Maryland Journal of International Law

Volume 37 | Issue 1 Article 4

Deconstructing Race in Immigration Law's Origin Stories

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Deconstructing Race in Immigration Law's Origin Stories

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This symposium, *Race, Sovereignty, and Immigrant Justice*, explores the racialized history of immigration laws and their enforcement with the goal of rethinking possibilities for immigrant justice, sovereignty, and human rights. This Essay uses Critical Race Theory to explore how the plenary powers doctrine promotes immigration exceptionalism which has impacted U.S. immigration law and policy's origin stories. Under the plenary powers doctrine, courts give substantial deference to immigration law policymakers and enforcers. These legal doctrines operate under the guise of neutrality which hinders an examination of the racist history and foundation of the laws. This normalizes racism and hinders a comprehensive understanding of how race continues to permeate many facets of immigration law and enforcement. As scholar E. Tenya opines "[…] borders structurally exclude and discriminate on a racial basis as a matter of course often through facially face-neutral law and policy."[1]

Critical Race Theory provides a praxis-centered approach to counter entrenched racial inequity for immigrants who have been historically barred from constitutional and human rights norms. This reflection focuses on the intersection of racism and immigration enforcement, arguing that failing to pay attention to how the plenary powers doctrine perpetuates systemic racism improperly shifts the focus to individual bad actors at every level—whether it be a rogue President, disgruntled immigration judge, or mounted border patrol agent—who claim to enforce facially neutral immigration laws outside of their historical context that in reality continue to replicate racial hierarchy. These legal doctrines continue to protect racial hierarchy

† Clinical Professor of Law, Vanderbilt University Law School. Special thank you to Professors Janel George and Ragini Shah for their feedback and comments. I would like to thank Vanderbilt Clinical Faculty for their helpful comments and feedback during our WIP workshop series. Emily Burgess provided excellent research assistance.

1. E. Tendayi Achiume, *Racial Borders*, 110 GEORGETOWN L. J. 445, 449 (March 2022).

with multiple Supreme Court decisions affirming neutral reasons for upholding and enforcing the immigration laws.

Geared towards praxis-oriented reform, this Essay considers the power of counter narratives to immigration origin stories through analyzing recent federal cases contextualizing the racist legislative history of immigration laws criminalizing unlawful re-entry. First, this Essay examines the racist origins of U.S. immigration law, it then analyzes the plenary powers doctrine and how it perpetuates immigration exceptionalism that obscures these racist origins and gives (virtually) unchecked deference to immigration lawmakers and enforcers. The Essay concludes with a critical analysis—*United States v. Carrillo-Lopez*[2] as an atypical case that reframes the ways in which the history of immigration laws is regarded as colorblind which is a step towards justice and equality.

IMMIGRATION LAW'S ORIGIN STORIES AND RACE

Immigration systems and borders are predicated on membership and belonging. Throughout U.S. history, membership and belonging have been narrowly construed and available to a limited few;[3] the 1790 Naturalization Law, for instance, limited citizenship to free white males, which was granted in practice only to white male property owners.[4] In 1857, Justice Taney in *Dred Scott v. Sanford*[5] stated that formerly enslaved Black persons could not be granted U.S. citizenship and that the Black man "had no rights which the white man was bound to respect."[6] Racial restrictions on citizenship were not eliminated entirely until 1952.[7]

Consideration of the Supreme Court and Congress's first iterations of race-based exclusions limiting the recognition and rights of noncitizens is key to understanding how racism operates in

2. *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1008 (D. Nev. 2021).

3. Angela Banks, *The Curious Relationship Between 'Self Deportation Policies' and Naturalization Rates*, 16.4 LEWIS & CLARK L. REV. 1149, 1163 (2012).

4. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795).

5. 60 U.S. 393, 407 (1857), superseded (1868).

6. *Id.*

7. *Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, IMMIGR. & ETHNIC HIST. SOC'Y, https://immigrationhistory.org/item/immigration-and-nationality-act-the-mccarran-walter-act/, (last visited May 6, 2022).

immigration enforcement today. The first immigration and naturalization laws demarcated a Black-white binary and America's historic emphasis on Black-white relations. Historian Isabel Wilkerson places race-based immigration exclusions in a historical context:

> There was a tremendous churning at the beginning of the 20th century of people who were arriving in these undetermined or middle groups that did not fit neatly into the bipolar structure that America had created. And at the beginning of the 20th century, there were petitions to the Supreme Court, petitions to the government, for clarity about where they would fit in. And they were often petitioning to be admitted to the dominant caste. One of the examples, a Japanese immigrant petitioned to qualify for being Caucasian because he said, 'My skin is actually whiter than many people that I identified as white in America. I should qualify to be considered Caucasian.' And his petition was rejected by the Supreme Court. *But these are all examples of the long-standing uncertainties about who fits where when you have a caste system that is bipolar [Black and white], such as the one that was created here*.[8]

Understanding how racism impacts immigration enforcement helps to develop a praxis towards eradicating systemic racism.

Within the history of immigration enforcement, around 1889, the Chinese Exclusion Act Cases became precedent for how the judiciary defers to congressional enactments of immigration laws.[9] The Chinese Exclusion Acts banned Chinese nationals from entering the United States.[10] In the Chinese Exclusion Act cases, the Supreme Court

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8. Terry Gross, *It's More Than Racism: Isabel Wilkerson Explains America's "Caste" System*, NPR (Aug. 4, 2020), https://www.npr.org/2020/08/04/898574852/its-more-than-racism-isabel-wilkerson-explains-america-s-caste-system. *See also*, ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS (2020).

9. *See* Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183 (2018).

10. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943). There were a series of Chinese exclusion statutes from 1882 to 1892. *See* Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943) (executing certain treaty stipulations relating to Chinese); Act of July 5, 1884, ch. 220, 23 Stat. 115 (repealed 1943) (amending treaty stipulations relating to Chinese); Act of Oct. 1, 1888, ch. 1064, §§ 1–2, 25 Stat. 504 (repealed 1943) (supplementing prior treaty stipulations); Act of May 5, 1892, ch. 60, §§ 1–3, 27 Stat. 25 (repealed 1943) (prohibiting the immigration of Chinese).

created the precedent exempting the federal government from adhering to constitutional norms—the plenary powers doctrine.[11] When Congress enacts immigration laws or the Executive Branch acts pursuant to the laws, courts have construed the political branch's immigration power as complete with no limitations.[12] This doctrine is justified on the rationale that the constitution provides Congress and the executive branch's—as a sovereign—primacy over foreign policy, its borders, and national security.[13] Because immigration is assumed to be tied to foreign policy and national security, courts will subject federal immigration statutes and regulations to a highly deferential review.[14] Through the expansion of this doctrine, constitutional limits typically placed on any exercise of sovereign power against its citizens are avoided and broad deference is granted.[15] Sovereignty is not a neutral principle as it cannot be separated from its origins where First World nation-states employed borders and sovereignty "to preserve the racially segregated colonial order on their own terms."[16] Scholar Achiume states:

> Today, sovereignty-based justifications remain legal shields that enable racial conduct and policy that would, in many jurisdictions, amount to prohibited discrimination if the conduct or policy were not laundered through the categories of nationality.[17]

The effects and premises of the Chinese Exclusion Cases form the backbone of the American immigration system as we know it today.

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11. *Chae Chan Ping v. U.S.* (Chinese Exclusion Case), 130 U.S. 581, 609 (1889). *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550 (1990). It is of note that the plenary powers doctrine is not in the Constitution. It stems from the penumbra of powers that the political branches have to regulate immigration. Immigration laws, policies, and enforcement fall within the political question doctrine. *See generally,* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power,* 1984 THE SUPREME COURT REV. 255, 255 (1984) (explaining the plenary powers doctrine as one where "the [Supreme] Court has declared itself powerless to review even those immigration provisions that explicitly classify on such disfavored bases as race, gender and legitimacy").

12. *Id.* at 547.

13. *Id.* at 551–52.

14. *Id.* at 547.

15. *Id.* at 547.

16. Achiume, *supra* note 1 at 490 (highlighting how sovereignty has been utilized by First World nation-states "to preserve the racially segregated colonial order on their own terms").

17. *Id.*at 488 – 489.

"The plenary power doctrine protects the federal government from claims that it is violating an individual's constitutional right to equal protection when it imposes discriminatory burdens on non-U.S. citizens."[18]

The plenary powers doctrine is often considered without discussion of how the underlying laws and Supreme Court cases excluded an entire race of Chinese nationals and enshrined sovereignty and national security as facially neutral justifications for the immigration policy.[19] The plenary powers doctrine normalized the historical exclusion and discrimination against Chinese nationals—race-based exclusions—as the prerogative of a sovereign nation to construct its own populace.[20]

The Supreme Court's opinion in the Chinese Exclusion Act cases contained racially-charged language. In the opinion, the Supreme Court emphasized:

> It is true this statute is directed only against *the obnoxious Chinese*, but, if the power exists, who shall say it will not be exercised tomorrow against other classes and other people? If the guaranties of these amendments can be thus ignored in order to *get rid of this distasteful class*, what security have others that a like disregard of its provisions may not be resorted to?[21]

The underlying history of the plenary powers doctrine must be excavated from its neutral justifications. Failing to recognize the underlying history results in an immigration system that allows racist laws, policies, and practices to remain in place, which continues to perpetuate racial subordination.

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18. Mary M. Sevandal, *Special Registration: Discrimination in the Name of National Security*, 8 J. GENDER RACE & JUST. 735, 745 (2005). Legomsky, *supra*. note 11 at 258 (stating "Cutting across a wide spectrum of individual rights, the principle [the plenary powers doctrine] has been applied with greatest consistency to challenges based on constitutional provisions that protect substantive rights […]. Whether the claims are based directly on the infringement of a liberty interest or on discrimination between specified classes of aliens, the Supreme Court has effectively withheld review in those cases.").

19. Motomura, *supra* note 11 at 550–54.

20. *Id.* at 552.

21. Fong Yue Ting v. United States, 13 S. Ct. 1016, 1018, 1034 (1893).

The Supreme Court continuously relies on this doctrine to uphold discriminatory immigration laws that abrogate the constitutional rights of noncitizens. The discriminatory immigration laws operate under a banner of neutrality and when they or their enforcement are challenged, the plenary powers doctrine is often asserted to support the government's sweeping powers to regulate immigration. This perpetuates immigration exceptionalism. This broad unchecked discretion has resulted in the replication of racialized norms. Scholar Sumi Cho states:

> National sovereignty, federalism, separation of powers, and plenary powers are all central legal principles on which the United States was founded. Each term embeds a racialized history in which race and law were mutually constructed.[22]

> This historical context cannot be dismissed when evaluating the contemporary application of the plenary powers doctrine in immigration enforcement. The plenary powers doctrine normalized race-based exclusions that would be unlawful if applied to U.S. citizens under the U.S. Constitution.

The plenary powers doctrine is still applied to immigration laws and policies providing the executive and political branches a neutral cover for discriminatory policies and enforcement practices.[23] While U.S. immigration laws have largely moved away from explicitly discriminating based on racial classifications, the historical racist foundations continue to pervade many facets of the enforcement of immigration laws.[24]

The holding in *Trump v. Hawaii* serves as one example.[25] The Supreme Court's upholding of former President Trump's Travel Ban affirmed a sovereign's discretion to discriminate against noncitizens when national security is implicated without questioning the

22. Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1609–10 (2009).

23. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

24. Motomura, *supra* note 11, at 555. *See generally*, *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975) (allows police to consider race alongside other factors ("Mexican appearance") when making an immigration stop).

25. *Trump*, 138 S. Ct. 2392.

motivations or necessity of the underlying executive action.[26] The plaintiffs argued that the President's Orders and Proclamation violated the Immigration and Nationality Act and the Establishment Clause of the First Amendment to the U.S. Constitution where the orders were "motivated not by concerns pertaining to national security but by a discriminatory animus towards Islam."[27]

This case demonstrates how the deferential review of Legislative and Executive branch actions has become the common manner in which immigration laws are construed—ignoring any discriminatory or racial implications of the laws. Cloaking these laws under the guise of sovereignty and national security, as the ordinary means by which immigration laws and policies are evaluated, makes racism difficult to address and cure because it is not acknowledged. The plenary powers doctrine is colorblind, simply compelling deference to the political branches' ability to construct borders. When sovereignty and national security are evoked, immigration law is equally applied giving the President sweeping discretion. Under Immigration and Nationality Act ("INA") § 212(f), the President now has broad authority to "suspend the entry of any aliens or of a class of aliens or place restrictions on the entry of a class of aliens temporarily if he or she determines that the entry of such aliens would be detrimental to the U.S. interest."[28]

The Supreme Court defers to colorblind immigration laws and policies based on the premise that all immigration laws equally apply to all noncitizens regardless of race. The Court refuses to examine the underlying reasons for the law or the impact of the law where race discrimination and exclusion is unavoidable to maintaining borders.

In Justice Sotomayor's dissent in *Trump v. Hawaii*, she asserted that federal courts should examine facially neutral executive policies to determine whether the policy bears a reasonable relationship to the

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26. *Id.* at 2419 (citing *Kleindienst v. Mandel*, 92 S.Ct. 2576, 2585 (1972) (stating "'when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification' against the asserted constitutional interests of U.S. citizens."). *See also*, Executive Order No. 13769, 82 FR 8922 (Jan. 27, 2017), https://www.federalregister.gov/documents/2017/02/01/2017-02281/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states.

27. *Id.* at 2406.

28. Immigration and Nationality Act ("INA"), § 212(f), 8 U.S.C.A. § 1182(f).

legitimate state interests.[29] She proposed that the examination would involve a rigorous analysis of the *history* that led up to the promulgation of the executive action in relation to the statutory framework of the INA.[30] The adoption of her dissent would erode the strict deference to the political branches' authority over immigration. This standard would place a check on immigration policies that discriminate against immigrants of color.

After the Supreme Court's decision, the Executive branch used this sweeping authority to expand the Muslim ban adding four Muslim majority African countries.[31] The Muslim ban became known as "Muslim and African ban."[32]While the original ban affected 135 million people in seven countries, the expanded ban affected nearly a quarter of the African continent's 1.2 billion people.[33]After the ban, policy analysts stated, "The rationale for limiting visas to the nationals of these four African countries can only be seen as a demand for a reduction in immigration from African countries collectively especially due to the White House's previous assessment regarding 'shithole countries.'"[34]

Advocates demanded more information on the justifications for the ban asserting that Nigeria was added to the list two years after former President Trump "reportedly stated that Nigerians would never 'go back to their huts' after seeing the United States."[35] The National Association for Advancement of Colored People (NAACP) asserted

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29. *Trump*, 138 S. Ct. (Sotomayor, J., dissenting) at 2438. *See also*, Karla McKanders, *Deconstructing Invisible Walls: Sotomayor's Dissents in an Era of Immigration Exceptionalism*, 27 WM. & MARY J. RACE GENDER & SOC. JUST. 95 (2020).

30. *Id.*

31. Proclamation No. 9983, 85 FR 6699 (February 5, 2020) (the updated travel ban added Nigeria, Sudan, Tanzania, and Eritrea to the travel ban and maintains the ban on travel from Libya and Somalia).

32. Yomi Kazeen, *"AFRICAN BAN" The Trump administration has confirmed visa bans on four African countries, including Nigeria*, QUARTZ AFRICA (Jan. 31, 2020), https://qz.com/africa/1795007/trump-issues-travel-ban-on-nigeria-eritrea-tanzania-sudan/.

33. Ruth Maclean and Abdi Latif Dahir, *New U.S. Travel Ban Shuts Door on Africa's Biggest Economy, Nigeria*, NY TIMES (Feb. 2, 2020), https://www.nytimes.com/2020/02/02/world/africa/trump-travel-ban.html.

34. Kazeen, *supra*. note 32.

35. Eric Naing, *Civil Rights Groups Seek Critical Information on Trump's Muslim and African Ban*, NAACP LDF PRESS RELEASE, Feb. 25, 2020, https://www.naacpldf.org/press-release/civil-rights-groups-seek-critical-information-on-trumps-muslim-and-african-ban/.

that there was no real national security justification for the travel ban and that the expansion was motivated by racism.[36] The Court's failure to engage with the history of immigration laws allows it to hide behind national security without a probing inquiry into the foundations of the laws.

Individual Bad Actors Operating under the Pretext of Neutrality

Today, quasi-race-neutral executive immigration policies and enforcement practices create a system that perpetuates racial inequality.[37] The illusion of neutrality allows for the passage and enforcement of immigration laws that repeatedly disparately impact immigrants of color. "The doctrine of immigration exceptionalism demonstrates what happens when the law consistently fails to acknowledge and redress the harms caused by racism in the political process."[38] This doctrine has enabled immigration laws to be historically viewed as racially (facially) neutral—what some scholars call "colorblind"—permitting courts to cite deference to the political branch's authority over immigration and shift the focus to individual bad actors within the system instead of historically contextualizing and evaluating INA or executive action to understand the impact on immigrants of color.

This pattern is a hallmark of how systemic racism operates in the United States: facially neutral laws, executive actions, and individual actors enforcing immigration laws are justified on the basis of sovereignty and national security. When advocates identify discriminatory immigration enforcement practices, legal remedies focus on changing an administration or removing bad actors from the system. These remedies are often traditional civil rights remedies that

36. *Id.*

37. Achiume, *supra*. note 1 at 448–49 (arguing "[…] the racial disparities enforced by national border structurally benefits some nations and racial groups at the expense of others. […] And proximity to whiteness calibrates these privileges. *This racial privilege inheres in the facially-neutral legal categories and regimes of territorial and political borders (sovereignty, citizenship, nationality, passports, and visas). It also inheres in rules and practices of national membership and international mobility*.").

38. Jennifer M. Chacón, *The Failure of Equal Protection and the Fragility of Temporary Protection*, 43 UCLA L. MAG., Fall 2020, https://uclalawmagazine.com/the-failure-of-equal-protection-and-thefragility-of-temporary-protection/ [https://perma.cc/2B7J-VX4V] (discussing *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1891 (2020)).

are ill-equipped to address the systemic issues that pervade the history of immigration laws. Critical Race Theory Scholar Khiara M. Bridges critiques, "traditional civil rights discourses [which] tend to define racism as discrete, easily identifiable invariable intentional, always irrational acts perpetuated by [individual] bad actors."[39] Focusing on individual bad actors within a larger enforcement system continues to perpetuate racism without ever addressing the underlying power dynamics that continue to perpetuate racism in immigration enforcement.

For example, successive U.S. presidents have *all* been criticized for how their immigration policies disproportionately impact immigrants of color. Several administrations' policies and enforcement practices—both Democrat and Republican—have resulted in the disproportionate exclusion or deportation of immigrants of color, as described below:

- President Bill Clinton spearheaded 1996 legislation, Anti-Terrorism and Effective Death Penalty Act ("AEDPA") and Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which resulted in mass deportations with minimal due process rights and mandatory detention, including deportations of lawful permanent residents who have minimal ties to their home countries, which disproportionately impacts immigrants of color.[40]
- In 2014, under the Obama administration, the Secretary of Homeland Security shifted its enforcement priorities to the deportation of noncitizens convicted of crimes.[41] President Obama indicated that the prosecutorial policy would focus on "[f]elons, not families. Criminals, not children. Gang members, not a mom who's working hard to provide for her kids."[42] The Obama administration stated: "Any

39. KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 36 (First edition. ed. 2019).

40. *See* Donald Kerwin, *From IIRIRA to Trump: Connecting the Does to the Current US Immigration Policy Crisis*, 6 J. ON MIGRATION & HUM. SEC. 192 (2018). *See also*, Karla M. McKanders, *Immigration and Racial Justice: Enforcing the Borders of Blackness*, 37 GA. ST. U. L. REV. 1139 (2021).

41. *Strengthening Enforcement*, OBAMAWHITEHOUSE.ARCHIVES.GOV https://obamawhitehouse.archives.gov/issues/immigration/strengthening-enforcement (last visited May 6, 2022).

42. *Id.*

immigrant—including legal noncitizens—will be a priority for deportation if he or she has been convicted of an 'aggravated felony' or certain misdemeanor crimes, such as driving under the influence."[43] President Obama deported the most (5,281,115) undocumented immigrants in the history of the United States and was known as the "Deporter in Chief."[44]

- The Trump administration's immigration policies were explicitly intended to exclude immigrants of color.[45] The Trump administration signed numerous executive orders, enacted regulations, and changed enforcement policies that disproportionately impacted and increased the deportation rates of migrants from African countries.[46] In 2017, after President Trump entered office, ICE removals decreased; however, the deportation of African migrants went up—in some cases, more than doubling.[47]

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43. *Transcript: Obama's Immigration Speech*, WASH. POST (Nov. 20, 2014), https://www.washingtonpost.com/politics/transcript-obamas-immigration-speech/2014/11/20/14ba8042-7117-11e4-893f-86bd390a3340_story.html.

44. Muzaffar Chishti, Sarah Pierce, & Jessica Bolter, *The Obama Record on Deportations: Deporter in Chief or Not?*, MIGRATION POL'Y INST. (Jan. 26, 2017), https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not.

45. Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197 (2019), https://www.stanfordlawreview.org/online/white-nationalism-as-immigration-policy/. See also, Karla Mari McKanders, *Immigration and Blackness: What's Race Got to Do with It?*, 44 HUM. RTS. 20, 21 (2019) ("The administration has promoted racist narratives, asking why migrants from 'shithole countries' are coming to the United States. Senator Durbin stated that the president made these comments in a White House meeting with 23 members of Congress. He allegedly repeatedly referred to Haiti and African countries as 'shitholes,' stating the United States should get more people from countries like Norway to migrate to the United States."); *see also* Ali Vitali et al., *Trump Referred to Haiti and African Nations As 'Shithole' Countries*, NBC NEWS, Jan. 12, 2018, https://www.nbcnews.com/politics/white-house/trump-referred-haiti-african-countries-shithole-nations-n836946 [https://perma.cc/Z8MK-E8NU]; Jeremy Raff, *The 'Double Punishment' for Black Undocumented Immigrants*, THE ATLANTIC (Dec. 30, 2017), https://www.theatlantic.com/politics/archive/2017/12/the-double-punishment-for-black-immigrants/549425/ [https://perma.cc/99J2-XTHZ] ("The Haitians 'all have AIDS,' Trump said in a June meeting with his top advisers according to the *Times*, while the Nigerians would not 'go back to their huts' after seeing America, he sa*Id.* (The White House denied the comments.)").

46. *Id.*

47. *Fiscal Year 2017 ICE Enforcement and Removal Operations Report*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf (last visited May 6, 2022).

- The Biden Administration continues to enforce Title 42, which has resulted in non-transparent deportations and refoulement of Haitian nationals.[48] Under the Biden Administration, allegedly rogue individual horse border patrol officers whipped Haitian nationals.[49]

The 1985 Supreme Court case *Jean v. Nelson* provides insight into how engrained the focus on neutrality and eliminating individual bad actors is in immigration enforcement.[50] In *Jean v. Nelson*, the plaintiffs alleged that the Office of the Attorney General, through Immigration and Naturalization Service ("INS" precursor to Department of Homeland Security), violated the equal protection guarantee of the Fifth Amendment when it discriminated against Haitian nationals on the basis of race and national origin in terminating parole.[51] Under INA § 212(d)(5)(A), immigration officers have the discretion to admit into the United States on a case-by-case basis immigrants who would otherwise be inadmissible when they determine the immigrant has "urgent humanitarian reasons" or "significant public benefit." This is not a permanent immigration status. It is only granted for a limited duration.

The plaintiffs alleged that they were impermissibly denied parole because they were Black and Haitian asylum seekers.[52] During the late 1970s and early 1980s, south Florida experienced an increase in undocumented noncitizens, mainly from Haiti and Cuba.[53] With this increase, at the beginning of 1981, the Attorney General ordered INA to detain without parole any immigrants who could not demonstrate they were admissible to the United States.[54] By July 31, 1981, the

48. Mary Biekert, *Title 42, The Law Removing Haitians From U.S. Border*, WASH. POST (Sept. 29, 2021), https://www.washingtonpost.com/business/title-42-the-law-removing-haitians-from-us-border/2021/09/24/57971d7e-1d6f-11ec-bea8-308ea134594f_story.html.

49. Joel Rose, *The Inquiry Into Border Agents on Horseback Continues. Critics See A Broken System*, NPR (Nov. 6, 2021), https://www.npr.org/2021/11/06/1052786254/border-patrol-agents-horseback-investigation-haitian-immigrants.

50. 472 U.S. 846 (1985).

51. *Id.* at 848.

52. *Id.* at 849.

53. *Id.* at 849.

54. *Id.*

limitations on parole were in full force in south Florida.[55] Prior to the 1980s, parole was freely granted.[56] During the 1980s, the Attorney General ordered the INS to detain without parole any immigrants who could not present a prima facie case for admission.[57] This change reversed the decades-long policy of paroling noncitizens into the United States.

The main issue was whether individual immigration officers at the border could discriminate in admission decisions on the basis of race—here against Black Haitian nationals.[58]

While the case was pending, INS promulgated a new rule requiring even-handed treatment that prohibited the consideration of race and national origin in parole decisions.[59] The plaintiffs argued:

> This case does not implicate the authority of Congress, the President, or the Attorney General. Rather, it challenges the *power of low-level politically unresponsive government officials* to act in a manner which is contrary to federal statutes [. . .] and the directions of the President and the Attorney General, both of whom provided for a policy of non-discriminatory enforcement.[60]

Relying on the government's plenary authority to control the borders, the Eleventh Circuit concluded that any such discrimination concerning parole would not violate the Constitution's Fifth Amendment.[61] The majority Supreme Court opinion remanded the case to evaluate whether the *individual low-level officers* were exercising their discretion without regard to race or national origin.[62] The majority opinion highlighted that "immigration officials clearly have the authority to deny parole to unadmitted aliens if they can advance a 'facially legitimate and

55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 848.
59. *Id.* at 850–51.
60. *Id.* at 853.
61. *Id.* at 848 (citing Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983), on reh'g, 727 F.2d 957 (11th Cir. 1984), aff'd, 472 U.S. 846, 105 S. Ct. 2992, 86 L. Ed. 2d 664 (1985)).
62. *Id.* at 857.

> bona fide reason' for doing so."[63] The majority asserted that the officers were provided through regulations a "lengthy list of *neutral* criteria which bear on the grant or denial of parole."[64]

Contrastingly, Justice Thurgood Marshal's dissent would have held "[…] that petitioners [Haitian asylum seekers] have a Fifth Amendment right to parole decisions free from invidious discrimination based on race or national origin."[65] Justice Marshall asserted that equal protection should apply to Haitians and prohibit the government from discriminating on the basis of race or national origin in exercising their discretion.[66]

Justice Marshall critiqued the allegedly facially neutral criteria that governed immigration officers exercising discretion in making parole decisions.[67] He asserted that the regulations, in fact, allowed for discriminatory factors to be part of the criteria upon which parole decisions were made, as the regulations provided no specific prohibitions on utilizing national origin as one of the criteria.[68]

Rather than focusing on the context and history where neutrality has facilitated turned a blind-eye to discriminatory practices, the system of immigration enforcement continues to provide wide discretion to individual officers implementing and enforcing immigration laws. Contemporary manifestations of the sweeping discretion of the executive branch have resulted in:

- The Biden Administration's attempt to target individual horse patrol officers for using their horse reigns against Haitians at the Del Rio border.[69] Recently, U.S. Customs and Border Protection referred four agents to a Discipline Review Board for their conduct but found no evidence during their internal investigation that any of the migrants

63. *Id.* at 853 (quoting *Jean II*, 727 F.2d at 977, citing *Kleindienst v. Mandel*, 408 U.S. 770 (1972)).
64. *Id.* at 855.
65. 472 U.S. 846 (1985) (Marshall, J., dissenting) at 858.
66. *Id.*
67. *Id.* at 860–65.
68. *Id.* at 863–64.
69. Rose, *supra* note 49.

were whipped by horse reins and declined to find an element of intentionality motivated the officers conduct..[70]

- The resignation of top-level State Department officials critiquing the Biden administration's implementation of Title 42 as violating the United States' legal obligation not to expel or return ('refouler') individuals who fear persecution, death, or torture—especially migrants fleeing from Haiti.[71] Title 42 is a COVID-19 pandemic policy that barred immigrants and asylum seekers from entering at the Southern U.S. Mexican border. In his resignation memo, one official also criticized the differential treatment of Afghan refugees and the Biden Administration's use of Title 42 in contrast with Haitian nationals.[72]
- In late 2021, advocacy organizations filed a lawsuit on behalf of Cameroonian migrants who were restrained and shackled in a "cruel, inhumane and degrading" way by *federal officials* who then expelled them.[73] The complaint alleged that "the darker your skin, the harsher the treatment."[74]

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70. Department of Homeland Security, U.S. Customs and Border Protection, Report of Investigation: Incident Near Del Rio, Tx Port of Entry, September 19, 2021/Del Rio, Val Verde, Tx (July 8, 2022) https://www.cbp.gov/sites/default/files/assets/documents/2022-Jul/202112280-cbp-closing-report-public-redacted-final.pdf; Bridget Johnson, *Four Border Patrol Agents Face Disciplinary Review for Confrontation with Haitian Migrants as OPR Finds CBP Command Failures*, HOMELAND SECURITY TODAY (July 8, 2022), https://www.hstoday.us/subject-matter-areas/border-security/four-border-patrol-agents-face-disciplinary-review-for-confrontation-with-haitian-migrants/ (the report found that "there is no evidence that BPAs involved in this incident struck, intentionally or otherwise, any migrant with their reins"). See also, *DHS Update Regarding the Investigation of Horse Patrol Activity in Del Rio, Texas on September 19, 2021*, DEP'T OF HOMELAND SECURITY (Nov. 16, 2021), https://www.dhs.gov/news/2021/11/16/dhs-update-regarding-investigation-horse-patrol-activity-del-rio-texas-september-19.

71. Alex Thompson & Alexander Ward, *Top State Adviser Leaves Post, Rips Biden's Use of Trump-Era Title 42*, POLITICO (Oct. 4, 2021), https://www.politico.com/news/2021/10/04/top-state-adviser-leaves-post-title-42-515029.

72. *Id.*

73. Benjamin Barber, *Lawsuit Seeks Information on U.S. Treatment of Black Asylum Seekers*, THE INST. FOR S. STUDIES (Oct. 28, 2021), https://www.facingsouth.org/2021/10/lawsuit-seeks-information-us-treatment-black-asylum-seekers-0.

74. *Id.*

- In March 2022, U.S. Customs and Border Protection exempted Ukrainian nationals at land border ports of entry from the Title 42 COVID-19 pandemic ban.[75]

The end goal of post-racial civil rights reform is for individual actors to be able to exercise their authority in a neutral or colorblind manner without regard to race.[76] Traditional civil rights reform seeks to eliminate bias and prejudice on an individual level so that society can finally be neutral.[77] Neutrality occurs when individual bad actors stop bias or prejudice in exercising their duties. The individual actors, however, cannot be considered without interrogating the foundations of the institutions in which they operate. The actions of individuals within immigration enforcement need to be contextualized with the history of the enforcement entity recognizing that an individual actor is operating in an institution that is the product of power and politics. This accumulation of negative consequences requires questioning if a *legal* framework that considers the historical foundation of immigration laws is sufficient to eradicate systemic racism in the enforcement of the laws.

RETELLING THE HISTORY OF IMMIGRATION LAWS

The goal of dismantling systemic racism within immigration involves deconstructing the power dynamic in race, racism, and the institutions of immigration enforcement through examining and re-telling the origins of immigration laws. This section examines the role of recent judicial opinions centering the racist history of immigration laws and their impact on immigration enforcement today.

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75. Matthew S. Davies, U.S. Customs and Border Protection, *Title 42 Exceptions for Ukrainian Nationals* Memo, March 11, 2022.

76. Cho, *supra.* note 22, at 1598 ("Colorblindness, in comparison, offers a largely normative claim for a retreat from race that is aspirational in nature."). *See also*, Angela Onwuachi-Willig & Anthony V. Alfieri, *(Re)framing Race in Civil Rights Lawyering, Stony the Road: Reconstruction, White Supremacy, and the Rise of Jim Crow*, 130 YALE L.J. 2052 (2021)(stating "Implicit here is the claim that federal and state courts normally and ably manage colorblind impartial processes, seldom tainted by discrete instances of racial prejudice or larger patterns and practices of systemic racism").

77. *Id.*

Judicial opinions have played a key role in the social construction of race in America. Even though cultural norms accept and treat race as an extralegal phenomenon, race is an ideological construct and a historical product.[78] Legal actors have been conscious participants in the legal construction of race.[79] Scholar Ian Haney Lopez states, "the legal construction of race pushes in many different directions on a multitude of levels, sometimes along mutually reinforcing lines but more often along divergent vectors, occasionally entrenching existing notions of race but also at other times or even simultaneously fabricating new conceptions of racial difference."[80]

Recent arguments and judicial opinions in unlawful re-entry cases have highlighted the explicit racism in the legislative process that prompted the passing of the law.[81] The unlawful re-entry laws are still being enforced under the guise of neutrality where the laws are deemed to be equally applied to all noncitizens. A necessary step towards immigrant justice involves relinquishing the narrative of immigration law and enforcement practices as neutral and acknowledging the ways in which they cannot be separated from the racism that was present when immigration laws were enacted.

In the recent district court case *United States v. Carrillo-Lopez*, district court Judge Du engages with the racist history of 8 U.S.C. § 1326(a) & (b) ("Section 1326"). This law makes it a crime to return to the United States after deportation and a violation of the equal protection clause.[82] The court found that Section 1326 was enacted with a discriminatory purpose and that the law has a disparate impact on Latinx persons.[83] In his appellate arguments, Mr. Carrillo-Lopez's defense lawyer presented historical evidence at the time the unlawful re-entry statute was passed:

78. IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 79 (10th ed. 2006).

79. *Id.*

80. *Id.* at 81.

81. *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1008 (D. Nev. 2021); *United States v. Machic-Xiap*, 3:19-cr-407-SI, 2021 WL 3362738, (D. Or. Aug. 3, 2021).

82. *Carrillo-Lopez*, 555 F. Supp. 3d at 1008.

83. *Id.* at 1000.

- Congress criminalized illegal reentry at the end of the 1920s, a decade in which "the Ku Klux Klan was reborn, Jim Crow came of age, and public intellectuals preached the science of eugenics. [84]
- Illinois Representative Martin Madden added that the 1924 bill "leaves open the doors for perhaps the worst element that comes into the United States—the Mexican peon."[85]
- Connecticut Representative Patrick O'Sullivan criticized the lack of restrictions on Latinx immigrants compared to white Italian immigrants: "the average Italian is as much superior to the average Mexican as a full-blooded Airedale is to a mongrel."[86]
- During debate on the bill, Congressmen openly discussed the need to keep immigration limited to white Northern and Western Europeans. Representatives lamented Mexican "hordes" coming in "droves," and argued, from a "moral standpoint," Latinos were "poisoning the American citizen" because they are "of a class" "very undesirable."[87]
- Representative Box characterized the goal of immigration law as "the protection of American racial stock from further degradation or change through mongrelization," and he referred to Mexican citizens as having "negro slave blood" creating "the Mexican peon" "different from us in character, in social position." [88]

  After the unlawful re-entry act was passed, the defendant's attorney presented evidence that between 1929 and 1936, over 40,000 Latinx migrants were imprisoned under the illegal reentry law.[89] [Now], Latinos often comprised 99% of defendants each year.[90] The defense lawyer's arguments contextualize the passing of the unlawful re-entry statute demonstrating the racial animus behind the passing of the law.[91]

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84. Appellee Gustavo Carrillo-Lopez's Answering Brief, p. 7 in *United States v. Carrillo-Lopez*, Case: 21-10233, 04/08/2022, ID: 12416631, available at https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/Carrillo-Lopez_Appellee_Brief.pdf.

85. *Id.* at 8.

86. *Id.*

87. *Id.*

88. *Id.* at 8.

89. *Id.* at 12.

90. *Id.* at 10.

91. *Id.* at 40.

The statute is now viewed as facially neutral but disproportionately impacts Black and Brown immigrants.[92]

Based on Carrillo-Lopez's arguments, the district court held that the government failed to show that Section 1326 would have been enacted absent racial animus.[93] Although limited in scope, the opinion states that the record reflected Congress has at no point confronted the racist, nativist roots of the provision that criminalizes unlawful re-entry.[94] This case goes back to the origins and history of Section 1326 to the 1920s, described in the order as "the first and only era in which Congress openly relied on the now discredited theory of eugenics to enact immigration legislation."[95]

In another Oregon district court case challenging the same unlawful re-entry statute, the Court did not overturn the statute based upon its racial animus.[96] The court instead challenged Congress to repudiate the racist history that underlies U.S. immigration law.[97]

[T]he Court finds that racism has permeated the official congressional debate over United States immigration laws since the late 19th and early 20th centuries, including the 1929 Act. Although some members of Congress in 1952 hoped that the INA would eliminate the bigotry of earlier immigration legislation, especially anti-Asian bigotry, other members of Congress at that time continued to express statements exhibiting overt racial, ethnic, or religious prejudices. Indeed, new expressions of prejudice, evidenced by Congress's frequent use in the 1950s of the derogatory epithet "wetback" to describe immigrants from Latin America, emerged during the debate leading to the enactment of the INA. [98]

These opinions are examples of how racial power dynamics can be historically contextualized to challenge the normalcy of racism while providing a comprehensive understanding of how race operates in

92. McKanders, *supra*, note 40.
93. *Carrillo-Lopez*, *supra* note 82, at 1008.
94. *Id.*
95. *Id.* at 1009.
96. *United States v. Machic-Xiap*, 3:19-cr-407-SI, 2021 WL 3362738, (D. Or. Aug. 3, 2021).
97. *Id.*
98. *Id.*

immigration law and enforcement. The cases are some of the first cases to contextualize the legislative history of the statute to determine why the statute was passed.

These cases join a recent group of cases—outside immigration law—in which judges are examining the racist foundations of qualified immunity laws to challenge the ways in which the courts have reinforced systemic racism with their opinions.[99] In order to challenge long-held doctrines, reexamination of immigration's origin stories is needed to replace narratives that reinforce a false sense of neutrality returning back to the historical foundations of the laws and the impact of the laws today on immigrants of color. Centering the voices and perspectives of immigrants of color is a step towards justice and equality.

CONCLUSION

This Essay examines how the idea of neutrality in immigration law and policy needs to be placed in a historical context. Examining the history of U.S. immigration laws and Supreme Court precedent when evaluating the constitutionality of the laws pushes immigration advocates to reflect on whether the overall structure of the U.S. legal system is ill-equipped to redress the centuries of harms. These harms continue to perpetuate racism through the enforcement of allegedly colorblind immigration laws.

New questions—outside of sovereignty, national security, and neutrality—must be raised to challenge our understanding of racism in the enforcement of immigration laws. These legal doctrines are so engrained that they normalize racism. Viewing the doctrines as neutral hinders a comprehensive understanding of how race operates in immigration and how it continues to permeate many facets of immigration enforcement.

The Supreme Court's evaluation of legislative and executive branch enforcement policies raises questions about how to work to dismantle systemic racism and whether legal reforms provide possibilities for eradicating deeply entrenched norms of neutrality and deference that prioritize sovereignty and national security. Supreme

99. *Jamison v. McClendon*, 476 F. Supp. 3d 386 (S.D. Miss. 2020).

Court review that gives repeated deference to individual bad actors without regarding how the immigration enforcement system perpetuates racism will continue the endless cycle of immigration laws being part and parcel of systemic racism in the U.S.

Advocates and movement lawyers must evaluate whether the law is equipped to shift away from paradigmatic frameworks that target individual bad actors' enforcement of race-neutral policies over recognition of how historically systemic racism impacts enforcement. Repeatedly applying the plenary powers doctrine and viewing immigration laws, policies, and enforcement practices in abstraction from the racist history results in continually utilizing the wrong frame to eradicate systemic racism. This frame fails to pay attention to the historical narratives and focuses on eradicating individual bad actors at every level. This solution is a fool's errand in which advocates will not be able to dismantle racism within a frame that continues to replicate racial hierarchies within immigration enforcement.