER (Jan. 29, 2020), <https://www.newyorker.com/news/our-columnists/trumps-immigration-rule-is-cruel-and-racist-but-its-nothing-new>.

175. *See* Brief of Amicus Curiae NAACP Legal Defense & Educational Fund and Latino Justice PRLDEF, *supra* note 156, at *18-19, 22 (indicating some changes to immigration law under the Trump administration); *see also* Susan Bibler Coutin, *Falling Outside: Excavating the History of Central American Asylum Seekers*, 36 LAW & SOC. INQUIRY 569 (2011) (reviewing history of U.S. government’s treatment of Central American asylum seekers from 1980s through 2010); SARAH PIERCE & JESSICA BOLTER, MIGRATION POL’Y INST., DISMANTLING AND RECONSTRUCTING THE U.S. IMMIGRATION SYSTEM: A CATALOG OF CHANGES UNDER THE TRUMP PRESIDENCY (2020), https://www.migrationpolicy.org/sites/default/files/publications/MPI_US-Immigration-Trump-Presidency-Final.pdf.

176. *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018); Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13, 13 (2019) (“The majority deferred to the

second stage of the bifurcated intent doctrine analysis because they gave short shrift to the *Arlington* intent factors. The government asked the Court to invoke plenary power by referencing “foreign affairs”¹⁷⁷ as a legitimate nondiscriminatory rationale. However, the Court did not reference national security,¹⁷⁸ sovereignty, or foreign affairs in dismissing the equal protection claim. The Court did not move on to considering whether the government presented a legitimate, nondiscriminatory purpose for terminating DACA because they instead deemed that discriminatory intent was lacking in the first place.

As has been characteristic of the Court’s equal protection jurisprudence, the Court declined to consider “actual motives of today’s government officials,”¹⁷⁹ here, former President Trump. It is possible that the plenary power doctrine contributed to the Justices’ unwillingness to probe the President’s intent, deem his statements contemporaneous, or consider the longstanding history of official anti-Mexican and anti-Latinx immigration policy.¹⁸⁰

As foretold by Jennifer Chacón’s analysis of the decision in the Census 2020 case, *Department of Commerce v. New York*,¹⁸¹ the Court set the stage for the DACA case outcome—rejection of an equal protection challenge in favor of an Administrative Procedures Act (APA) claim.¹⁸² The Census 2020 case had indirect implications for racialized immigrants and citizens. That case challenged policies “aimed at legal outsiders” that “circumscribe the

President’s national security justification, despite smoking gun evidence of anti-Muslim animus, because it determined that animus was not the ‘sole’ motive for the travel ban.”); see Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475, 1476 (2018) (“One tool that has enabled the cohabitation of national security and immigration is the ‘plenary power doctrine,’ which originates from a case known as *Chae Chan Ping v. United States* (alternately, the *Chinese Exclusion Case*) and refers to the complete power ‘political branches’ have over immigration.”).

177. Brief for Petitioners at 54, *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (Nos. 18-587, 18-588, 18-589), 2019 WL 3942900, at *54.

178. See Zainab Ramahi, *The Muslim Ban Cases: A Lost Opportunity for the Court and A Lesson for the Future*, 108 CALIF. L. REV. 557, 560 (2020) (explaining the Court’s failure to recognize the Trump administration’s discriminatory intent in the travel ban cases, stating that “the judicial decision upholding [the Muslim Ban] perpetuates the pattern of using national security as an excuse to discriminate against minorities. The nation has seen this before, in *Chae Chan Ping v. United States* and *Korematsu v. United States*.”).

179. Haney-López, *supra* note 44, at 1856.

180. See Chin, *supra* note 85, at 60 (observing that “modern international law generally prohibits racial discrimination” such that plenary power should no longer be interpreted to permit Congress to exercise unlimited power over immigration, including engaging in racial discrimination).

181. 139 S. Ct. 2551 (2019).

182. Chacón, *supra* note 80, at 232.

political and social power of the racialized immigrant communities.”¹⁸³ Chief Justice Robert’s rationale in finding an APA violation in *Department of Commerce* was that the Secretary’s inclusion of a citizenship question was not valid.¹⁸⁴ Yet, characteristic of the intentional blindness of equal protection rulings, his reasoning stopped there without considering that the reason was not valid because it was a pretext for racial discrimination.¹⁸⁵ The Ninth Circuit specifically indicated that, unlike the Supreme Court’s ruling in *Trump v. Hawaii*, the DACA case did not concern national security, implying that plenary power-based deference was not appropriate.¹⁸⁶ Yet the Court’s lack of rigorous examination of the policy had the same result.¹⁸⁷

The *Trump v. Hawaii* case, *Regents*, and the Census 2020 case reflect a White Supremacist ideology manifested in Executive Action—what most casual observers might see as the elephant in the room.¹⁸⁸ Instead of validating the substantive rights at issue and reckoning with racism, the Court continues to undermine equal protection rights by relegating remedy to procedural channels. The Court’s decisions in the Census 2020 case, *Trump v. Hawaii*, and now *Regents* have, albeit narrowly, reaffirmed the unavailability of equal protection to invalidate government action tainted by racial (or religious) animus—whether noncitizen Latinos are impacted (*Regents*), or all Latinos in the country (Census 2020).

V. CONCLUSION

Rescission of DACA would have been one small but significant component of what Kevin Johnson described as Trump’s “new Latinx repatriation”—race-neutral policies that will result in a greater exodus of those of Mexican descent than any other period in United States history.¹⁸⁹

183. *Id.* at 233.

184. 139 S. Ct. at 2575.

185. Chacón, *supra* note 80, at 244 (describing Roberts’ failing as failing to explain or acknowledge “from what the Secretary might have been trying to distract the Court”).

186. *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 519-20 (2018). As Chacón observed, and predicted, while the DACA case was not an immigration case and would not normally have triggered deferential review (presumably indicative of plenary power), the Supreme Court still, just as in the 2020 Census case, exercised significant discretion in disregarding evidence of racial bias and discriminatory impact on Latinos. *See* Chacón, *supra* note 80, at 257.

187. *See* Chacón, *supra* note 80, at 247-48 (noting that the Census 2020 Case arose in a “purely domestic, nonsecurity context,” and even as the Court was “nominally applying a more stringent standard of review, a norm of deference exerted strong pull on the Court’s reasoning”).

188. This also implicates the importance of Charles Lawrence III’s proposed perception of systemic racism approach to Equal Protection intent claims. *See* Lawrence, *supra* note 128. As Susan Bibler Coutin noted to the author, this raises the question of why a government and political system built on white supremacy would allow itself to be challenged or changed.

189. Johnson, *supra* note 21, at 1444.

As long as the Court is unwilling to eliminate the discriminatory motivation requirement or consider just disparate impact in conjunction with history of systemic and implicit bias, the Equal Protection Clause may not protect noncitizens subjected to discriminatory immigration law and policy.

If the *Plyler* Court was concerned enough about undocumented immigrant children to strike down a state law that might otherwise create a caste system, or if immigration decisions may stigmatize citizens,¹⁹⁰ the Court should be concerned about noncitizens facing discrimination by the federal government in determining who should be able to come and stay—particularly when such discrimination creates a perception of undesirability and inequality that stigmatizes lawful immigrants and citizens of that national origin.¹⁹¹ The Court's failure to dispose of plenary power and the consistently inconsistent approach to immigration equal protection is the doctrine's undoing.¹⁹²

If equality is considered a necessary component of rule of law, racism has historically undermined that rule and its democratic moorings.¹⁹³ The

190. *Plyler v. Doe*, 457 U.S. 202, 238-39 (1982).

191. See Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 327 (1977) (“When Congress declares that aliens of Chinese or Irish or Polish origin are excludable on the grounds of ancestry alone, it fixes a badge of opprobrium on citizens of the same ancestry.”).

192. Just as scholars have anticipated the erosion of plenary power to hopefully signal the mainstreaming of constitutional equal protection, Jenny Brooke-Condon anticipated optimistically that if the Court struck down the gender-based discrimination at issue in an immigration law in *Morales Santana*, that could “pave the way for integration of immigrants’ claims with the rest of equality doctrine.” Condon, *supra* note 85, at 570. Yet not long after the Court in fact did invalidate the law and validate Equal Protection, it reversed course and refused to find discriminatory intent in *Regents* and in *Trump v. Hawaii*, in part, upon invoking plenary power. *Id.* Condon also calls for the Court to shift to “a more functional approach to judicial review focused on the anti-caste norms at the heart of Equal Protection.” *Id.* at 571.

193. See Richard Delgado, *Rodrigo’s Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994) (examining systemic racism and deeming racism an inherent part of the Enlightenment and influencing American jurisprudence); Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 824-25 (1995) (contending that racial equality is a “substantive societal condition rather than . . . an individual right” such that the 13th, 14th, and 15th Amendments morally and constitutionally require disestablishing the ideology, practice, and structures of racism); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 950-51, 962 (2001) (the constitutional norm of anti-subordination is embodied in equal protection and is necessary to individual equality); Gerald P. López, *Growing Up in Authoritarian 1950s East LA*, 66 UCLA L. REV. 1532, 1581 (2019) (contending that even in celebrating the victory of defeating fascist, Nazi Germany, “through and within the rule of law, racism and misogyny continued as the norm within the very military forces saluted as without equal across history”); Rosenbaum, *supra* note 113 (characterizing plenary power as unlawful in a democratic republic if rule of law requires meaningful adherence to equality norms); see also DERRICK BELL JR., *RACE, RACISM, AND AMERICAN LAW* (1973) (examining American racism within United States law).

anti-democratic discordance of racism necessitates change reflective of Hiroshi Motomura's proposal that for borders to be ethical, immigration laws must not discriminate in any way that would be disallowed domestically—particularly by race or religion.¹⁹⁴ For borders to be ethical, the intent doctrine and immigration plenary power must not undermine equal protection's role in preventing invidious discrimination, including in determination of who may be permitted to enter and remain in the United States.

194. Motomura, *supra* note 95, at 472.